



2019 Disparity Study

City of Indianapolis and Marion County

FINAL REPORT

Final Report

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2019 City of Indianapolis and Marion County Disparity Study

Prepared for

The City of Indianapolis and
Marion County

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CHAPTER ES.

Executive Summary

CHAPTER ES.

Executive Summary

The City of Indianapolis and Marion County (referred to together as *the City*) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help refine the organization's implementation of the Minority-owned Business Enterprise/Woman-owned Business Enterprise/Veteran-owned Business-Enterprise/Disabled-owned business enterprise (MBE/WBE/VBE/DOBE) Business Utilization Plan. The primary objective of the program is to help ensure that minority-, woman-, veteran-, and disabled-owned businesses have an equal opportunity to participate in City and municipal corporation (MC) contracts and procurements.¹

² To meet that objective, the City uses various *race- and gender-neutral* and *race- and gender-conscious measures*. In the context of contracting and procurement, race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in a government organization's contracting, regardless of the race/ethnicity or gender of the businesses' owners. In contrast, race- and gender-conscious measures are measures that are specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting. As part of the disparity study, BBC assessed whether there were any disparities between:

- The percentage of contract dollars that the City and MCs spent with minority-, woman-, veteran-, and disabled-owned businesses between January 1, 2014 and December 31, 2018 (i.e., the *study period*) (i.e., *utilization*, or *participation*); and
- The percentage of contract dollars that minority-, woman-, veteran-, and disabled-owned businesses might be expected to receive based on their availability to perform specific types and sizes of City and MC prime contracts and subcontracts (i.e., *availability*).

The disparity study also examined other quantitative and qualitative information related to:

- The legal framework related to the City's implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan;
- Conditions in the local marketplace for minority-, woman-, veteran-, and disabled-owned businesses; and

¹ "Woman-owned businesses" refers to non-Hispanic white woman-owned businesses. Information and results for minority woman-owned businesses are included along with their corresponding racial/ethnic groups.

² MCs are organizations that operate autonomously but are owned by Marion County. As recipients of City funding, MCs are also required to use MBE/WBE/VBE/DOBE goals in awarding individual City-funded contracts and report MBE/WBE/VBE/DOBE participation in City-funded contracts to the City. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

- Contracting practices and business assistance programs that the City currently has in place or could consider implementing in the future.

The City could use information from the study to help refine its implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan, including setting overall aspirational goals for the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracting and determining which program measures to use to encourage the participation of those businesses in City and MC contracting. BBC summarizes key information from the 2019 City of Indianapolis Disparity Study in five parts:

- Analyses in the disparity study;
- Availability analysis results;
- Utilization analysis results;
- Disparity analysis results; and
- Program implementation.

A. Analyses in the Disparity Study

BBC examined extensive information related to outcomes for minority-, woman-, veteran-, and disabled-owned businesses and the City's implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan:

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of legal requirements related to minority- and woman-owned business programs, including the MBE/WBE/VBE/DOBE Business Utilization Plan (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities, women, veterans, people with disabilities, and the businesses that they own throughout the *relevant geographic market area*.³ In addition, the study team collected qualitative information about potential barriers that those individuals and businesses face in the local marketplace through in-depth interviews, telephone surveys, public meetings, and written testimony (see Chapter 3, Appendix C, and Appendix D).
- The study team analyzed the percentage of relevant City and MC contracting dollars that minority-, woman-, veteran-, and disabled-owned businesses are available to perform. That analysis was based on telephone surveys that the study team completed with businesses that work in industries related to the specific types of construction; architecture and engineering; other professional services; and goods and services contracts that the City and MCs award (see Chapter 5 and Appendix E).

³ BBC identified the relevant geographic market area as Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Morgan, and Shelby counties in Indiana.

- BBC analyzed the dollars that minority-, woman-, veteran-, and disabled-owned businesses received on more than 95,000 construction; architecture and engineering; other professional services; and goods and services contracts that the City and MCs awarded during the study period (see Chapter 6).
- The study team examined whether there were any disparities between the participation and availability of minority-, woman-, veteran-, and disabled-owned businesses on construction; architecture and engineering; other professional services; and goods and services contracts that the City and MCs awarded during the study period (see Chapter 7).
- BBC reviewed the measures that the City uses to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in its contracting as well as measures that other organizations in the region use (see Chapter 8).
- The study team provided guidance related to additional program options and potential changes to current contracting practices for the City's consideration (see Chapter 9).

B. Availability Analysis Results

BBC conducted a *custom census* approach to analyze the availability of minority-, woman-, veteran-, and disabled-owned businesses for City and MC prime contracts and subcontracts. BBC's approach relied on information from surveys that the study team conducted with potentially available businesses located in the relevant geographic market area that perform work within relevant subindustries. That approach allowed BBC to develop a representative, unbiased, and statistically-valid database of businesses to estimate the availability of minority-, woman-, veteran-, and disabled-owned businesses accurately.

Minority- and woman-owned businesses. BBC examined the availability of minority- and woman-owned businesses for various contract sets to assess the degree to which they are ready, willing, and able to perform different types of City and MC work.

City work. BBC assessed the availability of minority- and woman-owned businesses for contracts and procurements that the City awarded separately from those that MCs awarded.

Overall. Figure ES-1 presents dollar-weighted availability estimates by relevant business group for City contracts and procurements. Overall, the availability of minority- and woman-owned businesses for City contracts and procurements is 19.3 percent, indicating that minority- and woman-owned businesses might be expected to receive 19.3 percent of the dollars that the City awards in construction; architecture and engineering; other professional services; and goods and services.

Figure ES-1.
Overall availability estimates by
racial/ethnic and gender group for City work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	8.5 %
Asian Pacific American-owned	1.2
Black American-owned	6.1
Hispanic American-owned	0.8
Native American-owned	0.3
Subcontinent Asian American-owned	2.3
Total Minority-owned	10.8
Total Minority- and Woman-owned	19.3 %

Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for City prime contracts and subcontracts. Figure ES-2 presents those results. As shown in Figure ES-2, the availability of minority- and woman-owned businesses considered together is lower for City prime contracts (17.2%) than for subcontracts (31.0%). Among other factors, that result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are thus often more accessible to minority- and woman-owned businesses.

Figure ES-2.
Availability estimates by
contract role for City work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-9 and F-10 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	7.7 %	13.2 %
Asian Pacific American-owned	1.2	1.6
Black American-owned	5.6	8.8
Hispanic American-owned	0.5	2.7
Native American-owned	0.3	0.3
Subcontinent Asian American-owned	2.0	4.4
Total Minority-owned	9.6	17.8
Total Minority- and Woman-owned	17.2 %	31.0 %

Industry. BBC examined availability analysis results separately for City construction; architecture and engineering; other professional services; and goods and services contracts. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is highest for the City's goods and services contracts (20.6%) and lowest for other professional services contracts (16.8%).

Figure ES-3.
Availability estimates by industry for City work

Business group	Industry			
	Construction	Architecture and engineering	Other professional services	Goods and services
Non-Hispanic white woman-owned	9.7 %	6.3 %	9.0 %	7.8 %
Asian Pacific American-owned	0.8	2.2	1.2	1.3
Black American-owned	5.3	2.9	4.1	10.2
Hispanic American-owned	1.1	0.0	0.2	1.3
Native American-owned	0.3	0.0	1.8	0.0
Subcontinent Asian American-owned	1.8	8.2	0.5	0.0
Total Minority-owned	9.2	13.4	7.8	12.8
Total Minority- and Woman-owned	19.0 %	19.7 %	16.8 %	20.6 %

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figure F-5, F-6, F-7, and F-8 in Appendix F.

Source: BBC Research & Consulting availability analysis.

MC work. Figure ES-4 presents dollar-weighted availability estimates by relevant business group for contracts and procurements that all MCs considered together awarded during the study period. Overall, the availability of minority- and woman-owned businesses for MC contracts and procurements is 27.1 percent, indicating that minority- and woman-owned businesses might be expected to receive 27.1 percent of the dollars that MCs award in construction; architecture and engineering; other professional services; and goods and services.

Figure ES-4.
Availability estimates for MC work

Business group	Availability %
Non-Hispanic white woman-owned	11.6 %
Asian Pacific American-owned	2.8
Black American-owned	10.2
Hispanic American-owned	0.4
Native American-owned	0.7
Subcontinent Asian American-owned	1.4
Total Minority-owned	15.5
Total Minority- and Woman-owned	27.1 %

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-15 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Veteran-owned businesses. BBC examined the overall availability of veteran-owned businesses for City and MC work. The availability analysis indicated that the availability of veteran-owned businesses is 5.3 percent for City contracts and procurements and 12.2 percent for MC contracts and procurements.

Disabled-owned businesses. BBC also examined the overall availability of disabled-owned businesses for City and MC work. The availability analysis indicated that the availability of disabled-owned businesses is 3.3 percent for City contracts and procurements and 9.1 percent for MC contracts and procurements.

C. Utilization Analysis Results

BBC measured the participation of minority-, woman-, veteran, and disabled-owned businesses in City and MC contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that those businesses received on City and MC prime contracts and subcontracts during the study period. BBC measured the participation of minority-, woman-, veteran, and disabled-owned businesses in City and MC contracts regardless of whether they were certified as such through the City.

Minority- and woman-owned businesses. BBC examined the participation of minority- and woman-owned businesses for various sets of contracts that the City and MCs awarded during the study period. The study team assessed the participation of all of those businesses considered together and separately for each relevant racial/ethnic and gender group.

City work. BBC assessed the participation of minority- and woman-owned businesses separately for contracts and procurements that the City awarded and those that MCs awarded.

Overall. Figure ES-5 presents the percentage of contracting dollars that minority- and woman-owned businesses received on construction; architecture and engineering; other professional services; and goods and services contracts and procurements that the City awarded during the study period (including both prime contracts and subcontracts). As shown in Figure ES-5, overall, minority- and woman-owned businesses considered together received 14.6 percent of the relevant contracting dollars that the City awarded during the study period.

Figure ES-5.
Overall utilization
results for City work

Note:

Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.

For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	6.6 %
Asian Pacific American-owned	0.3
Black American-owned	4.5
Hispanic American-owned	1.1
Native American-owned	0.5
Subcontinent Asian American-owned	1.7
Total Minority-owned	8.0
Total Minority- and Woman-owned	14.6 %

Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. In addition, the City's use of MBE/WBE goals in awarding individual contracts and procurements is designed to encourage minority- and woman-owned business participation specifically as subcontractors. Thus, it is useful to examine participation separately for City prime contracts and subcontracts. As shown in Figure ES-6, the participation of minority- and woman-owned businesses considered together was much lower in City prime contracts (8.2%) than subcontracts (51.5%). Among other factors, that result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts, and are thus often more accessible to minority- and woman-owned businesses, and because the City's use of MBE/WBE goals is focused on subcontracting opportunities.

Figure ES-6.
Utilization results by
contract role for City work

Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.
For more detail, see Figures F-9 and F-10 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	4.3 %	19.7 %
Asian Pacific American-owned	0.1	1.1
Black American-owned	2.2	17.7
Hispanic American-owned	0.4	5.4
Native American-owned	0.3	1.1
Subcontinent Asian American-owned	0.9	6.5
Total Minority-owned	3.9	31.8
Total Minority- and Woman-owned	8.2 %	51.5 %

Industry. BBC examined utilization analysis results separately for City construction; architecture and engineering; other professional services; and goods and services contracts. As shown in Figure ES-7, the participation of minority- and woman-owned businesses considered together was highest for architecture and engineering contracts (27.3%) and lowest for goods and services contracts (7.6%).

Figure ES-7.
Utilization results by industry for City work

Business group	Construction	Architecture and engineering	Other professional services	Goods and services
Non-Hispanic white woman-owned	7.2 %	9.2 %	5.3 %	4.6 %
Asian Pacific American-owned	0.1	0.0	1.3	0.2
Black American-owned	5.3	7.2	2.7	2.2
Hispanic American-owned	1.6	1.6	0.1	0.5
Native American-owned	0.9	0.3	0.2	0.0
Subcontinent Asian American-owned	0.2	8.9	0.1	0.0
Total Minority-owned	8.1	18.1	4.3	3.0
Total Minority- and Woman-owned	15.3 %	27.3 %	9.6 %	7.6 %

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.
For more detail, see Figures F-5, F-6, F-7, and F-8 in Appendix F.

Source: BBC Research & Consulting utilization analysis.

MC work. Figure ES-8 presents the participation of minority- and woman-owned businesses in contracts and procurements that MCs awarded during the study period. Overall, the participation of minority- and woman-owned businesses for MC contracts and procurements was 20.9 percent.

Veteran-Owned Businesses

BBC examined the participation of veteran-owned businesses in the contracts and procurements that the City and MCs awarded during the study period. The utilization analysis indicated that the participation of veteran-owned businesses was 2.6 percent in City contracts and procurements and 2.1 percent in MC contracts and procurements.

Figure ES-8.
Utilization results for MC work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figure F-15 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	8.3 %
Asian Pacific American-owned	0.7
Black American-owned	7.5
Hispanic American-owned	3.6
Native American-owned	0.4
Subcontinent Asian American-owned	0.4
Total Minority-owned	12.6
Total Minority- and Woman-owned	20.9 %

Disabled-Owned Businesses

Similarly, BBC examined the participation of disabled-owned businesses in the contracts and procurements that the City and MCs awarded during the study period. The utilization analysis indicated that the participation of disabled-owned businesses was 0.5 percent in City contracts and procurements and 0.4 percent in MC contracts and procurements.

D. Disparity Analysis Results

Although information about the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracts is useful on its own, it is even more useful when it is compared with the level of participation that might be expected based on their availability for City and MC work. As part of the disparity analysis, BBC compared the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work. BBC calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent utilization by percent availability and multiplying by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular contract set (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of less than 80 indicates a *substantial* disparity between participation and availability.

Minority-and woman-owned businesses. BBC examined the availability of minority- and woman-owned businesses for various contract sets to assess the degree to which they may have been underutilized on various types of City and MC work.

City work. BBC assessed disparities between the participation and availability of minority- and woman-owned businesses separately for City and MC contracts.

Overall. Figure ES-9 presents disparity indices for all relevant prime contracts and subcontracts that the City awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability (i.e., *underutilization*). A line is also drawn at a disparity index level of 80, because some courts use 80 as the threshold for what indicates a substantial disparity. As shown in Figure ES-9,

overall, the participation of minority- and woman-owned businesses in contracts that the City awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 76 indicates that minority- and woman-owned businesses received approximately \$0.76 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the City awarded during the study period. Disparity analysis results by individual racial/ethnic and gender group indicated that:

- Four groups exhibited disparity indices substantially below parity: non-Hispanic white woman-owned businesses (disparity index of 78), Asian Pacific American-owned businesses (disparity index of 22), Black American-owned businesses (disparity index of 73), and Subcontinent Asian American-owned businesses (disparity index of 74).
- Hispanic American-owned businesses (disparity index of 136) and Native American-owned businesses (disparity index of 132) did not exhibit a disparity for all City contracts considered together.

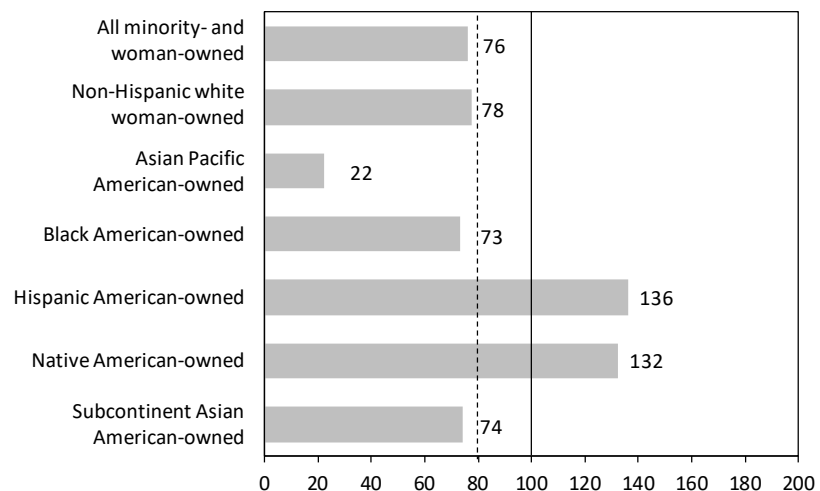
Figure ES-9.
Disparity indices by group
for City work

Note:

For more detail, see Figure F-2 in
Appendix F.

Source:

BBC Research & Consulting disparity
analysis.



Contract role. Subcontracts tend to be much smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to minority- and woman-owned businesses. In addition, the City’s use of MBE/WBE goals to award individual contracts is designed to encourage minority- and woman-owned business participation specifically as subcontractors. Thus, it might be reasonable to expect better outcomes for minority- and woman-owned businesses on City subcontracts than prime contracts. Figure ES-10 presents disparity indices for all relevant groups for prime contracts and subcontracts. As shown in Figure ES-10, whereas minority- and woman-owned businesses considered together showed a substantial disparity for prime contracts (disparity index of 48), they did not show a disparity for subcontracts (disparity index of 166). Results for individual groups indicated that:

- All groups showed substantial disparities on prime contracts except for Native American-owned businesses (disparity index of 102).

- No groups showed substantial disparities on subcontracts except for Asian-Pacific American-owned businesses (disparity index of 71).

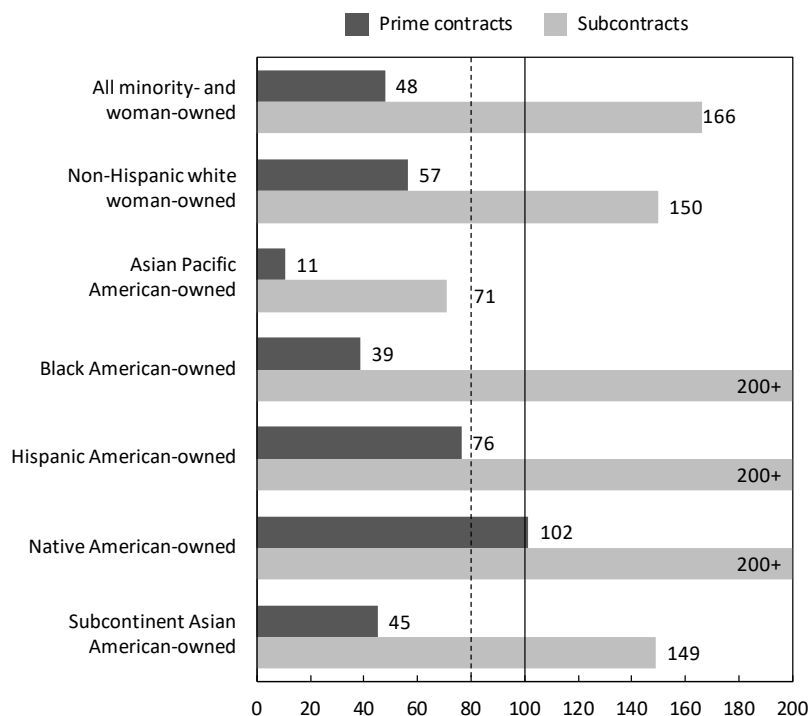
Figure ES-10.
Disparity indices by
contract role for City work

Note:

For more detail, see Figures F-9 and F-10 in Appendix F.

Source:

BBC Research & Consulting
disparity analysis.



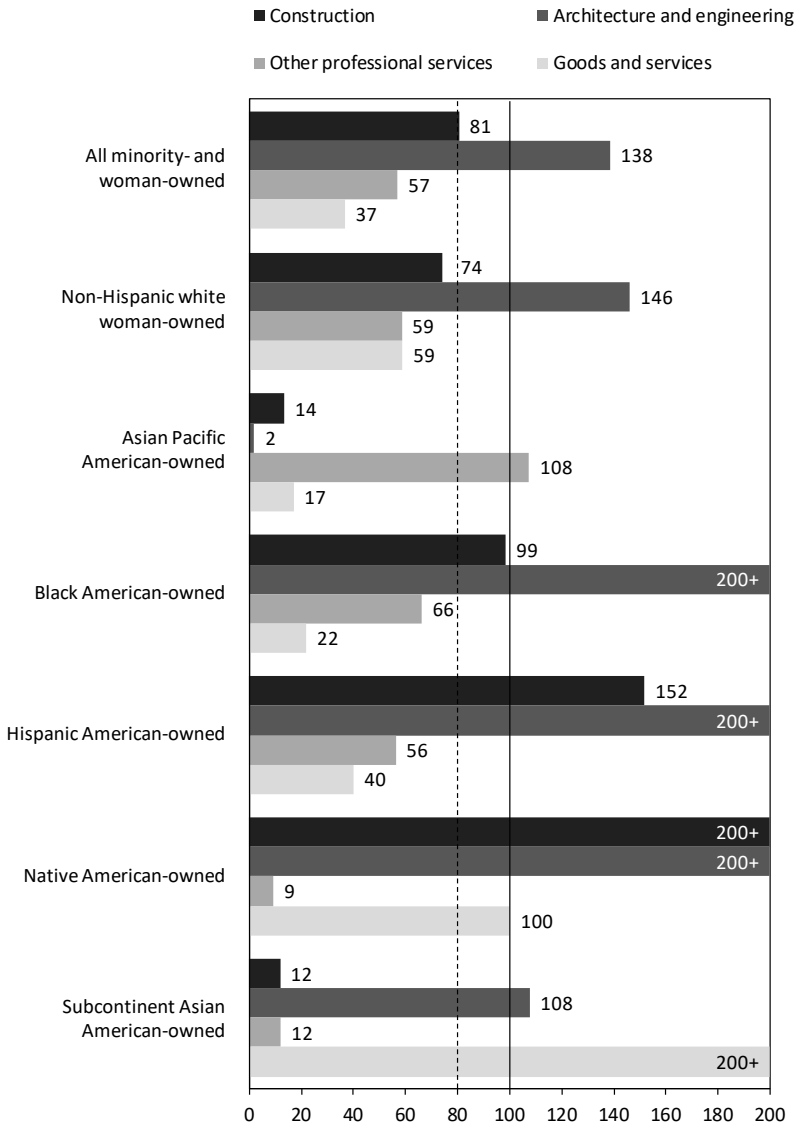
Industry. BBC examined disparity analysis results separately for the City’s construction; architecture and engineering; other professional services; and goods and services contracts. As shown in Figure ES-11, minority- and woman-owned businesses considered together showed substantial disparities for other professional services (disparity index of 57) and goods and services (disparity index of 37). Disparity analysis results differed by industry and group:

- Three individual groups showed substantial disparities on construction contracts: Non-Hispanic white woman-owned businesses (disparity index of 74), Asian Pacific American-owned businesses (disparity index of 14), and Subcontinent Asian American-owned businesses (disparity index of 12).
- No individual group showed disparities on architecture and engineering contracts except for Asian Pacific American-owned businesses (disparity index of 2).
- All individual groups showed substantial disparities on other professional services contracts except for Asian Pacific American-owned businesses (disparity index of 108).
- All individual groups showed substantial disparities on goods and services contracts except for Native American-owned businesses (disparity index of 100) and Subcontinent Asian American-owned businesses (disparity index of 200+).

Figure ES-11.
Disparity analysis results
by relevant industry for
City work

Note:
 For more detail, see Figures
 F-5, F-6, F-7, and F-8 in Appendix F.

Source:
 BBC Research & Consulting
 disparity analysis.



MCs. Figure ES-12 shows that, overall, the participation of minority- and woman-owned businesses in contracts that MCs awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work (disparity index of 77).

Veteran-owned businesses. BBC compared participation to availability for veteran-owned businesses in City and MC work. The disparity analysis indicated that veteran-owned businesses exhibited a disparity index of 48 for City contracts and procurements and a disparity index of 17 for MC contracts and procurements, indicating that their actual participation in both City and MC contracting was substantially less than their availability.

Disabled-owned businesses. BBC also compared participation to availability for disabled-owned businesses in City and MC work. The disparity analysis indicated that disabled-owned businesses exhibited a disparity index of 14 for City contracts and procurements and a

disparity index of 4 for MC contracts and procurements, indicating that their actual participation in both City and MC contracting was substantially less than their availability.

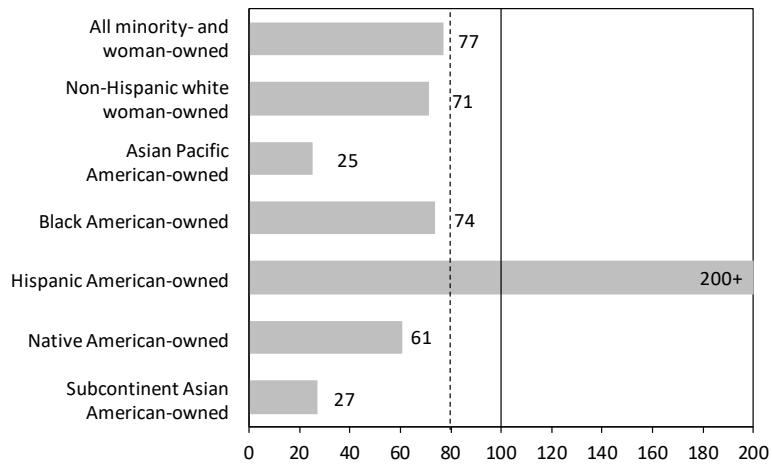
Figure ES-12.
Disparity indices for MC work

Note:

For more detail, see Figures F-15 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



E. Program Implementation

The City should review study results and other relevant information in connection with making decisions concerning its implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan. Key considerations in making any refinements are discussed below. In making those considerations, the City should also assess whether additional resources, changes in internal policy, or changes in state law may be required. For additional details about program implementation, see Chapter 9.

Overall annual aspirational goal. Section 202-401 of the City’s revised code establishes aspirational participation goals of 15 percent for minority-owned businesses, 8 percent for woman-owned businesses, 3 percent for veteran-owned businesses, and 1 percent for disabled-owned businesses in City contracts. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the City in revising its overall goals for minority-, woman-, veteran-, and disabled-owned business participation in its contracting and procurement. The availability analysis indicated that minority-owned businesses might be expected to receive 10.8 percent of City contract dollars; woman-owned businesses might be expected to receive 8.5 percent of City contracting dollars; veteran-owned businesses might be expected to receive 5.3 percent of City contracting dollars; and disabled-owned businesses might be expected to receive 3.3 percent of City contract dollars based on their availability for that work. The City should consider adjusting its overall aspirational goals based on that information and information about local marketplace conditions presented in Chapter 3, Appendix C, and Appendix D.

Goal-setting process. The City should consider establishing and documenting a process for setting overall annual aspirational goals and determine how frequently it will revise those goals (e.g., every three years). The City could consider adopting the two-step goal-setting process presented in Chapter 9. The City should also regularly review its goal-setting process to ensure

that it provides adequate flexibility to respond to recent changes in marketplace conditions; anticipated City work; new statistical or anecdotal evidence; and other factors.

OMWBD office. The City employs dedicated staff members to implement the MBE/WBE/VBE/DOBE Business Utilization Plan and monitor the participation of certified businesses in its contracts. However, interviews with City staff and anecdotal evidence indicated that OMWBD does not have a large enough staff to fully implement monitoring and compliance activities; supportive services programs; and other program measures that could improve the effectiveness of its business programs. In addition, the City relies largely on partnerships and external organizations to provide technical assistance and business development services to small and disadvantaged businesses. Establishing internal programs could allow the City to tailor technical assistance and other business development services to the specific needs of minority-, woman-, veteran-, and disabled-owned businesses in the local market area, but doing so would require substantial staff time. The City should consider expanding OMWBD's staff to carry out essential program functions.

Capacity building. Results from the disparity study indicated that there are many minority-, woman-, veteran-, and disabled-owned businesses throughout the Indianapolis area but most of them have relatively low capacities for City and MC work. The City should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for City and MC contracts. Anecdotal evidence indicated that businesses find that such programs, when implemented effectively, are valuable in helping them grow and learn the necessary skills required to compete in their industries. Anecdotal evidence also indicated that businesses face various challenges—such as access to financing, bonding requirements, obtaining equipment, and back office accounting—that inhibit or slow their growth. In addition to considering programs that could be open to all minority-, woman-, veteran-, and disabled-owned businesses, the City could consider implementing a program to assist certain businesses with development and growth. As part of such a program, the City could have an application and interview process to select businesses with which it would then work closely to provide the specific support and resources they need to grow.

Growth monitoring. The City might consider collecting data on the impact that the MBE/WBE/VBE/DOBE Business Utilization Plan has on the growth of minority-, woman-, veteran-, and disabled-owned businesses over time. Doing so would require the City to collect baseline information on MBE/WBE/VBE/DOBE-certified businesses—such as revenue, number of locations, number of employees, and employee demographics—and then continue to collect that information from each business on an annual basis. The City could collect those data as part of preexisting certification and renewal forms. Such metrics would allow the City to assess whether the program is helping businesses grow and refine the measures that it uses as part of the MBE/WBE/VBE/DOBE Business Utilization Plan.

Data collection. The City maintains data on the prime contracts and procurements that it awards, and those data are generally well-organized and comprehensive. The City also maintains comprehensive subcontract information on contracts awarded by the Department of Public Works (DPW). However, DPW maintains subcontract information separately from the City's centralized procurement and contract system and appears to be the only City department that maintains comprehensive subcontract information. MCs maintain subcontract information to

varying degrees. The City should consider collecting comprehensive data on *all* subcontracts, regardless of the characteristics of business owners or whether the businesses are certified as MBE/WBE/VBE/DOBEs. Collecting data on all subcontracts will help ensure that the City monitors the participation of minority-, woman-, veteran-, and disabled-owned businesses as accurately as possible and help the City identify additional businesses that could become certified. The City should also consider working with MCs to help them collect comprehensive subcontract information on their contracts. The City should train relevant department and MC staff to collect and enter subcontract data accurately and consistently.

Contract-specific goals. The City currently sets the same MBE/WBE/VBE/DOBE goals on all applicable contracts, and those goals are typically met through good faith efforts in lieu of subcontractor participation. In addition, disparity analysis results indicated that nearly all relevant groups showed substantial disparities on key sets of contracts that the City awarded during the study period, indicating that they are facing barriers as part of the City's contracting processes. The City could consider setting *contract-specific* goals for relevant contracts. Rather than apply the same goal to each contract, the City would determine contract-specific goals based on information about market availability; project size; type of work or service required; and other factors. Doing so may bring contract goals closer in line with market realities and decrease the use of good faith efforts to meet City goals. The City could use information from the availability analysis as a starting point for establishing contract-specific goals based on work type. However, the goals that the City would use to award individual contracts would vary, and the City would not use goals to award certain contracts.

Professional services contracts. Although the City encourages the participation of MBE/WBE/VBE/DOBEs in all City contracts, it only actively reviews and enforces business participation in construction and goods and services contracts worth \$50,000 or more. Disparity study results indicated that most minority- and woman-owned business participation on construction; architecture and engineering; and goods and services contracts came from certified MBE/WBEs. In contrast, most of the minority- and woman-owned business participation on professional services contracts came from non-certified businesses. Disparity analysis results also indicated that nearly all relevant groups showed substantial disparities on the professional services contracts that the City awarded during the study period. The City should consider enforcing and monitoring goals on professional services contracts worth \$50,000 or more.

Exclusive teaming. Anecdotal evidence indicated that subcontractors are sometimes asked to enter into exclusive partnerships to be considered as part of potential project teams. As indicated by businesses during in-depth interviews, such teaming requirements ultimately limit the work available to small businesses. The City should consider prohibiting exclusive subcontracting or teaming requests by integrating such language into its bid, RFP, and contract language. For example, the Dallas/Fort Worth International Airport explicitly prohibits exclusive teaming requirements as part of its RFP language.

Using different subcontractors. The disparity study indicated that the vast majority of City contracting dollars that were awarded to minority- and woman-owned businesses were largely concentrated with a relatively small number of businesses. The City could consider using RFP and contract language to encourage prime contractors to use subcontractors and suppliers with

which they have never worked. For example, the City might ask primes to document and submit their efforts to identify and team with businesses with which they have not worked as part of their bids.

Prequalification. Per Indiana state code, vendors who are interested in proposing on public works building construction contracts worth \$150,000 or more or highway, street, road, or alley construction contracts worth \$300,000 or more must be prequalified through the Indiana Department of Administration (IDOA) or the Indiana Department of Transportation (INDOT), respectively. Prequalification through IDOA is valid for 27 months, and prequalification through INDOT is valid for one year. Vendors applying for prequalification through INDOT must also submit a certified financial audit with their initial applications and renewal documents. City staff indicated that the costs associated with conducting annual certified financial audits has been a barrier for many small businesses. The City should consider ways to offset such costs (e.g., working with local accountants to offer audits at a reduced cost) and consider other ways it can work with IDOA and INDOT to make the prequalification less cumbersome for small businesses.

Unbundling large contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that the City awarded during the study period. In addition, as part of in-depth interviews and public meetings, several businesses owners reported that the size of government contracts often serves as a barrier to their success. To further encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses, the City should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller contract pieces. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority-, woman-, veteran-, and disabled-owned business participation.

Prime contract opportunities. Overall, disparity analysis results indicated substantial disparities for all racial/ethnic and gender groups—with the exception of Native American-owned businesses—on the prime contracts that the City awarded during the study period. The City might consider setting aside select small prime contracts for small business bidding to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses as prime contractors. Indiana state code already allows state agencies to set aside certain public works and goods and services contracts for small businesses and allows state agencies to use small business price preferences for those purchases. To implement small business contracting programs, the City would need to develop a small business certification program.

Prompt payment. As part of in-depth interviews, several businesses reported difficulties with receiving payment in a timely manner on City contracts, particularly when they work as subcontractors. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. City contracts include language to ensure payment to the prime contractor within 30 days of an accepted invoice but do not include language to ensure prompt payment of subcontractors. The City should consider including prompt payment requirements for subcontracting in all of its contracts. For example, IDOA requires prime contractors to pay their subcontractors within 10 days of receiving payment from IDOA. Doing so might help ensure that subcontractors receive payment in a timely manner. It may also help ensure that minority-, woman-, veteran-, and disabled-owned businesses have enough operating capital to remain successful.

CHAPTER 1.

Introduction

CHAPTER 1.

Introduction

Indianapolis is the capital of Indiana and the seat of Marion County. It is the most populous city in Indiana and one of the 20 most populous cities in the United States. The City of Indianapolis and Marion County—which are referred to collectively through this report as *the City*, because they operate as a consolidated government organization—provides myriad services to the nearly 900,000 people who live and work in the region. Those services include police and fire protection; health and mental health services; road construction and maintenance; and a variety of other social and economic services. As part of providing those services, the City typically spends hundreds of millions of contract and procurement dollars each year to procure various goods and services related to construction; architecture and engineering; other professional services; and goods and services.

The City's Office of Minority and Women Business Development (OMWBD) implements the Minority-owned Business Enterprise/Woman-owned Business Enterprise/Veteran-owned Business-Enterprise/Disabled-owned business enterprise (MBE/WBE/VBE/DOBE) Business Utilization Plan to help ensure that minority-, woman-, veteran-, and disabled-owned businesses have an equal opportunity to participate in City contracts and procurements. The program and utilization plan comprise myriad efforts to encourage the participation of those business in City contracting, including:

- Establishing overall aspirational goals for the participation of minority-, woman-, veteran-, and disabled-owned businesses in City contracting (15%, 8%, 3%, and 1%, respectively);
- Monitoring and reporting the participation of minority-, woman-, veteran-, and disabled-owned businesses in City contracts and procurements;
- Providing technical assistance to minority-, woman-, veteran-, and disabled-owned businesses and other businesses to help address any barriers associated with competing for City contracts and procurements;
- Facilitating and participating in various network and outreach efforts and events, including workshops, pre-bid conferences, local events, and bid notices;
- Maintaining a directory of minority-, woman-, veteran-, and disabled-owned businesses to increase awareness of those businesses among prime contractors and City staff;
- Requiring prime contractors to submit Equal Opportunity Forms and Affirmative Action plans with their bids, quotes, and proposals; and
- Using MBE/WBE/VBE/DOBE goals to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses on individual contracts and procurements.

The Mayor of Indianapolis reauthorizes the MBE/WBE/VBE/DOBE Business Utilization Plan each year.

The City retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its measures to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and municipal corporation (MC) contracts and procurements.¹ As part of the study, BBC examined whether there are any disparities between:

- The percentage of contract dollars that the City and MCs spent with minority-, woman-, veteran-, and disabled-owned businesses during the study period (i.e., *utilization*); and
- The percentage of contract dollars that minority-, woman-, veteran-, and disabled-owned businesses might be expected to receive based on their availability to perform specific types and sizes of City and MC prime contracts and subcontracts (i.e., *availability*).

BBC also assessed other quantitative and qualitative information related to:

- The legal framework related to the City's implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan;
- Local marketplace conditions for minority-, woman-, veteran-, and disabled-owned businesses; and
- Contracting practices and business assistance programs that the City currently has in place.

There are several reasons why the disparity study will be useful to the City:

- The disparity study provides an independent review of the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracts and procurements, which will be valuable to City leadership and external stakeholders;
- Information from the disparity study will be useful to the City as it makes decisions about the MBE/WBE/VBE/DOBE Business Utilization Plan;
- The disparity study provides insights into how to increase contracting opportunities for minority-, woman-, veteran-, and disabled-owned businesses; and
- Organizations that have successfully defended their implementations of business programs that include minority- and woman-owned businesses in court have typically relied on information from disparity studies.

BBC introduces the City of Indianapolis Disparity Study in three parts:

- A. Background;
- B. Study scope; and
- C. Study team members.

¹ MCs are organizations that operate autonomously but are owned by Marion County. As recipients of City funding, MCs are also required to use MBE/WBE/VBE/DOBE goals in awarding individual City-funded contracts and report MBE/WBE/VBE/DOBE participation in City-funded contracts to the City. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

A. Background

The MBE/WBE/VBE/DOBE Business Utilization Plan is designed to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in City contracts and procurements. To try to meet the objectives of the program, the City uses various *race- and gender-neutral* and *race- and gender-conscious program measures* to encourage the participation of those businesses in its own contracting. Race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in a government organization's contracting, regardless of the race/ethnicity or gender of businesses' owners. The types of race- and gender-neutral measures that the City currently uses include:

- Networking and outreach events;
- Technical assistance events;
- City process workshops; and
- Monitoring and reporting.

In contrast to race- and gender-neutral measures, race- and gender-conscious measures are measures that are specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting (e.g., participation goals for minority- and woman-owned business on individual contracts). The City applies MBE/WBE goals on individual contracts. (The City also applies VBE/DOBE on individual contracts). Prime contractors can meet contract goals by either making subcontracting commitments with certified MBE/WBE/VBE/DOBE businesses at the time of bid or by submitting program waivers showing that they made reasonable good faith efforts to fulfill the goals but could not do so.

B. Study Scope

Information from the disparity study will help the City continue to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in its contracts and procurements. In addition, it will help the City implement the MBE/WBE/VBE/DOBE Business Utilization Plan effectively and in a legally-defensible manner.

Relevant business groups. In general, BBC focused its analyses on whether barriers or discrimination based on race/ethnicity; gender; veteran status; or disability status affected the participation of businesses in City contracts and procurements, regardless of whether those businesses were MBE/WBE/VBE/DOBE-certified. Analyzing the participation and availability of businesses regardless of certification allowed BBC to assess whether such barriers affect business success independent of whether they decided to become certified through the City. To interpret the core analyses presented in the disparity study, it is useful to understand how the study team defined the various groups of businesses that are the focus of the MBE/WBE/VBE/DOBE Business Utilization Plan.

Minority- and woman-owned businesses. BBC analyzed business outcomes for minority- and woman-owned businesses, which were defined as businesses owned and controlled by Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, or non-Hispanic white women. To avoid double-counting, BBC classified minority woman-owned businesses with their corresponding minority groups. (For example, Black

American woman-owned businesses were classified with businesses owned by Black American men as Black American-owned businesses.) Thus, *woman-owned businesses* in this report refers specifically to non-Hispanic white woman-owned businesses.

Veteran-owned businesses. BBC analyzed business outcomes for veteran-owned businesses, which were defined as businesses that are owned by veterans of the United States military.

Disabled-owned businesses. BBC also analyzed business outcomes for disabled-owned businesses, which were defined as businesses that are owned by individuals who have a mental or physical disability.

MBE/WBE/VBE/DOBE-certified businesses. MBE/WBE/VBE/DOBE-certified businesses are minority-, woman-, veteran-, and disabled-owned businesses that are specifically certified as such through the City. Businesses seeking MBE/WBE/VBE/DOBE certification are required to submit an application to the City. The application is available online and requires businesses to submit various information, including business name; contact information; license information; financial information; work specializations; the race/ethnicity and gender of their owners; veteran status of their owners; and disability status of their owners. The City reviews each application for approval and may conduct site visits to confirm eligibility. City certified MBE/WBE/VBE/DOBE businesses are collectively referred to as *XBEs*.

Majority-owned businesses. Majority-owned businesses are businesses that are owned by non-Hispanic white men who are neither veterans nor have mental or physical disabilities.

Analyses in the disparity study. The primary focus of the disparity study was to examine whether there are any disparities between the participation and availability of minority-, woman-, veteran-, and disabled-owned businesses on City contracts and procurements. In addition, the disparity study also includes:

- A review of legal issues related to the City's implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan;
- An analysis of local marketplace conditions for minority-, woman-, veteran-, and disabled-owned businesses;
- An assessment of the City's contracting practices and business assistance programs; and
- Other information for the City to consider as it refines its implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan.

The study focused on construction; architecture and engineering; other professional services; and goods and services that the City and MCs awarded between January 1, 2014 and December 31, 2018 (i.e., the study period). Information in the disparity study is organized as follows:

Legal framework and analysis. The study team conducted a detailed analysis of relevant federal regulations, case law, state law, and other information to guide the methodology for the disparity study. The analysis included a review of federal and state requirements concerning the implementation of business programs, particularly as they relate to minority- and woman-owned businesses. The legal framework and analysis is summarized in **Chapter 2** and presented in detail in **Appendix B**.

Marketplace conditions. BBC conducted quantitative analyses of the success of minorities, women, veterans, and people with disabilities as well as minority-, woman-, veteran-, and disabled-owned businesses in the local contracting and procurement industries. In addition, the study team collected qualitative information about potential barriers minority-, woman-, veteran-, and disabled-owned businesses face in the Indianapolis region through in-depth interviews, public meetings, focus groups, and surveys. Information about marketplace conditions is presented in **Chapter 3, Appendix C, and Appendix D.**

Data collection. BBC collected comprehensive data on the prime contracts and subcontracts that the City and MCs awarded during the study period as well as information on the businesses that participated in those contracts. The scope of BBC's data collection efforts is presented in **Chapter 4.**

Availability analysis. BBC assessed the degree to which minority-, woman-, veteran-, and disabled-owned businesses are *ready, willing, and able* to perform on City and MC prime contracts and subcontracts. That analysis was based on City and MC data and surveys that the study team conducted with hundreds of businesses located in the Indianapolis region and that work in industries related to the types of contracts and procurements that the City and MCs awards. Results from the availability analysis are presented in **Chapter 5 and Appendix E.**

Utilization analysis. BBC analyzed the degree to which minority-, woman-, veteran-, and disabled-owned businesses participated in prime contracts and subcontracts that the City and MCs awarded during the study period. Results from the utilization analysis are presented in **Chapter 6.**

Disparity analysis. BBC examined whether there were any disparities between the utilization and availability of minority-, woman-, veteran-, and disabled-owned businesses on prime contracts and subcontracts that the City and MCs awarded during the study period. The study team also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 7 and Appendix F.**

Program measures. BBC reviewed measures that the City uses to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in its contracting as well as measures that other organizations across the country use. That information is presented in **Chapter 8.**

Program implementation. BBC reviewed the City's contracting practices and program measures that are part of its implementation of the MBE/WBE/VBE/DOBE Business Utilization Plan. BBC provided guidance related to additional program options and changes to current contracting practices for the City to consider. The study team's review and guidance related to program implementation is presented in **Chapter 9.**

C. Study Team Members

The BBC disparity study team was made up of five firms that, collectively, possess decades of experience related to conducting disparity studies in connection with small and diverse business programs.

BBC (prime consultant). BBC is a Denver-based disparity study and economic research firm. BBC had overall responsibility for the disparity study and performed all of the quantitative analyses.

Engaging Solutions. Engaging Solutions is a Black American woman-owned survey fieldwork firm based in Indianapolis. The firm conducted surveys with thousands of businesses located in the Indianapolis region to gather information for the utilization and availability analyses.

Briljent. Briljent is a woman-owned community engagement firm based in Indianapolis. The firm conducted in-depth interviews with businesses located in the Indianapolis region as part of the study team's qualitative analyses of marketplace conditions.

Bingle Research Group. Bingle Research Group is a veteran-owned community engagement firm based in Indianapolis. The firm conducted in-depth interviews with businesses located in the Indianapolis region as part of the study team's qualitative analyses of marketplace conditions.

Holland & Knight. Holland & Knight is a law firm with offices throughout the country. Holland & Knight conducted the legal analysis that provided the basis for the study.

CHAPTER 2.

Legal Analysis

CHAPTER 2.

Legal Analysis

The City of Indianapolis and Marion County (referred to together as *the City*) uses various efforts to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in its contracts and procurements, including its operation of the Minority-owned Business Enterprise/Woman-owned Business Enterprise/Veteran-owned Business-Enterprise/Disabled-owned business enterprise (MBE/WBE/VBE/DOBE) Business Utilization Plan. To try to meet the objectives of the program, the City uses various *race- and gender-neutral* and *race- and gender-conscious program measures*. Race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in an organization's contracting regardless of the race/ethnicity or gender of businesses' owners.

In contrast, race- and gender-conscious measures are designed to specifically encourage the participation of minority- and woman-owned businesses in the organization's contracting (e.g., participation goals for minority- and woman-owned business on individual contracts). The City applies MBE/WBE goals on individual contracts. (The City also applies VBE/DOBE on individual contracts). Prime contractors can meet contract goals by either making subcontracting commitments with certified MBE/WBE/VBE/DOBE businesses at the time of bid or by submitting program waivers showing that they made reasonable good faith efforts to fulfill the goals but could not do so. Although prime contractors are required to submit MBE/WBE/VBE/DOBE participation plans as part of their bids, they typically do not meet the City's goals. In most cases, the City accepts good faith efforts in lieu of prime contractors meeting MBE/WBE/VBE/DOBE goals through subcontractor participation. It is instructive to review legal standards surrounding the use of such measures in case the City decides that using race- and gender-conscious measures is appropriate in the future.

Any use of race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.¹ The strict scrutiny standard presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, a government organization must:

- Have a *compelling governmental interest* in remedying past identified discrimination or its present effects; and
- Establish that the use of any such measure is *narrowly tailored* to achieve the goal of remedying the identified discrimination.

¹ Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

A government organization's program must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard. A program that fails to meet either component is unconstitutional.

BBC Research & Consulting (BBC) summarizes the elements of the MBE/WBE/VBE/DOBE Business Utilization Plan as well as the legal standards to which the City must adhere in implementing the program. BBC presents that information in two parts:

- A. Program overview; and
- B. Legal standards.

A. Program Overview

The MBE/WBE/VBE/DOBE Business Utilization Plan is designed to ensure that minority-, woman-, veteran-, and disabled-owned businesses have an equal opportunity to participate in City contracts and procurements and encourage their participation in those opportunities. The program and utilization plan comprise myriad race- and gender-neutral and race- and gender-conscious efforts, including:

- Establishing overall aspirational goals for the participation of minority-, woman-, veteran-, and disabled-owned businesses in City contracting (15%, 8%, 3%, and 1%, respectively);
- Monitoring and reporting the participation of minority-, woman-, veteran-, and disabled-owned businesses in City contracts and procurements;
- Providing technical assistance to minority-, woman-, veteran-, and disabled-owned businesses and other businesses to help address any barriers associated with competing for City contracts and procurements;
- Facilitating and participating in various network and outreach efforts and events, including workshops, pre-bid conferences, local events, and bid notices;
- Maintaining a directory of minority-, woman-, veteran-, and disabled-owned businesses to increase awareness of those businesses among prime contractors and City staff;
- Requiring prime contractors to submit Equal Opportunity Forms and Affirmative Action plans with their bids, quotes, and proposals; and
- Using MBE/WBE/VBE/DOBE goals to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses on individual contracts and procurements.

Chapter 8 provides additional details about the MBE/WBE/VBE/DOBE Business Utilization Plan.

B. Legal Standards

There are different legal standards for determining the constitutionality of contracting programs depending on whether they rely only on race- and gender-neutral measures or a combination of race- and gender-neutral and race- and gender-conscious measures. BBC briefly summarizes legal standards for both types of programs below.

Programs that rely only on race- and gender-neutral measures. Government organizations that implement contracting programs that rely only on race- and gender-neutral measures must show a *rational basis* for their programs. Showing a rational basis requires organizations to demonstrate that their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government contracting programs. When courts review programs based on a rational basis, only the most egregious violations lead to programs being deemed unconstitutional.

Programs that rely on race- and gender-neutral and race- and gender-conscious measures. The United States Supreme Court has established that contracting programs that include both race- and gender-neutral and race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.² In contrast to a rational basis, the strict scrutiny standard presents the highest threshold for evaluating the legality of government contracting programs short of prohibiting them altogether. The two key United States Supreme Court cases that established the strict scrutiny standard for such programs are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;³ and
- The 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.⁴

Under the strict scrutiny standard, a government organization must show a *compelling governmental interest* to use race- and gender-conscious measures and ensure that its use of race- and gender-conscious measures is *narrow tailored*. A program that fails to meet either component is unconstitutional.

Compelling governmental interest. An organization that uses race- or gender-conscious measures as part of a business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Organizations cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.⁵ It is not necessary for a government organization itself to have discriminated against minority- or woman-owned businesses for it to take remedial action. In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, “if [the organization] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

² Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

³ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵ See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

Narrow tailoring. In addition to demonstrating a compelling governmental interest, a government agency must also demonstrate that its use of race- and gender-conscious measures is *narrowly tailored*. There are a number of factors that a court considers when determining whether the use of such measures is narrowly tailored including:

- The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.⁶

Meeting the strict scrutiny standard. Many government organizations have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring that their use of race- and gender-conscious measures is narrowly tailored. Specifically, organizations have assessed evidence of any disparities between the participation and availability of minority- and woman-owned businesses for their contracts and procurements. In *City of Richmond v. J.A. Croson Company*, the United States Supreme Court held that, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” Lower court decisions since *City of Richmond v. J.A. Croson Company* have held that a compelling governmental interest must be established for each racial/ethnic and gender group to which race- and gender-conscious measures apply.

Many programs have failed to meet the strict scrutiny standard, because they have failed to meet the compelling governmental interest requirement, the narrow tailoring requirement, or both. However, many other programs have met the strict scrutiny standard and courts have deemed them to be constitutional. Appendix B provides detailed discussions of the case law related to those programs.

⁶ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted).

CHAPTER 3.

Marketplace Conditions

CHAPTER 3.

Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.^{1, 2, 3, 4} Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.⁵ Minorities and women in Indiana faced similar barriers. In the 19th and early 20th centuries, Indiana had 18 counties in which it was illegal for Black Americans to appear after dark.⁶ In addition, during that time period, the Indiana Ku Klux Klan had a chapter in each county and had more than 150,000 members.⁷ Disparate treatment of minorities and women also extended into the labor market. For example, 1930 census data indicate that only 14 percent of Indiana women were in the labor market in Indiana.

In the middle of the 20th century, many reforms opened up new opportunities for minorities and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.⁸ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women.^{9, 10, 11, 12} However, despite those improvements, minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.^{13, 14, 15, 16}

Federal Courts and the United States Congress have considered barriers that minorities; women; and minority- and woman-owned businesses face in a local marketplace as evidence for the existence of race- and gender-based discrimination in that marketplace.^{17, 18, 19} The United States Supreme Court and other federal courts have held that analyses of conditions in a local marketplace for minorities; women; and minority- and woman-owned businesses are instructive in determining whether agencies' implementations of minority- and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for government contracts. Passive participation in discrimination means that agencies unintentionally perpetuate race- or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race- or gender-based discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{20, 21, 22}

The study team conducted quantitative and qualitative analyses to assess whether minorities; women; and minority- and woman-owned businesses face any barriers in the Indianapolis construction; professional services; and goods and services industries.¹ In addition, where data were available, the study team conducted analogous analyses for veteran-owned businesses and disabled-owned businesses. The study team also examined the potential effects that any such barriers have on the formation and success of businesses and on their participation in, and availability for, contracts that the City of Indianapolis and Marion County (the City) and municipal corporations award.² The study team examined local marketplace conditions primarily in four areas:

- **Human capital**, to assess whether minorities, women, veterans, and people with disabilities face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether minorities, women, veterans, and people with disabilities face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership** to assess whether minorities and women own businesses at rates that are comparable to that of non-Hispanic white men; and
- **Success of businesses** to assess whether minority- and woman-owned businesses have outcomes that are similar to those of businesses owned by non-Hispanic white men.

The information in Chapter 3 comes from existing research related to discrimination as well as from primary research that the study team conducted of current marketplace conditions. Additional quantitative and qualitative information about marketplace conditions are presented in Appendix C and Appendix D, respectively.

A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Human capital factors such as education, business experience, and managerial experience have been shown to be related to business success.^{23, 24, 25, 26} Any barriers in those areas may make it more difficult for minorities women, veterans, and people with disabilities to work in relevant industries and prevent some of them from starting and operating businesses successfully.

Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{27, 28} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education that they receive.^{29, 30} Minorities are far more likely than

¹ The Indianapolis marketplace is defined in this study as Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Morgan, and Shelby Counties in Indiana.

² Municipal corporations are organizations that operate autonomously but are owned by Marion County.

non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³¹ In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.³² For those and other reasons, minorities are far less likely than non-Hispanic whites to attend college; enroll at highly- or moderately selective four-year institutions; or earn college degrees.³³

Educational outcomes for minorities in Indianapolis are similar to those for minorities nationwide. The study team's analyses of the Indianapolis labor force indicate that certain minority groups are far less likely than non-Hispanic whites to earn a college degree. Figure 3-1 presents the percentage of Indianapolis workers that have earned four-year college degrees by race/ethnicity and gender as well as for veterans and people with disabilities. As shown in Figure 3-1, Black American, Hispanic American, and Native American workers are substantially less likely than non-Hispanic white workers to have four-year college degrees. In addition, disabled and veteran workers are substantially less likely to have four-year college degrees than non-disabled and non-veteran workers, respectively.

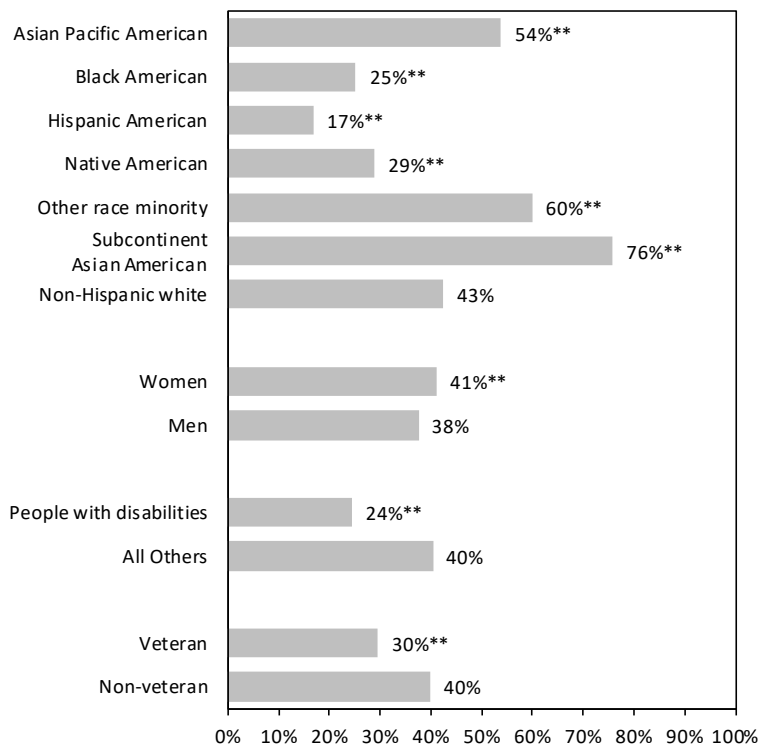
Figure 3-1.
Percentage of Indianapolis
workers 25 and older with
at least a four-year
college degree

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men; people with disabilities and people without disabilities; or veterans and non-veterans) is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



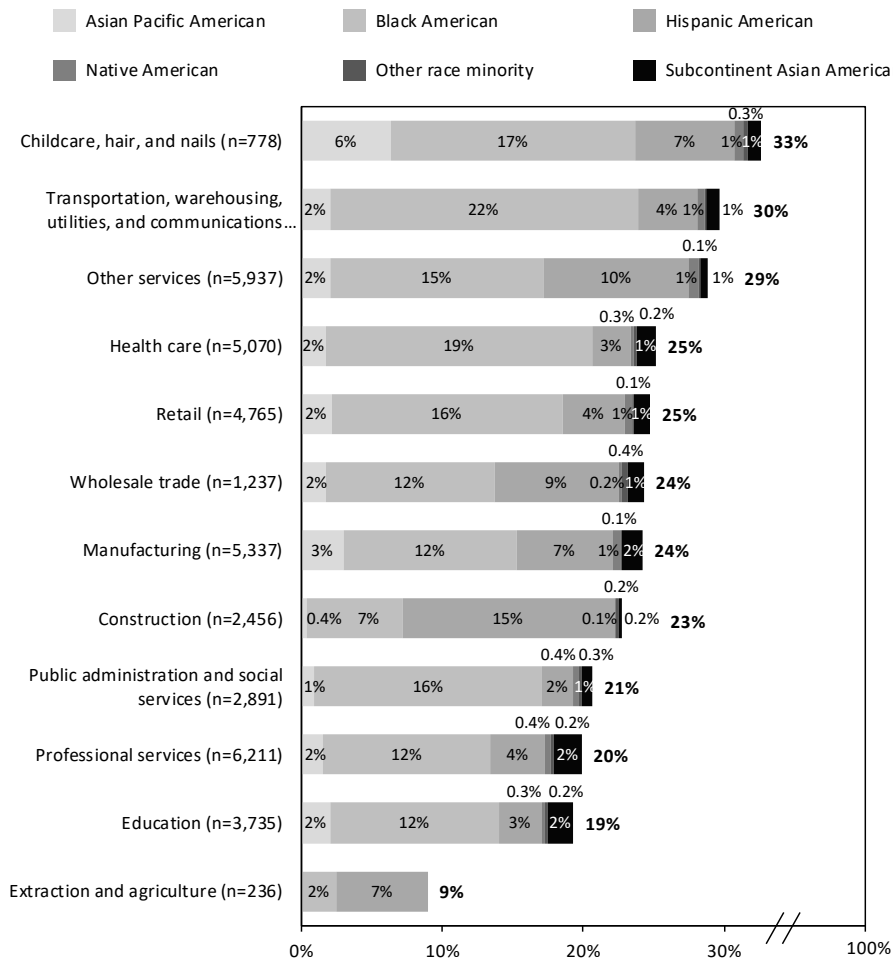
Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit minorities, women, veterans, or people with disabilities from acquiring that experience could prevent them from starting and operating related businesses in the future.

Employment. On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire relevant experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{34, 35, 36} When employed, they are often relegated to peripheral positions in the labor market and to industries that exhibit already high

concentrations of minorities or women.^{37, 38, 39, 40, 41} In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in Indiana and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth.^{42, 43, 44, 45} The study team's analyses of the labor force in Indianapolis are consistent with those findings.

Figure 3-2.

Percent representation of minorities in various Indianapolis industries



Note: ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 95% confidence level.

The representation of minorities among all Indianapolis workers is 2% for Asian Pacific Americans, 15% for Black Americans, 6% for Hispanic Americans, 1% for Native Americans, 1% for subcontinent Asian Americans, and 0% for other race minorities.

"Other race minority" includes respondents who do not identify with the racial categories defined by the U.S. Census Bureau.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

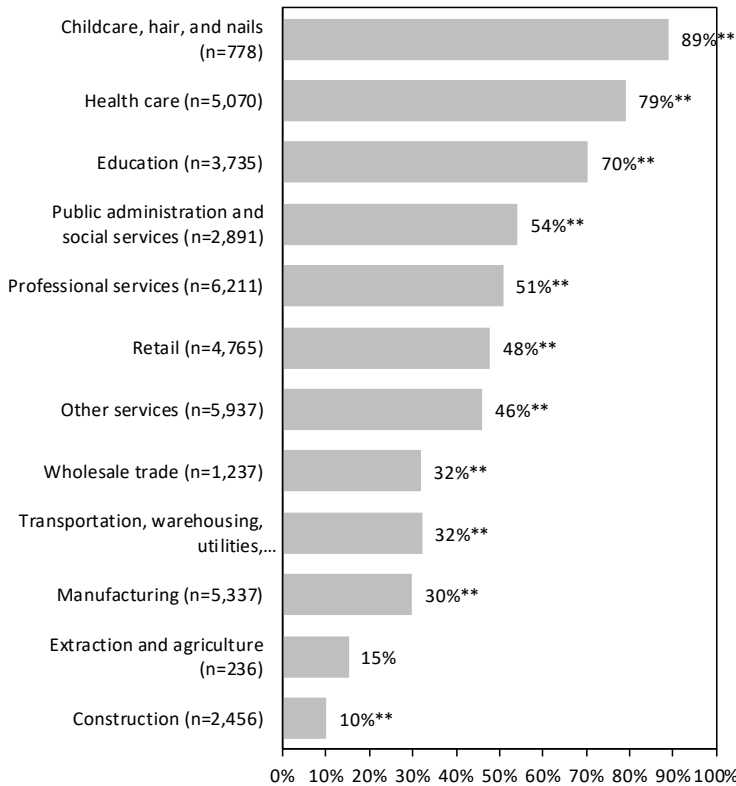
Figures 3-2 presents the representation of minority workers in various Indianapolis industries. As shown in Figure 3-2, the industries with the highest representations of minority workers are childcare, hair, and nails; transportation, warehousing, utilities, and communications; and other

services. The Indianapolis industries with the lowest representations of minority workers are professional services; education; and extraction and agriculture.

Figures 3-3 indicates that the Indianapolis industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The industries with the lowest representations of women are manufacturing; extraction and agriculture; and construction.

Figure 3-3.

Percent representation of women in various Indianapolis industries



Note: ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 95% confidence level.

The representation of women among all Indianapolis workers is 48%.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Management experience. Managerial experience is an essential predictor of business success. However, discrimination remains a persistent obstacle to greater diversity in management positions.^{46, 47, 48} Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.^{49, 50} Similar outcomes appear to exist for minorities, women, veterans, and people with disabilities in Indianapolis. The study team examined the concentration of minorities, women, veterans, and people with disabilities in management positions in the Indianapolis construction; professional services; and goods and services industries. As shown in Figure 3-4:

- A smaller percentage of Black Americans than non-Hispanic whites work as managers in the construction; professional services; and goods and services industries;
- A smaller percentage of Hispanic Americans than non-Hispanic whites work as managers in the construction and goods and services industries; and
- A smaller percentage of women than men work as managers in the construction and professional services industries.

Figure 3-4
Percentage of workers who worked as a manager in study-related industries in Indianapolis

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men; people with disabilities and people without disabilities; or veterans and non-veterans) is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes that significant differences in proportions were not reported due to small sample size.

Source:

BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Indianapolis	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	19.1%	0.0%	3.0%
Black American	4.2% **	0.4% **	0.8% **
Hispanic American	0.9% **	3.0%	1.3% **
Native American	10.1%	0.0%	0.0%
Other race minority	0.0%	0.0%	0.0%
Subcontinent Asian American	0.0%	7.5%	0.0%
Non-Hispanic white	9.4%	3.7%	4.5%
Gender			
Women	4.0% **	2.2% **	2.6%
Men	8.2%	4.6%	4.1%
Disability Status			
People with disabilities	12.5%	3.2%	2.1%
All Others	7.4%	3.4%	3.7%
Veteran Status			
Veteran	12.3%	4.6%	3.4%
Non-veteran	7.4%	3.3%	3.6%
All individuals	7.8%	3.4%	3.6%

Intergenerational business experience. Having a family member who owns a business and is working in that business is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks; obtain knowledge of best practices and business etiquette; and receive hands-on experience in helping to run businesses. However, at least nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.^{51, 52} That lack of experience makes it difficult for minorities and women to subsequently start their own businesses and operate them successfully.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{53, 54, 55} Individuals can acquire financial capital through many sources including employment wages, personal wealth, homeownership, and financing. If discrimination exists in financial capital markets, minorities, women, veterans, and people with disabilities may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

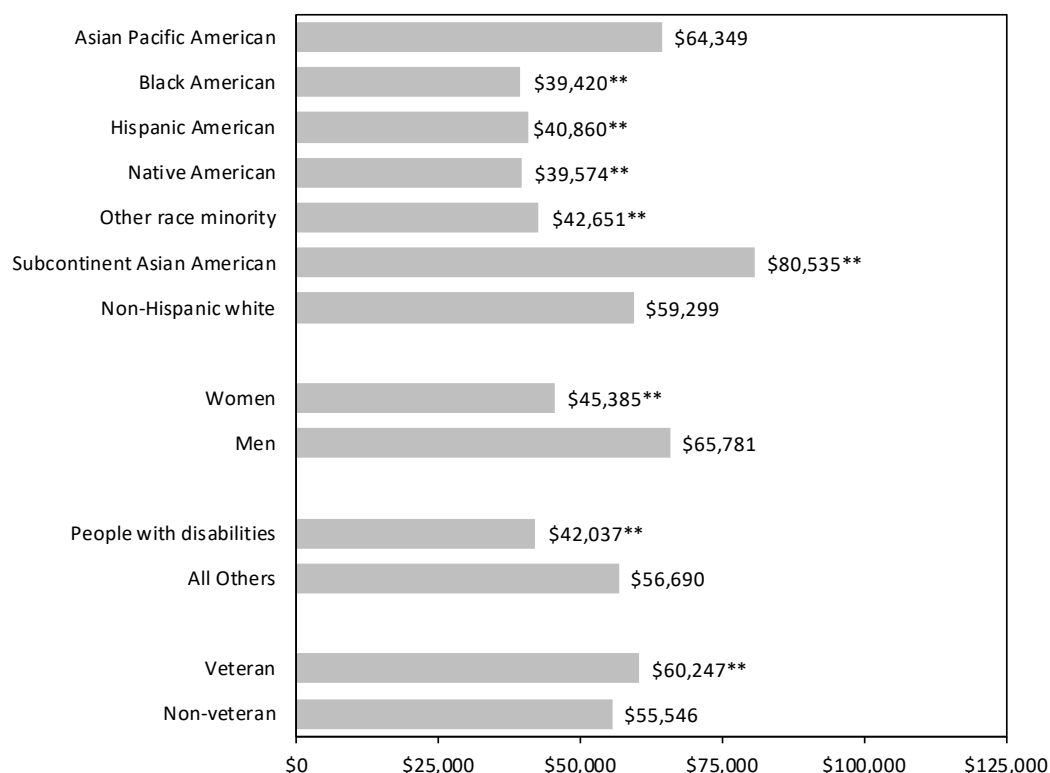
Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers

have statistically controlled for various personal factors unrelated to race and gender.^{56, 57, 58} For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.^{59, 60} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.⁶¹ Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

BBC observed wage gaps in Indianapolis consistent with those that researchers have observed nationally. Figure 3-5 presents mean annual wages for Indianapolis workers by race/ethnicity, gender, veteran status, and disability status. As shown in Figure 3-5:

- Black Americans, Hispanic Americans, Native Americans, and other race minorities in Indianapolis earn substantially less than non-Hispanic whites;
- Women workers earn substantially less than men; and
- People with disabilities earn substantially less than people without disabilities.

Figure 3-5.
Mean annual wages in Indianapolis



Note: The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

** Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), from people without disabilities (for people with disabilities), or from non-veterans (for veterans) at the 95% confidence level.

Source: BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

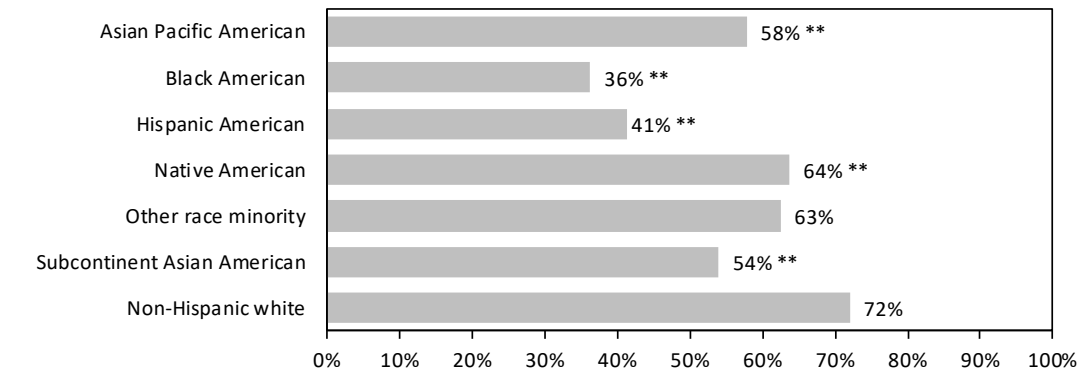
BBC also conducted regression analyses to assess whether wage disparities exist even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for various personal factors, being Black American, Hispanic American, or Native American was associated with substantially lower earnings than being non-Hispanic white. In addition, being a woman was associated with substantially lower earnings than being a man, and being a person with a disability was associated with substantially lower earnings than being a person without a disability (for details, see Figure C-9 in Appendix C).

Personal wealth. Another potentially important source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.^{62, 63} For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent that of non-Hispanic whites, respectively. In Indianapolis, 28 percent of Black Americans and 34 percent Hispanic Americans are living in poverty. In the United States, approximately one-out-of-five Black Americans and Hispanic Americans are living in poverty, about double the comparable rate for non-Hispanic whites.⁶⁴ Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁶⁵

Homeownership. Homeownership and home equity have been shown to be key sources of business capital.^{66, 67} However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.⁶⁸ Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.^{69, 70} Minorities who own homes tend to own homes that are worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.^{71, 72} Differences in home values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to the depressed property values that tend to exist in racially-segregated neighborhoods.^{73, 74}

Minorities appear to face homeownership barriers in Indianapolis that are similar to those observed nationally. BBC examined homeownership rates in Indianapolis for relevant racial/ethnic groups. As shown in Figure 3-6, Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans in Indianapolis exhibit homeownership rates that are lower than that of non-Hispanic whites.

Figure 3-6.
Home ownership rates in Indianapolis



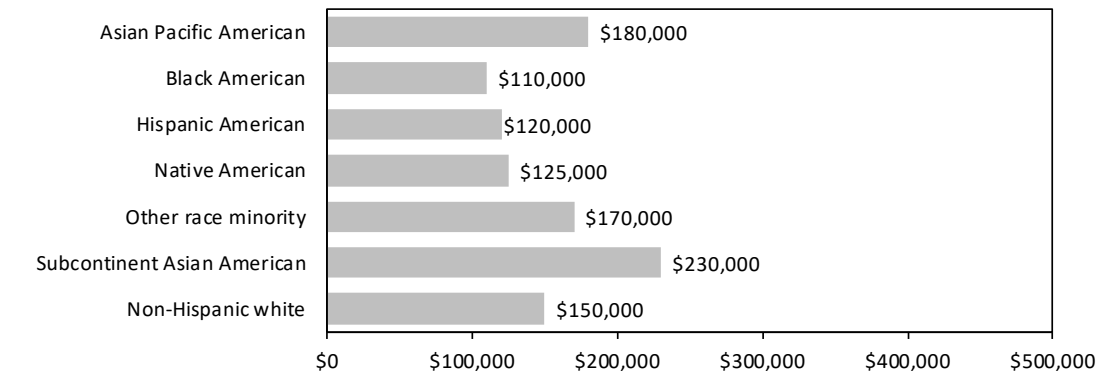
Note: The sample universe is all households.

** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.

Source: BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Indianapolis. Consistent with national trends, homeowners of certain minority groups—Black American, Hispanic American, and Native American—own homes that, on average, are worth less than those of non-Hispanic whites.

Figure 3-7.
Median home values in Indianapolis



Note: The sample universe is all owner-occupied housing units.

Source: BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{75, 76, 77, 78, 79, 80} The study team summarizes results related to difficulties that minorities, women, veterans, people with disabilities, and the businesses they own face in home credit and business credit markets.

Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and

women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.^{81, 82, 83, 84, 85} Race- and gender-based barriers in home credit markets, as well as the foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{86, 87, 88, 89} To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates in for high-income households by race/ethnicity. The study team analyzed those data for Indianapolis and the United States as a whole. As shown in Figure 3-8, Black Americans; Hispanic Americans; and Native Americans or Other Pacific Islanders in Indianapolis were denied home loans at higher rates than non-Hispanic whites. In addition, the study team's analyses indicate that certain minority groups in Indianapolis are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-14 in Appendix C).

Figure 3-8.
Denial rates of
conventional purchase
loans for high-income
households in
Indianapolis

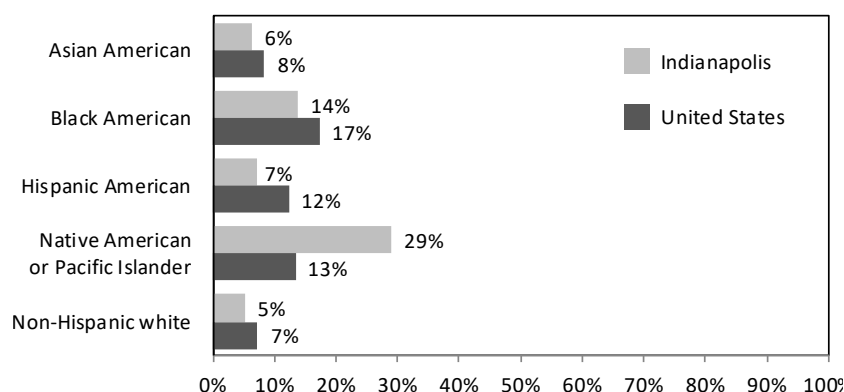
Note:

High-income households are those with 120% or more of the HUD area median family income.

Native Americans are combined with Pacific Islanders due to small samples.

Source:

FFIEC HMDA data 2016. The raw data was obtained from Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.



Business credit. Minority- and woman-owned businesses face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.⁹⁰ Researchers have shown that Black American-owned businesses and Hispanic American-owned businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.^{91, 92, 93} In addition, women are less likely to apply for credit and receive loans of less value when they do.^{94, 95} Without equal access to business capital, minority- and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.^{96, 97, 98, 99}

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, Black American-owned businesses increased by 35 percent, and Hispanic American-owned businesses increased by 46 percent.¹⁰⁰ Despite the progress that minorities and women have made with regard to business ownership rates, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women

are still less likely to start businesses than non-Hispanic white men.^{101, 102, 103, 104} In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.^{105, 106, 107}

The study team examined rates of business ownership in the Indianapolis construction; professional services; and goods and services industries by race/ethnicity, gender, veteran status, and disability status. As shown in Figure 3-9:

- Black Americans exhibit lower business ownership rates than non-Hispanic whites in professional services and goods and services; and
- Women exhibit lower business ownership rates than men in all relevant industries.

Figure 3-9.
Self-employment rates in study-related industries in Indianapolis

Group	Industry		
	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	11.7%	9.4%	10.0%
Black American	23.3%	10.9% **	5.8% *
Hispanic American	30.8%	12.2%	8.4%
Native American	36.0%	64.4%	0.0%
Other minority group	0.0%	25.7%	0.0%
Subcontinent Asian American	43.5%	12.5%	0.0%
Non-Hispanic white	23.7%	19.7%	9.0%
Gender			
Women	14.6% **	13.4% **	12.4% **
Men	25.8%	23.6%	6.2%
Disability Status			
People with disabilities	36.5% **	21.9%	6.3%
All Others	23.8%	18.3%	8.5%
Veteran Status			
Veteran	23.3%	27.6% **	6.8%
Non-veteran	24.8%	18.1%	8.4%
All individuals	24.7%	18.6%	8.3%

Note: For each industry and group, self-employment rates are calculated by determining the proportion of total workers in the labor force and the number that are self-employed as either an incorporated or non-incorporated business. As shown in the figure, the self-employment rate for Black Americans in the professional services industry is 10.9%. That means that, of all the Black Americans in the labor force in the professional services in Indianapolis, 10.9% are self-employed.

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men; people with disabilities and people without disabilities; or veterans and non-veterans) is statistically significant at the 95% confidence level.

† Denotes that significant differences in proportions were not reported due to small sample size.

Source: BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

BBC also conducted regression analyses to determine whether differences in business ownership rates based on race/ethnicity, gender, veteran status, and disability status exist even after statistically controlling for various personal factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. Figure 3-10 presents the racial/ethnic-, gender-, veteran-, and disability-related factors that were significantly and independently related to business ownership for each relevant industry. As shown in Figure 3-10, even after accounting for various personal factors:

- Being a woman or veteran was associated with a lower likelihood of owning a construction business compared to being a man or a non-veteran, respectively; and
- Being Subcontinent Asian American or being a woman was associated with a lower likelihood of owning a professional services business compared to being non-Hispanic white or a man, respectively.

Figure 3-10.
Predictors of business ownership in relevant industries in Indianapolis (probit regression)

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables, non-Hispanic whites for the race variables, men for the gender variable, non-veteran for the veteran variable, and not disabled for the disabled variable.

Source:

BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Industry and factors	Coefficient
Construction	
Disabled	0.27
Woman	-0.40
Veteran	-0.31
Professional services	
Native American	1.42
Subcontinent Asian American	-0.96
Woman	-0.25
Goods and services	
Women	0.42

D. Business Success

There is a great deal of research indicating that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of moving from business ownership to unemployment than non-Hispanic whites and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men, respectively, using a number of different indicators such as profits, closure rates, and business size (but also see Robb and Watson 2012).^{108,109,110} The study team examined data on business closure, business receipts, and business owner earnings to further explore business success in Indiana and Indianapolis.

Business closure. The study team examined the rates of closure among Indiana businesses by the race/ethnicity and gender of the owners. Figure 3-11 presents those results. As shown in Figure 3-11, Black American-, Asian American-, and Hispanic American-owned businesses in Indiana appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men. Increased rates of business closure among minority- and woman-owned businesses may have important effects on their availability for government contracts in Indianapolis.

Figure 3-11.
Rates of business closure in Indiana

Note:

Data include only to non-publicly held businesses.

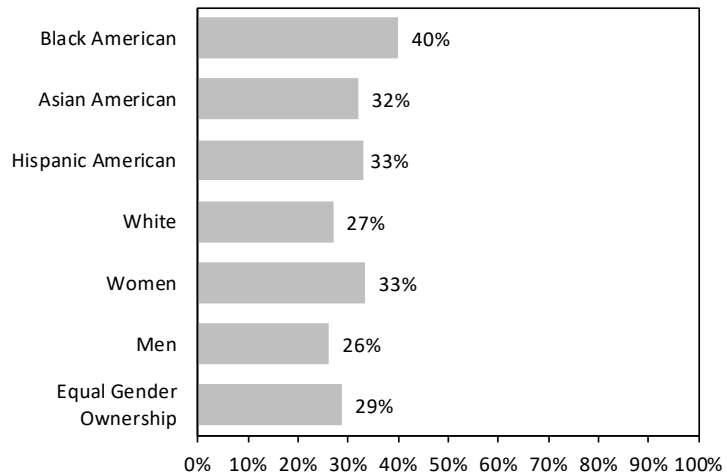
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

Statistical significance of these results cannot be determined, because sample sizes were not reported.

Source:

Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.



Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in Indianapolis earn as much as businesses owned by whites or business owned by men, respectively. Figure 3-12 shows mean annual receipts for businesses in the Indianapolis area by the race/ethnicity and gender of owners. Those results indicate that, in 2012, all relevant minority groups in Indianapolis showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses in Indianapolis showed lower mean annual business receipts than businesses owned by men.

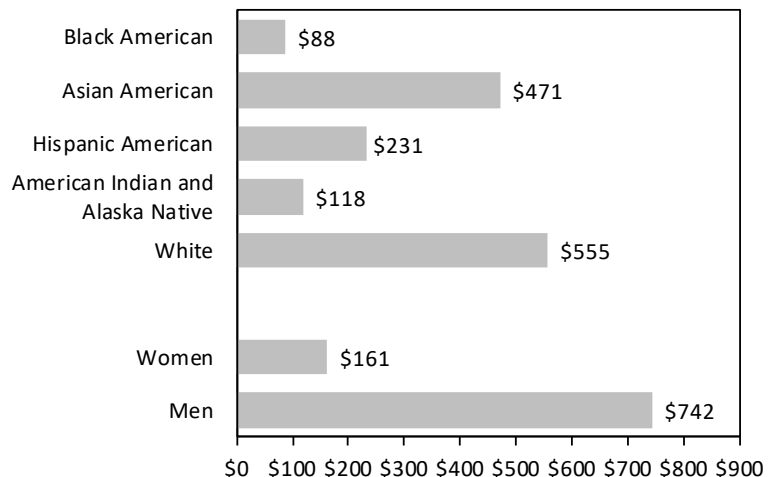
Figure 3-12.
Mean annual business receipts (in thousands) in Indianapolis MSA

Note:

Includes employer and non-employer firms. Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Source:

2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.



Business owner earnings. The study team analyzed business owner earnings to assess whether minorities, women, veterans, and people with disabilities in Indianapolis earn as much from the businesses that they own as non-Hispanic whites, men, non-veterans, and people without disabilities do. As shown in Figure 3-13:

- Black Americans, Hispanic Americans, and Native Americans earned less on average from their businesses than non-Hispanic whites earned from their businesses
- Women earned less from their businesses than men earned from their businesses; and

- People with disabilities earned less from their businesses than people without disabilities earned from their businesses.

Figure 3-13.
Mean annual business owner earnings in Indianapolis

Note:

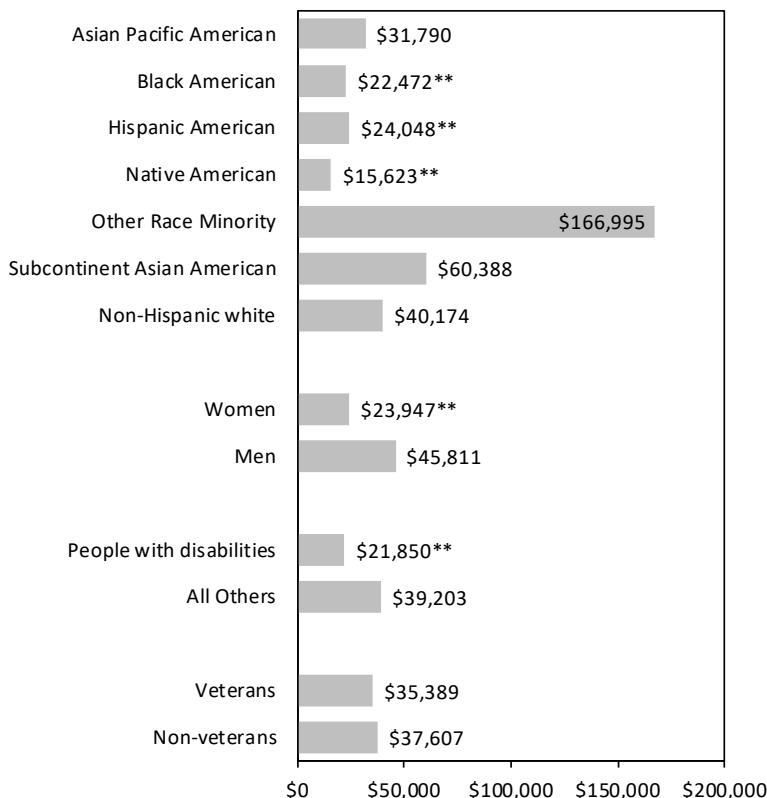
The sample universe is business owners age 16 and older who reported positive earnings. All amounts in 2016 dollars.

** Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), from people without disabilities (for people with disabilities), or from non-veterans (for veterans) at the 95% confidence level.

† Denotes that significant differences in proportions were not reported due to small sample size.

Source:

BBC Research & Consulting from 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to determine whether earnings differences in Indianapolis exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being non-Hispanic white, being Black American was associated with substantially lower business owner earnings. Similarly, being a woman was associated with substantially lower business owner earnings than being a man (for details, see Figure C-27 in Appendix C).

E. Summary

BBC's analyses of marketplace conditions indicate that minorities, women, veterans, people with disabilities, and the businesses they own face certain barriers in the Indianapolis region. Existing research, as well as primary research that the study team conducted, indicate that disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence that those disparities exist even after accounting for various race- and gender-neutral factors such as age, income, education, and familial status. There is also evidence that many disparities are due—at least, in part—to discrimination.

Barriers in the marketplace likely have important effects on the ability of minorities, women, veterans, and people with disabilities to start businesses in relevant Indianapolis industries—construction; professional services; and goods and services—and operating those businesses successfully. Any difficulties that those individuals face in starting and operating businesses may

reduce their availability for government work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in the marketplace indicates that government agencies in the region are passively participating in discrimination that makes it more difficult for minority-, woman-, veteran-, and disabled-owned businesses to successfully compete for their contracts. Many courts have held that passive participation in any race- or gender-based discrimination establishes a compelling governmental interest for agencies to take remedial action to address such discrimination.

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CHAPTER 4.

Collection and Analysis of Contract Data

CHAPTER 4.

Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies that the City of Indianapolis and Marion County (referred to together as *the City*) uses to award contracts and procurements; the contracts and procurements that the study team analyzed as part of the disparity study; and the process that the study team used to collect relevant prime contract, procurement, and subcontract data for the disparity study. Chapter 4 is organized into six parts:

- A. Overview of contracting and procurement policies;
- B. Collection and analysis of contract and procurement data;
- C. Collection of vendor data;
- D. Relevant geographic market area;
- E. Relevant types of work; and
- F. Agency review process.

A. Overview of Contracting and Procurement Policies

The Office of Finance and Management Purchasing Division provides guidance to all departments to ensure consistency in procurement procedures and compliance with the Indiana Public Purchasing Code, City-County ordinances, and administrative policies.^{1,2} The City has developed detailed guidelines for the procurement of goods, supplies, and services. The Purchasing Division is responsible for all City purchases and oversees all City contracts. The Purchasing Division is also responsible for establishing and maintaining procurement policies and procedures and ensuring compliance with those policies.

Purchase size thresholds. The City implements various purchasing methods, depending on the estimated cost of the purchase; the required goods or services; and the needs of the using agency. In general, the City's purchasing procedures can be categorized into three types: small purchases, written quotes, and competitive public bids. Most City purchases are procured using one of those three processes.

Small purchases. The City follows small purchase procedures for all procurements worth less than \$50,000. Purchasing requirements for small purchases differ depending on the size of the purchase.

Purchases worth \$500 or less. The Purchasing Division has delegated City agencies the authority to purchase goods and services worth \$500 or less through an Agency Purchasing Coordinator. Each agency is required to select a coordinator to act as a liaison between the

¹ Indiana State Statute IC 5-22 and Indiana State Statute IC 36-1-12, which applies to public works construction contracts.

² The Consolidated City of Indianapolis and Marion County Revised Code Sections 202-205.

agency and the Purchasing Division. Agencies are required to seek at least one quote for the required goods or services but are encouraged to seek more than one quote. Agencies are required to consider minority vendor participation whenever possible for purchases of that size.

Purchases between \$500 and \$2,500. Individual City agencies also have the authority to process purchases worth at least \$500 but less than \$2,500, but they are required to solicit a minimum of three verbal or written quotations for purchases of that size. In addition, the agency must make every attempt to include at least one quote from a minority-, woman-, veteran-, or disabled-owned business.

Purchases between \$2,500 and \$50,000. The Purchasing Division is responsible for procuring goods and services worth at least \$2,500 but less than \$50,000. Based on requisition details from the using agency, the Purchasing Division is required to solicit a minimum of three verbal or written quotations, at least one of which must be from a minority-, woman-, veteran-, or disabled-owned business.

Written quotes. The City follows competitive written quote procedures to procure goods, non-professional services, and construction services worth at least \$50,000 but less than \$150,000. The Purchasing Division administers competitive quote procedures for all City agencies for procurements of that size. As required by Indiana Code (IC) 5-22-8-3, the City must leave invitations to offer open for a minimum of seven days, but the City typically leaves them open for 10 days. The City is required to solicit a minimum of three written quotes. Once opened, competitive quotes are evaluated by the Purchasing Division. The procurement is then awarded to the lowest responsive and responsible vendor.

Competitive public bids. As required by IC 5-22-7, the City follows public bidding procedures—which require an invitation for sealed bids—to award goods, non-professional services, and construction services contracts worth \$150,000 or more. Under public bidding procedures, the solicitation must be advertised in a newspaper and on the City’s website at least 14 days prior to bid opening. The solicitation must include a description of the required goods or services; details about how the bid will be evaluated; contractual terms and conditions; time and location for bid opening; and other relevant information. The Purchasing Division must open the bids publicly at the time and location designated in the solicitation. After public opening, the Purchasing Division and using agency evaluate each bid or proposal for responsiveness and completeness. The procurement is then awarded to the lowest responsive and responsible bidder.

Professional services. Individual City agencies are responsible for the solicitation and award of professional services contracts.³ Competition is encouraged for professional services solicitations when feasible. City agencies have the authority to negotiate an acceptable price for the required service.

³ The City defines professional services as services which require a license and formal education to provide, including accounting, architecture, law, medicine, land surveying, and engineering.

Special procurements. The City can use special purchasing methods in situations provided under IC 5-22-10. The need for special procurements must qualify under one of the criteria listed in that section including:

- Purchases that involve substantial savings to the City;
- Purchases of data processing or software license agreements;
- Purchases where there is a single source for supply;
- Purchases made under emergency conditions;
- Purchases for which the use of other purchasing methods resulted in no responsive offers;
- Purchases for which the use of other purchasing methods would seriously impair the functioning of the agency;
- Purchases made at auctions;
- Purchases of specialty equipment;
- Purchases of copyrighted material; and
- Purchases of supplies transferred from the federal government.

The Purchasing Division requires as much competition as practical even when using special procurement practices. In addition, the originating agency must provide written justification for why the use of a special procurement method was necessary.

Information technology. The Information Services Agency (ISA) and the Information Technology Board (IT Board) are responsible with planning of City-wide connectivity, compatibility, and integration of information technology and telecommunications. All technology purchases must be reviewed by an ISA designated Business Services Consultant and approved by the Chief Information Officer of ISA.

Prequalification. Per Indiana state code, all contractors and subcontractors who are interested in proposing on public works building construction contracts worth \$150,000 or more or highway, street, road, or alley construction contracts worth \$300,000 or more must be prequalified through the Indiana Department of Administration (IDOA) or the Indiana Department of Transportation (INDOT), respectively.^{4, 5} Vendors must demonstrate that they have adequate experience; are competent and responsible; and have the necessary financial resources to comply with state code. Vendors applying for prequalification through INDOT must also submit a certified financial audit with their applications. Prequalification through IDOA is valid for 27 months, and prequalification through INDOT is valid for one year.

⁴ IC 4-13.6-4

⁵ IC 8-23-10

B. Collection and Analysis of Contract Data and Procurement Data

BBC Research & Consulting (BBC) collected contracting and vendor data from the City's centralized PeopleSoft data system and from municipal corporations (MCs) to serve as the basis of key disparity study analyses, including the utilization, availability, and disparity analyses.⁶ The study team collected the most comprehensive data that was available on prime contracts and subcontracts that the City and MCs awarded between January 1, 2014 and December 31, 2018.⁷ BBC sought data that included information about prime contracts and subcontracts regardless of the race/ethnicity and gender of the owners of the businesses that performed on those contracts or their statuses as certified woman-, minority- veteran-, or disabled-owned businesses. The study team collected data on construction; architecture and engineering; other professional services; and goods and services prime contracts and subcontracts that the City and MCs awarded during the study period.

Prime contract data collection. The City and MCs provided the study team with electronic data on relevant prime contracts that each organization awarded during the study period. The City maintains those data in PeopleSoft and through the Office of Minority and Women Business Development (OMWBD). Each MC maintains its own prime contract and procurement information and provided it to the study team in electronic format. As available, BBC collected the following information about each relevant prime contract:

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date;
- Whether XBE goals were used;
- Funding source (federal, state, or local funding);
- Prime contractor name; and
- Prime contractor identification number.

As available, the City and MCs also provided the study team with information about payments made during the study period. The City and MCs advised the study team on how to interpret the provided data, including how to identify unique bid opportunities and how to aggregate related payment amounts. When possible, the study team aggregated individual payments or purchase order line items into contract or purchase order elements. In instances where payments or line

⁶ MCs are organizations that operate autonomously but are owned by Marion County. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

⁷ The study only included MC contracts and procurements worth \$50,000 or more.

items could not be aggregated, the study team treated payment and line item records as individual contract elements.

Subcontract data collection. The City and MCs also provided the study team with electronic data on subcontracts related to contracts that they awarded during the study period, as it was available. The City provided subcontract data for 315 prime contracts, which accounted for approximately \$144 million of the contract dollars that it awarded during the study period, and MCs provided subcontract data for 58 prime contracts, which accounted for \$72 million of the contract dollars that they awarded during the study period. In order to gather additional data about relevant City and MC subcontracts, the study team conducted surveys with prime contractors to collect information on subcontracts that were associated with the contracts on which they worked during the study period. BBC collected subcontract information about additional construction; architecture and engineering; parking services; and janitorial contracts. BBC sent out surveys to request subcontract data associated with an additional 307 prime contracts that the City awarded and 164 prime contracts that MCs awarded during the study period, accounting for approximately \$272 million of the contracting dollars that the City awarded during the study period and \$236 million of the contracting dollars that MCs awarded during the study period.

BBC collected the following information about each relevant subcontract as part of the survey process:

- Associated prime contract number;
- Subcontract commitment amount;
- Amount paid on the subcontract as of December 31, 2018;
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

After the first round of surveys, BBC sent reminder letters to unresponsive prime contractors and worked with the City and MCs to contact remaining unresponsive prime contractors. Through the survey effort, BBC collected subcontract data associated with more than \$340 million of contracting dollars that the City and MCs awarded during the study period (\$163 million City contract dollars and \$177 million MC contract dollars).

Contracts included in study analyses. The study team collected information on 90,855 relevant prime contract elements and 2,764 associated subcontracts that the City awarded during the study period, accounting for approximately \$876 million of City spend. In addition, the study team collected information on 1,651 relevant prime contract elements and 460 associated subcontracts that MCs awarded during the study period, accounting for approximately \$760 million of MC spend. Figure 4-1 presents the number of contract elements by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses. Figure 4-2 presents dollars by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

Figure 4-1.
Number of City and MC
contracts included in the
study

Source:

BBC Research & Consulting from City and MC contract and payment data.

Contract Type	City Contract Elements	MC Contract Elements
Construction	9,637	658
Architecture and engineering	1,734	315
Other professional services	1,934	648
Good and services	80,314	490
Total	93,619	2,111

Prime contract and subcontract amounts. For each contract element included in the study team's analyses, BBC examined the dollars that the City and MCs awarded or paid to each prime contractor and the dollars that the prime contractor paid to any subcontractors.

- If a contract did not include any subcontracts, the study team attributed the entire amount awarded or paid during the study period to the prime contractor.
- If a contract included subcontracts, the study team calculated subcontract amounts as the total amount paid to each subcontractor during the study period. BBC then calculated the prime contract amount as the total amount paid during the study period less the sum of dollars paid to all subcontractors.

Figure 4-2.
Number of City and MC
contracts included in the
study

Note:

Numbers rounded to nearest dollar and thus may not sum exactly to totals.

Source:

BBC Research & Consulting from City and MC contract and payment data.

Contract Type	City Dollars (in thousands)	MC Dollars (in thousands)
Construction	\$362,465	\$257,637
Architecture and engineering	159,904	109,102
Other professional services	113,942	234,944
Good and services	239,402	158,532
Total	\$875,713	\$760,215

C. Collection of Vendor Data

The study team compiled the following information on businesses that participated in relevant City and MC contracts during the study period:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was minority-owned, woman-owned, veteran-owned, or disabled-owned);
- Ethnicity of ownership (if minority-owned);
- XBE certification status;
- Primary lines of work;
- Business size; and
- Year of establishment.

BBC relied on a variety of sources for that information, including:

- City and MC contract and vendor data;
- City vendor registration list;
- Indiana Department of Administration Division of Supplier Diversity certification directory;
- Indiana Department of Transportation Disadvantaged Business Enterprise directory;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Telephone surveys that the study team conducted with business owners and managers as part of the utilization and availability analyses; and
- Business websites.

D. Relevant Geographic Market Area

The study team used City and MC data to help determine the *relevant geographic market area*—the geographical area in which the organizations spends the substantial majority of its contracting dollars—for the study. The study team’s analysis showed that 86 percent of relevant contracting dollars during the study period went to businesses with locations in Marion County as well as the eight contiguous counties—Boone, Hendricks, Morgan, Johnson, Shelby, Hancock, Madison, and Hamilton counties—indicating that those counties should be considered the relevant geographic market area for the study. BBC’s analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on those nine counties.

E. Relevant Types of Work

For each prime contract and subcontract element, the study team determined the *subindustry* that best characterized the business’s primary line of work (e.g., heavy construction). BBC identified subindustries based on City and MC contract and vendor data; telephone surveys that BBC conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-3 presents the dollars that the study team examined in the various construction; architecture and engineering, other professional services; and goods and services subindustries that BBC included in its analyses.

The study team combined related subindustries that accounted for relatively small percentages of total contracting dollars into four “other” subindustries: “other construction services,” “other construction materials,” “other goods,” and “other services.” For example, the contracting dollars that the City and MCs awarded to contractors for “waterproofing” represented less than 1 percent of total City and MC dollars that BBC examined in the study. BBC combined “waterproofing” with other construction services subindustries that also accounted for relatively small percentages of total dollars and that were relatively dissimilar to other subindustries into the “other construction services” subindustry.

There were also contracts that were categorized in various subindustries that BBC did not include as part of its analyses, because they are not typically analyzed as part of disparity studies. BBC did not include contracts in its analyses that:

- The City or MCs awarded to universities, government agencies, utility providers, hospitals, or other nonprofit organizations (\$972 million);
- Were classified in subindustries that reflected *national markets* (i.e., subindustries that are dominated by large national or international businesses) or were classified in subindustries for which the City or MCs awarded the majority of contracting dollars to businesses located outside of the relevant geographic market area (\$201 million);⁸
- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate leases or banking services; \$87 million); or
- Were classified in subindustries not typically included in a disparity study and account for small proportions of City or municipal corporation contracting dollars (\$16 million).⁹

F. Agency Review Process

The City and MCs reviewed BBC's contracting and vendor data several times during the study process. The BBC study team met with City and MC staff to review the data collection process, information that the study team gathered, and summary results. BBC incorporated feedback in the final contract and vendor data that the study team used as part of the disparity study.

⁸ Examples of such industries include computers, software, and specialized medical equipment.

⁹ Examples of industries not typically included in a disparity study include subscription services and lodging.

Figure 4-3.
City and MC contract
dollars by subindustry

Note:

Numbers rounded to nearest dollar
and thus may not sum exactly to
totals.

Source:

BBC Research & Consulting from
City and MC contract data.

Industry	City Total (in Thousands)	MC Total (in Thousands)
Construction		
Highway, street, and bridge construction	\$183,625	\$22,371
Building construction	28,181	69,753
Electrical work	24,987	21,325
Trucking, hauling and storage	18,802	3,513
Landscape services	16,468	5,940
Concrete work	14,606	959
Excavation	13,298	25,718
Plumbing and HVAC	11,470	20,910
Other construction materials	9,672	14,314
Concrete, asphalt, and related products	9,307	1,442
Water, sewer, and utility lines	6,175	32,054
Heavy construction equipment rental	4,199	1,028
Roofing and flooring contractors	3,706	10,257
Fencing, guardrails, and signs	3,652	442
Traffic control and safety	3,644	250
Other construction services	3,131	15,932
Insulation, drywall, and weatherproofing	3,056	5,375
Painting and pavement markings	2,594	5,908
Wrecking and demolition	1,893	144
Total construction	\$362,466	\$257,635
Architecture and engineering		
Engineering	\$106,851	\$50,242
Environmental services	36,269	7,044
Architectural and design services	5,951	27,337
Surveying and mapmaking	4,696	4,154
Transportation and urban planning	4,004	293
Construction management	1,077	11,497
Construction testing services	1,056	8,535
Total architecture and engineering	\$159,904	\$109,102
Other professional services		
Correctional facility management	\$66,667	-
Legal services	13,860	38,192
IT and data services	10,285	34,531
Business services and consulting	10,110	48,002
Finance consulting and accounting	3,366	13,013
Health and biological laboratories	3,292	11,087
Human resources and job training services	2,660	42,961
Advertising, marketing, and public relations	2,056	16,020
Insurance and real estate	1,644	31,137
Total other professional services	\$113,940	\$234,943

**Figure 4-3 (continued).
City and MC contract
dollars by subindustry**

Note:

Numbers rounded to nearest dollar
and thus may not sum exactly to
totals.

Source:

BBC Research & Consulting from
City and MC contract data.

Industry	City Total (in Thousands)	MC Total (in Thousands)
Goods and services		
Automobiles	\$72,162	\$3,672
Other goods	32,957	18,372
Industrial chemicals	17,750	3,467
Petroleum and petroleum products	16,997	17,738
Vehicle parts and supplies	16,180	10,365
Industrial equipment and machinery	11,448	2,806
Security systems services	9,209	5,763
Safety training	8,886	424
Food and concessions	7,916	524
Specialized waste removal	7,101	1,449
Vehicle repair services	6,387	-
Law enforcement / Fire equipment and supplies	5,805	455
Other services	4,220	3,828
Parking services	3,854	10,976
Uniforms and linens	3,809	2,381
Cleaning and janitorial services	3,734	9,472
Office equipment and supplies	3,545	16,732
Security guard services	1,999	24,769
Cleaning and janitorial supplies	1,729	7,994
Specialty vehicles	1,637	3,056
Communications equipment	1,578	6,457
Furniture	313	4,473
Airport terminal services	188	3,358
Total goods and services	\$239,404	\$158,531
GRAND TOTAL	\$875,714	\$760,211

CHAPTER 5.

Availability Analysis

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority-, woman-, veteran-, and disabled-owned businesses that are *ready, willing, and able* to perform on City of Indianapolis and Marion County (referred to together as *City*) as well as municipal corporation (MC) construction; architecture and engineering; other professional services; and goods and services prime contracts and subcontracts.^{1, 2} Chapter 5 describes the availability analysis in five parts:

- A. Purpose of the availability analysis;
- B. Potentially available businesses;
- C. Availability database;
- D. Availability calculations; and
- E. Availability results.

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority-, woman-, veteran-, and disabled-owned businesses for City and MC prime contracts and subcontracts to refine the City's implementation of the Minority-owned Business Enterprise/Woman-owned Business Enterprise/Veteran-owned Business-Enterprise/Disabled-owned business enterprise (MBE/WBE/VBE/DOBE) Business Utilization Plan as well as to use as benchmarks against which to compare the actual participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC work. Comparisons between participation and availability allowed BBC to determine whether certain business groups were underutilized during the study period relative to their availability for City and MC work (for details, see Chapter 7).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of contracts and procurements that the City and MCs awarded during the study period. BBC began the availability analysis by identifying the specific subindustries in which the City and MCs spend the majority of their contracting dollars (for details, see Chapter 4) as well

¹ "Woman-owned businesses" refers to non-Hispanic white woman-owned businesses. Information and results for minority woman-owned businesses are included along with their corresponding racial/ethnic groups.

² MCs are organizations that operate autonomously but are owned by Marion County. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

as the geographic areas in which the majority of the businesses with which the City and MCs spend those contracting dollars are located (i.e., the *relevant geographic market area*).³

BBC then conducted extensive surveys to develop a representative, unbiased, and statistically-valid database of potentially available businesses located in the relevant geographic market area that perform work within relevant subindustries. That method of examining availability is referred to as a *custom census* and has been accepted in federal court as the preferred methodology for conducting availability analyses. The objective of the availability survey was not to collect information from each and every relevant business that is operating in the local marketplace. It was to collect information from an unbiased subset of the business population that appropriately represents the entire business population operating in the local marketplace. That approach allowed BBC to estimate the availability minority-, woman-, veteran-, and disabled-owned businesses in an accurate, statistically-valid manner.

Overview of availability surveys. The study team conducted telephone surveys with business owners and managers to identify local businesses that are potentially available for City and MC prime contracts and subcontracts.⁴ BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of businesses—regardless of ownership—that perform work in relevant industries and have a location within the relevant geographic market area. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the contracts that the City and MCs awarded during the study period. BBC obtained listings on 5,541 local businesses that do work related to those work specializations. BBC did not have working phone numbers for 241 of those businesses but attempted availability surveys with the remaining 5,300 business establishments.

Availability survey information. BBC worked with Engaging Solutions to conduct telephone and online surveys with the owners or managers of the identified business establishments. Survey questions covered many topics about each business including:

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Interest in performing work for the City and other government agencies;
- Interest in performing work as a prime contractor or as a subcontractor;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Race/ethnicity and gender of ownership;

³ BBC identified the relevant geographic market area for the disparity study as Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Morgan, and Shelby Counties in Indiana.

⁴ The study team offered business representatives the option of completing surveys online or via fax if they preferred not to complete surveys via telephone.

- Veteran status of ownership; and
- Disability status of ownership.

Potentially available businesses. BBC considered businesses to be potentially available for City and MC prime contracts or subcontracts if they reported having a location in the relevant geographic market area and reported possessing *all* of the following characteristics:

- Being a private sector business (as opposed to a government or nonprofit organization);
- Having performed work relevant to City and MC construction; architecture and engineering; other professional services; or goods and services contracting or procurement;
- Having bid on or performed construction; architecture and engineering; other professional services; or goods and services prime contracts or subcontracts in either the public or private sector in the relevant geographic market area in the past five years; and
- Being interested in work for the City or other government agencies.⁵

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts that the City and MCs award:

- The role in which they work (i.e., as a prime contractor, subcontractor, or both); and
- The largest contract they bid or performed in the past five years.

C. Businesses in the Availability Database

After conducting availability surveys with local businesses, BBC developed a database of information about businesses that are potentially available for City and MC construction; architecture and engineering; other professional services; and goods and services contracts and procurements. Information from the database allowed BBC to assess businesses that are ready, willing, and able to perform work for the City. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority-, woman-, veteran-, or disabled-owned. The study team's analysis included 558 businesses that are potentially available for specific construction; architecture and engineering; other professional services; and goods and services contracts and procurements that the City and MCs award. As shown in Figure 5-1, of those 558 businesses, 31.7 percent were minority- or woman-owned, 8.2 percent were veteran-owned, and 4.5 percent were disabled-owned.

The information in Figure 5-1 merely reflects a simple *head count* of businesses with no analysis of their availability for specific City and MC contracts. Thus, it represents only a first step toward analyzing the availability of minority-, woman-, veteran-, and disabled-owned businesses for City and MC work. BBC used a custom census approach to calculate the availability of minority-, woman-, veteran-, and disabled-owned businesses for City and MC work rather than using a simple head count. BBC's custom census approach to measuring availability is more precise than

⁵ That information was gathered separately for prime contract and subcontract work.

completing a simple head count, because it accounts for specific business characteristics such as work type, relative business capacity, contractor role, and interest in relevant work. BBC's custom census approach to availability is described below.

Figure 5-1.
Percentage of businesses in the availability database that were minority-, woman-, veteran-, or disabled-owned

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	12.2 %
Asian Pacific American-owned	1.1
Black American-owned	12.4
Hispanic American-owned	2.7
Native American-owned	0.5
Subcontinent Asian American-owned	2.9
Total Minority- and Woman-owned	31.7 %
Veteran-owned	8.2 %
Disabled-owned	4.5 %

D. Availability Calculations

BBC analyzed information from the availability database to develop *dollar-weighted* estimates of the availability of minority-, woman-, veteran-, and disabled-owned businesses for City and MC work. Those estimates represent the percentage of associated contracting and procurement dollars that minority-, woman-, veteran-, and disabled-owned businesses would be expected to receive based on their availability for specific types and sizes of City and MC prime contracts and subcontracts.

Steps to calculating availability. BBC used a bottom up, contract-by-contract matching approach to calculate availability. Only a portion of the businesses in the availability database was considered potentially available for any given City or MC prime contract or subcontract. BBC first examined the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*) including type of work and contract size. BBC then identified businesses in the availability database that perform work of that type, in that role (i.e., as a prime contractor or subcontractor), and of that size. BBC identified the characteristics of each prime contract and subcontract included in the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported they:
 - Are interested in performing construction; architecture and engineering; other professional services; or goods and services work in that particular role for that specific type of work for the City or other government agencies; and
 - Have bid on or performed work of that size in the past five years.
2. The study team then counted the number of minority-owned businesses, woman-owned businesses, veteran-owned businesses, disabled-owned businesses, and businesses owned by non-Hispanic white men who are neither veterans nor have disabilities (i.e., *majority-owned businesses*) in the availability database that met the criteria specified in Step 1.

3. The study team translated the numeric availability of businesses for the contract element into percentage availability.

BBC repeated those steps for each contract element that the study team examined in the disparity study. BBC multiplied percentage availability for each contract element by the dollars associated with it, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of minority-, woman-, veteran-, and disabled-owned businesses overall and separately for each relevant group. Figure 5-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that the City awarded during the study period.

BBC's availability calculations are based on prime contracts and subcontracts that the City and MCs awarded between January 1, 2014 and December 31, 2018. A key assumption of the availability analysis is that the contracts and procurements that the City and MCs awarded during the study period are representative of the contracts and procurements that they will award in the future. If the types and sizes of those contracts and procurements differ substantially from the ones they awarded in the past, then the City and MCs should consider adjusting availability estimates accordingly.

Improvements on a simple head

count of businesses. BBC used a custom census approach to calculate the availability of minority-, woman-, veteran-, and disabled-owned businesses for City and MC work rather than using a simple *head count* of minority-, woman-, veteran-, and disabled-owned businesses (e.g., simply calculating the percentage of all local businesses that are minority-, woman-, veteran-, or disabled-owned). There are several important ways in which BBC's custom census approach to measuring availability is more precise than completing a simple head count.

BBC's approach accounts for type of work. Federal regulations suggest calculating availability based on businesses' abilities to perform specific types of work. As part of estimating availability for City and MC work, BBC took work type into account by examining 58 different subindustries that are relevant to City and MC contracting and procurement.

Figure 5-2. Example of an availability calculation for a City subcontract

On a contract that the City awarded during the study period, the prime contractor awarded a subcontract worth \$96,225 for engineering services. To determine the overall availability of minority-, woman-, veteran-, and disabled-owned businesses for that subcontract, the study team identified businesses in the availability database that:

- a. Indicated that they performed engineering work;
- b. Reported bidding on work of similar or greater size in the past; and
- c. Reported interest in working as a subcontractor on City projects.

The study team found 51 businesses in the availability database that met those criteria. Of those businesses, 9 were minority- or woman-owned businesses, 4 were veteran-owned business, and 4 were disabled-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 18 percent (i.e., $9/51 \times 100 = 18$), the availability of veteran-owned businesses was 8 percent ($4/51 \times 100 = 8$), and the availability of disabled-owned businesses was also 8 percent ($4/51 \times 100 = 8$).

BBC's approach accounts for contractor role. The study team collected information on whether businesses work as prime contractors, subcontractors, or both. Businesses that reported working as prime contractors were considered potentially available for prime contracts. Businesses that reported working as subcontractors were considered potentially available for subcontracts. Businesses that reported working as both prime contractors and subcontractors were considered potentially available for both prime contracts and subcontracts.

BBC's approach accounts for the relative capacity of businesses. To account for the capacity of businesses to work on City and MC contracts, BBC considered the size—in terms of dollar value—of the prime contracts and subcontracts that a business bid on or received in the previous five years when determining whether to count that business as available for particular prime contracts or subcontracts. For each contract element, BBC considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value. BBC's approach to accounting for capacity is consistent with many key court decisions that have found such measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.*,⁶ *Western States Paving Company v. Washington State DOT*,⁷ *Rothe Development Corp. v. U.S. Department of Defense*,⁸ *Engineering Contractors Association of S. Fla. Inc. v. Metro Dade County*,⁹ and *Midwest Fence Corporation v. Illinois Department of Transportation, et al.*¹⁰).

BBC's approach accounts for interest in relevant work. The study team collected information on whether businesses are interested in working on City and MC construction; architecture and engineering; other professional services; or goods and services work (in addition to several other factors related to relevant prime contracts and subcontracts, such as contract type and size). Businesses had to indicate that they are interested in performing such work for the City or other government agencies in order to be considered potentially available for City and MC contracts and procurements.

BBC's approach generates dollar-weighted results. BBC examined availability on a contract-by-contract basis and then dollar-weighted the results. Thus, the results of relatively large contract elements contributed more to overall availability estimates than those of relatively small contract elements. That approach is consistent with relevant case law and regulations.

E. Availability Results

BBC estimated the availability of minority-, woman-, veteran-, and disabled-owned businesses for 93,619 construction; architecture and engineering; other professional services; and goods and services prime contracts and subcontracts that the City awarded between January 1, 2014 and December 31, 2018 (the study period). BBC also estimated availability for 2,111

⁶ *AGC, San Diego Chapter v. California DOT*, 2013 WL 1607239 (9th Cir. April 16, 2013).

⁷ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

⁸ *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

⁹ *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

¹⁰ *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

construction; architecture and engineering; other professional services; and goods and services prime contracts and subcontracts that MCs awarded during the study period.

Minority-and woman-owned businesses. BBC examined the availability of minority- and woman-owned businesses for various contract sets to assess the degree to which they are ready, willing, and able to perform different types of City and MC work.

City work. BBC assessed the availability for contracts and procurements that the City awarded separately from those that MCs awarded.

Overall. Figure 5-3 presents dollar-weighted availability estimates by relevant business group for City contracts and procurements. Overall, the availability of minority- and woman-owned businesses for City contracts and procurements is 19.3 percent, indicating that minority- and woman-owned businesses might be expected to receive 19.3 percent of the dollars that the City awards in construction; architecture and engineering; other professional services; and goods and services. Non-Hispanic white woman-owned businesses (8.5%) and Black American-owned businesses (6.1%) exhibited the highest availability percentages among all groups.

Figure 5-3.
Overall availability estimates by
racial/ethnic and gender group for City work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	8.5 %
Asian Pacific American-owned	1.2
Black American-owned	6.1
Hispanic American-owned	0.8
Native American-owned	0.3
Subcontinent Asian American-owned	2.3
Total Minority-owned	10.8
Total Minority- and Woman-owned	19.3 %

Goal review. The City uses MBE/WBE/VBE/DOBE goals (15%, 8%, 3%, and 1%, respectively) to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses on individual contracts and procurements. As part of the award process, the Office of Minority and Women Business Development (OMWBD) reviews prime contractors' efforts to meet those goals through subcontract commitments on construction and goods and services contracts worth \$50,000 or more (*OMWBD-reviewed* contracts) but does not make such efforts on construction and goods and services contracts worth less than \$50,000 (*no-review* contracts). OMWBD does not conduct goal reviews on any professional services contracts. It is instructive to compare availability for minority- and woman-owned businesses on OMWBD-reviewed and no-review contracts. As shown in Figure 5-4, the availability of minority- and woman-owned businesses considered together is lower for OMWBD-reviewed contracts (18.6%) than for no-review contracts (26.8%). Among other factors, that result could be due to the fact that OMWBD-reviewed contracts are larger in size than no-review contracts, which often limits availability for minority- and woman-owned businesses.

Figure 5-4.
Availability estimates by
goal review for City work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-11 and F-12 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Goal review	
	OMWBD-reviewed	No-review
Non-Hispanic white woman-owned	8.7 %	10.7 %
Asian Pacific American-owned	0.7	3.2
Black American-owned	7.0	9.0
Hispanic American-owned	0.9	3.2
Native American-owned	0.2	0.1
Subcontinent Asian American-owned	1.1	0.7
Total Minority-owned	9.9	16.2
Total Minority- and Woman-owned	18.6 %	26.8 %

Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for City prime contracts and subcontracts. Figure 5-5 presents those results. As shown in Figure 5-5, the availability of minority- and woman-owned businesses considered together is lower for City prime contracts (17.2%) than for subcontracts (31.0%). Among other factors, that result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are thus often more accessible to minority- and woman-owned businesses.

Figure 5-5.
Availability estimates by
contract role for City work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-9 and F-10 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	7.7 %	13.2 %
Asian Pacific American-owned	1.2	1.6
Black American-owned	5.6	8.8
Hispanic American-owned	0.5	2.7
Native American-owned	0.3	0.3
Subcontinent Asian American-owned	2.0	4.4
Total Minority-owned	9.6	17.8
Total Minority- and Woman-owned	17.2 %	31.0 %

Industry. BBC examined availability analysis results separately for City construction; architecture and engineering; other professional services; and goods and services contracts. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is highest for the City's goods and services contracts (20.6%) and lowest for other professional services contracts (16.8%).

Figure 5-6.
Availability estimates by industry for City work

Business group	Industry			
	Construction	Architecture and engineering	Other professional services	Goods and services
Non-Hispanic white woman-owned	9.7 %	6.3 %	9.0 %	7.8 %
Asian Pacific American-owned	0.8	2.2	1.2	1.3
Black American-owned	5.3	2.9	4.1	10.2
Hispanic American-owned	1.1	0.0	0.2	1.3
Native American-owned	0.3	0.0	1.8	0.0
Subcontinent Asian American-owned	1.8	8.2	0.5	0.0
Total Minority-owned	9.2	13.4	7.8	12.8
Total Minority- and Woman-owned	19.0 %	19.7 %	16.8 %	20.6 %

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figure F-5, F-6, F-7, and F-8 in Appendix F.

Source: BBC Research & Consulting availability analysis.

Time period. BBC examined availability analysis results separately for contracts and procurements that the City awarded in the *early study period* (i.e., January 1, 2014 –December 31, 2016) and the *late study period* (i.e., January 1, 2017 – December 31, 2018) to determine whether the types and sizes of contracts that the City awarded across the study period changed over time, which in turn would affect availability. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together was similar in both time periods.

Figure 5-7.
Availability estimates by time period for City work

Business group	Time period	
	Early	Late
Non-Hispanic white woman-owned	8.9 %	7.7 %
Asian Pacific American-owned	1.2	1.4
Black American-owned	5.9	6.4
Hispanic American-owned	0.8	0.8
Native American-owned	0.4	0.3
Subcontinent Asian American-owned	2.2	2.5
Total Minority-owned	10.4	11.4
Total Minority- and Woman-owned	19.3 %	19.2 %

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figure F-3 and F-4 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

MC work. MCs are organizations that operate autonomously but are owned by Marion County. Figure 5-8 presents dollar-weighted availability estimates by relevant business group for contracts and procurements that MCs considered together awarded during the study period. Overall, the availability of minority- and woman-owned businesses for MC contracts and procurements is 27.1 percent, indicating that minority- and woman-owned businesses might be expected to receive 27.1 percent of the dollars that MCs award in construction; architecture and engineering; other professional services; and goods and services. Non-Hispanic white woman-owned businesses (11.6%) and Black American-owned businesses (10.2%) exhibited the

highest availability percentages among all groups. BBC also assessed the availability of minority- and woman-owned businesses separately for four key MCs:

- Capital Improvement Board (CIB): The availability of minority- and woman-owned businesses considered together for CIB contracts and procurements is 30.4%;
- Indianapolis Airport Authority (IAA): The availability of minority- and woman-owned businesses considered together for IAA contracts and procurements is 25.2%;
- Indianapolis Public Library (IPL): The availability of minority- and woman-owned businesses considered together for IPL contracts and procurements is 14.9%; and
- Indianapolis Public Transportation Corporation (IndyGo): The availability of minority- and woman-owned businesses considered together for IndyGo contracts and procurements is 25.6%.

Detailed availability results for those four MCs are provided in Appendix F, figures F-16, F-17, F-18, and F-19, respectively.

Figure 5-8.
Availability estimates for MC work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-15 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	11.6 %
Asian Pacific American-owned	2.8
Black American-owned	10.2
Hispanic American-owned	0.4
Native American-owned	0.7
Subcontinent Asian American-owned	1.4
Total Minority-owned	15.5
Total Minority- and Woman-owned	27.1 %

Veteran-owned businesses. BBC examined the overall availability of veteran-owned businesses for City and MC work. The availability analysis indicated that the availability of veteran-owned businesses is 5.3 percent for City contracts and procurements, and 12.2 percent for MC contracts and procurements.

Disabled-owned businesses. BBC also examined the overall availability of disabled-owned businesses for City and MC work. The availability analysis indicated that the availability of disabled-owned businesses is 3.3 percent for City contracts and procurements, and 9.1 percent for MC contracts and procurements.

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority-, woman-, veteran-, and disabled-owned businesses in construction; architecture and engineering; other professional services; and goods and services contracts and procurements that the City of Indianapolis and Marion County (referred to together as *City*) as well as municipal corporations (MCs) awarded between January 1, 2014 and December 31, 2018.¹ BBC Research & Consulting (BBC) measured the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that those businesses received on City and MC prime contracts and subcontracts during the study period.² For example, if 5 percent of prime contract and subcontract dollars went to non-Hispanic white woman-owned businesses on a particular set of contracts, utilization of non-Hispanic white woman-owned businesses for that set of contracts would be 5 percent. BBC considered utilization results on their own and as inputs in the disparity analysis (for details, see Chapter 7). The study team measured the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracts regardless of whether they were certified as Minority-owned Business Enterprises (MBEs), Woman-owned Business Enterprises (WBEs), Veteran-owned Business Enterprises (VBEs), or Disabled-owned Business Enterprise (DOBEs).

Minority- and Woman-owned Businesses

BBC examined the participation of minority- and woman-owned businesses for various sets of contracts that the City and MCs awarded during the study period. The study team assessed the participation of all of those businesses considered together and separately for each relevant racial/ethnic and gender group.

City work. BBC assessed the participation of minority- and woman-owned businesses separately for contracts and procurements that the City awarded and those that MCs awarded.

Overall. Figure 6-1 presents the percentage of contracting dollars that minority- and woman-owned businesses received on construction; architecture and engineering; other professional services; and goods and services contracts and procurements that the City awarded during the study period (including both prime contracts and subcontracts). As shown in Figure 6-1, overall, minority- and woman-owned businesses considered together received 14.6 percent of the relevant contracting dollars that the City awarded during the study period. Most of those dollars—12.2 percent—went to certified businesses. Non-Hispanic white woman-owned

¹ MCs are organizations that operate autonomously but are owned by Marion County. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

² “Woman-owned businesses” refers to non-Hispanic white woman-owned businesses. Information and results for minority woman-owned businesses are included along with their corresponding racial/ethnic groups.

businesses (6.6%) and Black American-owned businesses (4.5%) exhibited higher levels of participation on City contracts than all other groups.

Figure 6-1.
Overall utilization
results for City work

Note:

Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.

For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization %
Minority- and Woman-owned	
Non-Hispanic white woman-owned	6.6 %
Asian Pacific American-owned	0.3
Black American-owned	4.5
Hispanic American-owned	1.1
Native American-owned	0.5
Subcontinent Asian American-owned	1.7
Total Minority-owned	8.0
Total Minority- and Woman-owned	14.6 %
XBE-certified	
Non-Hispanic white woman-owned	5.3 %
Asian Pacific American-owned	0.3
Black American-owned	3.7
Hispanic American-owned	0.9
Native American-owned	0.4
Subcontinent Asian American-owned	1.7
Total XBE-certified Minority-owned	6.9
Total XBE-certified	12.2 %

Goal review. The City uses MBE/WBE/VBE/DOBE goals (15%, 8%, 3%, and 1%, respectively) to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses on individual contracts and procurements. As part of the award process, the Office of Minority and Women Business Development (OMWBD) reviews prime contractors' efforts to meet those goals through subcontract commitments on construction and goods and services contracts worth \$50,000 or more (*OMWBD-reviewed* contracts) but does not make such efforts on construction and goods and services contracts worth less than \$50,000 (*no-review* contracts). OMWBD does not conduct goal reviews on any professional services contracts. It is instructive to compare the participation of minority- and woman-owned businesses between OMWBD-reviewed and no-review contracts, because doing so can provide an assessment of the effectiveness of OMWBD's review process in encouraging the participation of minority- and woman-owned businesses in City contracting. Figure 6-2 presents those results. As shown in Figure 6-2, the participation of minority- and woman-owned businesses considered together was slightly higher in no-review contracts (12.5%) than in OMWBD-reviewed contracts (12.2%).

Figure 6-2.
Utilization results by
goal review for City work

Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.
For more detail, see Figures F-11 and F-12 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Goal review	
	OMWBD-reviewed	No-review
Non-Hispanic white woman-owned	6.3 %	5.1 %
Asian Pacific American-owned	0.2	0.1
Black American-owned	3.8	5.7
Hispanic American-owned	1.1	1.5
Native American-owned	0.6	0.1
Subcontinent Asian American-owned	0.1	0.0
Total Minority-owned	5.9	7.4
Total Minority- and Woman-owned	12.2 %	12.5 %

Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine participation separately for City prime contracts and subcontracts. As shown in Figure 6-3, the participation of minority- and woman-owned businesses considered together was much lower in City prime contracts (8.2%) than in subcontracts (51.5%). Among other factors, that result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts, and are thus often more accessible to minority- and woman-owned businesses, and because the City's application of MBE/WBE goals is designed to encourage minority- and woman-owned business participation specifically in subcontracts.

Figure 6-3.
Utilization results by
contract role for City work

Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.
For more detail, see Figures F-9 and F-10 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	4.3 %	19.7 %
Asian Pacific American-owned	0.1	1.1
Black American-owned	2.2	17.7
Hispanic American-owned	0.4	5.4
Native American-owned	0.3	1.1
Subcontinent Asian American-owned	0.9	6.5
Total Minority-owned	3.9	31.8
Total Minority- and Woman-owned	8.2 %	51.5 %

Industry. BBC examined utilization analysis results separately for City construction; architecture and engineering; other professional services; and goods and services contracts. As shown in Figure 6-4, the participation of minority- and woman-owned businesses considered together was highest for architecture and engineering contracts (27.3%) and lowest for goods and services contracts (7.6%).

Figure 6-4.
Utilization results by industry for City work

Business group	Construction	Architecture and engineering	Other professional services	Goods and services
Non-Hispanic white woman-owned	7.2 %	9.2 %	5.3 %	4.6 %
Asian Pacific American-owned	0.1	0.0	1.3	0.2
Black American-owned	5.3	7.2	2.7	2.2
Hispanic American-owned	1.6	1.6	0.1	0.5
Native American-owned	0.9	0.3	0.2	0.0
Subcontinent Asian American-owned	0.2	8.9	0.1	0.0
Total Minority-owned	8.1	18.1	4.3	3.0
Total Minority- and Woman-owned	15.3 %	27.3 %	9.6 %	7.6 %

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.

For more detail, see Figures F-5, F-6, F-7, and F-8 in Appendix F.

Source: BBC Research & Consulting utilization analysis.

Time period. BBC examined utilization results separately for contracts and procurements that the City awarded in the *early study period* (i.e., January 1, 2014 – December 31, 2016) and the *late study period* (i.e., January 1, 2017 – December 31, 2018) to determine whether outcomes for minority- and woman-owned businesses changed over time. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together in City contracts was lower in the early study period (13.7%) than the late study period (16.2%).

Figure 6-5.
Utilization results by time period for City work

Numbers rounded to nearest tenth of 1 percent.
Numbers may not add to totals.

For more detail, see Figures F-3 and F-4 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Time period	
	Early	Late
Non-Hispanic white woman-owned	6.5 %	6.8 %
Asian Pacific American-owned	0.2	0.4
Black American-owned	4.1	5.1
Hispanic American-owned	1.1	1.1
Native American-owned	0.3	0.7
Subcontinent Asian American-owned	1.5	2.0
Total Minority-owned	7.2	9.4
Total Minority- and Woman-owned	13.7 %	16.2 %

Concentration of dollars. BBC analyzed whether the dollars that each relevant business group received on City contracts during the study period were spread across a relatively large number of businesses or were concentrated with a relatively small number of businesses. The study team assessed that question by calculating:

- The number of different businesses within each relevant group that received contracting dollars during the study period; and
- The number of different businesses within each relevant group that accounted for 75 percent of the group's total contracting dollars during the study period.

Overall, 291 different minority- and woman-owned businesses participated in City contracts during the study period. Fifty of those businesses, or 17.2 percent of all utilized minority- and woman-owned businesses, accounted for 75 percent of the total contracting dollars that minority- and woman-owned businesses received during the study period. Figure 6-6 presents analogous results for each relevant racial/ethnic and gender group. Most notably, two native American-owned businesses accounted for 75 percent of the total contracting dollars that Native American-owned businesses received during the study period, and a single Native American-owned business accounted for 71 percent of those dollars.

Figure 6-6.
Concentration of dollars that went to minority- and woman-owned businesses on City work

Source:
BBC Research & Consulting utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	156	27	17.3%
Asian Pacific American-owned	7	2	28.6%
Black American-owned	75	14	18.7%
Hispanic American-owned	25	3	12.0%
Native American-owned	9	2	22.2%
Subcontinent Asian American-owned	19	3	15.8%
All Minority- and Woman-owned	291	50	17.2%

MC work. MCs are organizations that operate autonomously but are owned by Marion County. Figure 6-7 presents the participation of minority- and woman-owned businesses in contracts and procurements that MCs awarded during the study period. Overall, the participation of minority- and woman-owned businesses for MC contracts and procurements was 20.9 percent. Non-Hispanic white woman-owned businesses (8.3%) and Black American-owned businesses (7.5%) exhibited the highest participation among all groups. BBC also assessed the participation of minority- and woman-owned businesses separately for four key MCs:

- Capital Improvement Board (CIB): The participation of minority- and woman-owned businesses considered together for CIB contracts and procurements was 31.0%;
- Indianapolis Airport Authority (IAA): The participation of minority- and woman-owned businesses considered together for IAA contracts and procurements was 28.0%;
- Indianapolis Public Library (IPL): The participation of minority- and woman-owned businesses considered together for IPL contracts and procurements was 24.8%; and
- Indianapolis Public Transportation Corporation (IndyGo): The participation of minority- and woman-owned businesses considered together for IndyGo contracts and procurements was 4.6%.

Detailed utilization results for those four MCs are provided in Appendix F, figures F-16, F-17, F-18, and F-19, respectively.

Figure 6-7.
Utilization results for MC work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figure F-15 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	8.3 %
Asian Pacific American-owned	0.7
Black American-owned	7.5
Hispanic American-owned	3.6
Native American-owned	0.4
Subcontinent Asian American-owned	0.4
Total Minority-owned	12.6
Total Minority- and Woman-owned	20.9 %

Veteran-Owned Businesses

BBC examined the participation of veteran-owned businesses in the contracts and procurements that the City and MCs awarded during the study period. The utilization analysis indicated that the participation of veteran-owned businesses was 2.6 percent in City contracts and procurements, and 2.1 percent in MC contracts and procurements.

Disabled-Owned Businesses

Similarly, BBC examined the participation of disabled-owned businesses in the contracts and procurements that the City and MCs awarded during the study period. The utilization analysis indicated that the participation of disabled-owned businesses was 0.5 percent in City contracts and procurements, and 0.4 percent in MC contracts and procurements.

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

The disparity analysis compared the participation of minority-, woman-, veteran-, and disabled-owned businesses in contracts that the City of Indianapolis and Marion County (referred to together as *City*) as well as municipal corporation (MCs) awarded between January 1, 2014 and December 31, 2018 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work.¹ The analysis focused on construction; architecture and engineering; other professional services; and goods and services contracts and procurements. Chapter 7 presents the disparity analysis in four parts:

- A. Overview;
- B. Disparity analysis results;
- C. Statistical significance; and
- D. Case study analysis.

A. Overview

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work.² BBC expressed both actual participation and availability as percentages of the total dollars associated with a particular set of contracts (e.g., 5% participation compared with 4% availability). BBC then calculated a *disparity index* to help compare participation and availability results across relevant business groups and contract sets using the following formula:

$$\frac{\% \text{ participation}}{\% \text{ availability}} \times 100$$

A disparity index of 100 indicates *parity* between actual participation, or *utilization*, and availability. That is, participation of a particular business group was largely in line with its availability. A disparity index of less than 100 indicates a *disparity* between participation and availability. That is, a particular business group was *underutilized* relative to its availability. Finally, a disparity index of less than 80 indicates a *substantial disparity* between participation

¹ MCs are organizations that operate autonomously but are owned by Marion County. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

² “Woman-owned businesses” refers to non-Hispanic white woman-owned businesses. Information and results for minority woman-owned businesses are included along with their corresponding racial/ethnic groups.

and availability. That is, a particular business group was substantially underutilized relative to its availability.³

The disparity analysis results that BBC presents in Chapter 7 summarize detailed results tables that are presented in Appendix F. Each table in Appendix F presents disparity analysis results for a different set of contracts. For example, Figure 7-1, which is identical to Figure F-2 in Appendix F, presents disparity analysis results for all City contracts that BBC examined as part of the study. Appendix F includes analogous tables for different subsets of contracts including:

- Construction; architecture and engineering; other professional services; and goods and services contracts;
- Prime contracts and subcontracts; and
- Contracts that the City awarded in different study period years.

The heading of each table in Appendix F provides a description of the subset of contracts that BBC analyzed for that particular table.

A review of Figure 7-1 helps to introduce the calculations and format of all of the disparity analysis tables in Appendix F. As illustrated in Figure 7-1, the disparity analysis tables present information about each relevant business group in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as Minority-owned Business Enterprises (MBEs) or Woman-owned Business Enterprises (WBEs).
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as MBE/WBEs.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as MBE/WBEs.
- Rows (5) through (10) present results for businesses of each individual racial/ethnic group, regardless of whether they were certified as MBE/WBEs.
- Rows (11) through (19) present results for businesses of each individual racial/ethnic group that were certified as MBE/WBEs.⁴

³ Many courts have deemed disparity indices below 80 as being *substantial* and have accepted such outcomes as evidence of adverse conditions for a particular business group (e.g., see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

⁴ Disparity analysis results tables do not include results for veteran-owned businesses or disabled-owned businesses. Overall disparity analysis results for veteran-owned businesses and disabled-owned businesses are presented at the end of Section B in this chapter.

Figure 7-1.
Example of a disparity analysis table from Appendix F (same as Figure F-2 in Appendix F)

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	93,619	\$875,714	\$875,714				
(2) Minority and woman-owned businesses	6,712	\$128,104	\$128,104	14.6	19.3	-4.6	75.9
(3) Non-Hispanic white woman-owned	4,267	\$57,818	\$57,818	6.6	8.5	-1.9	77.8
(4) Minority-owned	2,445	\$70,285	\$70,285	8.0	10.8	-2.8	74.4
(5) Asian Pacific American-owned	42	\$2,395	\$2,395	0.3	1.2	-1.0	22.2
(6) Black American-owned	1,704	\$39,041	\$39,041	4.5	6.1	-1.6	73.4
(7) Hispanic American-owned	380	\$9,862	\$9,862	1.1	0.8	0.3	136.0
(8) Native American-owned	57	\$3,975	\$3,975	0.5	0.3	0.1	132.3
(9) Subcontinent Asian American-owned	262	\$15,013	\$15,013	1.7	2.3	-0.6	74.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	4,191	\$106,755	\$106,755	12.2			
(12) Non-Hispanic white woman-owned XBE	2,154	\$46,265	\$46,265	5.3			
(13) Minority-owned XBE	2,037	\$60,491	\$60,491	6.9			
(14) Asian Pacific American-owned XBE	34	\$2,210	\$2,210	0.3			
(15) Black American-owned XBE	1,563	\$32,271	\$32,271	3.7			
(16) Hispanic American-owned XBE	134	\$7,839	\$7,839	0.9			
(17) Native American-owned XBE	46	\$3,211	\$3,211	0.4			
(18) Subcontinent Asian American-owned XBE	260	\$14,959	\$14,959	1.7			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent. "woman-owned" refers to non-Hispanic white woman-owned.

* Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 9 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting disparity analysis.

Utilization results. Each disparity analysis table includes the same columns and rows:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that BBC analyzed as part of the City’s contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 93,619 City contract elements. The value presented in column (a) for each individual business group represents the number of contract elements in which businesses of that particular group participated (e.g., as shown in row (6) of column (a), Black American-owned businesses participated in 1,704 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of City contract elements. As shown in row (1) of column (b) of Figure 7-1, BBC examined approximately \$876 million for the entire set of contract elements. The dollar totals include both prime contract and subcontract dollars. The value presented in column (b) for each individual business group represents the dollars that the businesses of that particular group received on the set of contract elements (e.g., as shown in row (6) of column (b), Black American-owned businesses received approximately \$39 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of City contract elements after adjusting those dollars for businesses that BBC identified as minority-owned but for which specific race/ethnicity information was not available.
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of City contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for Black American-owned businesses, the study team divided \$39 million by \$876 million and multiplied by 100 for a result of 4.5%, as shown in row (6) of column (d)).
- The bottom half of Figure 7-1 presents utilization results for minority- and woman-owned businesses that were certified as MBE/WBEs.

Availability results. Column (e) of Figure 7-1 presents the availability of each relevant business group for all contract elements that the study team analyzed as part of the City’s contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts (e.g., as shown in row (6) of column (e), the availability of Black American-owned businesses for City work is 6.1%).

Differences between participation and availability. The next step in analyzing whether there was a disparity between the participation and availability of minority- and woman-owned businesses for City work is to subtract the participation percentage from the availability percentage. Column (f) of Figure 7-1 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group. For example, as presented in row (6) of column (f) of Figure 7-1, the participation of Black American-owned businesses in City contracts was 1.6 percentage points less than their availability.

Disparity indices. BBC also calculated a disparity index for each relevant racial/ethnic and gender group. Column (g) of Figure 7-1 presents the disparity index for each group. For example, as reported in row (6) of column (g), the disparity index for Black American-owned businesses was approximately 73.4, indicating that Black American-owned businesses actually received approximately \$0.73 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that the City awarded during the study period.

BBC applied the following rules when disparity indices were exceedingly large or could not be calculated because the study team did not identify any businesses of a particular group as available for a particular contract set:

- When BBC's calculations showed a disparity index exceeding 200, BBC reported an index of "200+." A disparity index of 200+ means that participation was more than twice as much as availability for a particular group for a particular set of contracts.
- When there was no participation and no availability for a particular group for a particular set of contracts, BBC reported a disparity index of "100," indicating parity.

B. Disparity Analysis Results

BBC measured disparities between the participation and availability of minority-, woman-, veteran-, and disabled-owned businesses for various sets of contracts that the City and MCs awarded during the study period.

Minority- and woman-owned businesses. BBC examined the availability of minority- and woman-owned businesses for various contract sets to assess the degree to which they may have been underutilized on various types of City and MC work.

City work. BBC assessed disparities between the participation and availability of minority- and woman-owned businesses separately for City and MC contracts.

Overall. Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts that the City awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as the threshold for what indicates a substantial disparity. As shown in Figure 7-2, overall, the participation of minority- and woman-owned businesses in contracts that the City awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 76 indicates that minority- and woman-owned businesses received approximately \$0.76 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the City awarded during the study period. Disparity analysis results by individual racial/ethnic and gender group indicated that:

- Four groups exhibited disparity indices substantially below parity: non-Hispanic white woman-owned businesses (disparity index of 78), Asian Pacific American-owned

businesses (disparity index of 22), Black American-owned businesses (disparity index of 73), and Subcontinent Asian American-owned businesses (disparity index of 74).

- Hispanic American-owned businesses (disparity index of 136) and Native American-owned businesses (disparity index of 132) did not exhibit a disparity.

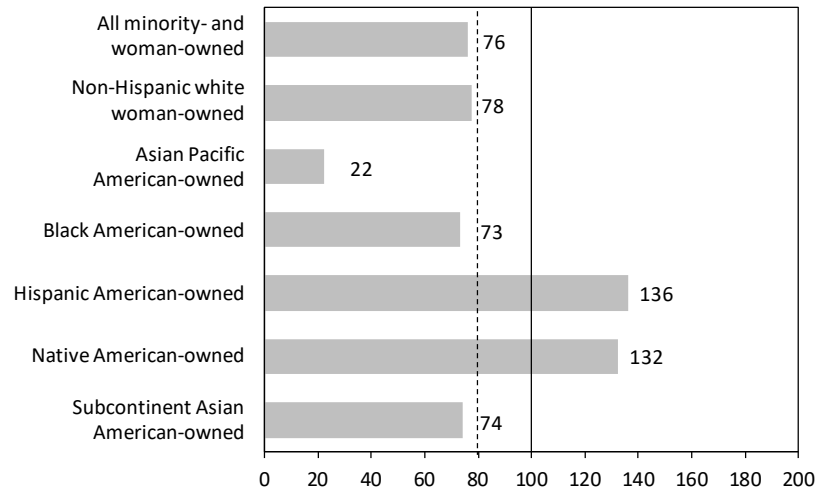
Figure 7-2.
Disparity indices by group
for City work

Note:

For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



Goal review. The City uses MBE/WBE/VBE/DOBE goals (15%, 8%, 3%, and 1%, respectively) to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses on individual contracts and procurements. As part of the award process, the Office of Minority and Women Business Development (OMWBD) reviews prime contractors' efforts to meet those goals through subcontract commitments on construction and goods and services contracts worth \$50,000 or more (*OMWBD-reviewed* contracts) but does not make such efforts on construction and goods and services contracts worth less than \$50,000 (*no-review* contracts). OMWBD does not conduct goal reviews on any professional services contracts. It is instructive to compare disparities for minority- and woman-owned businesses between OMWBD-reviewed and no-review contracts, because doing so provides an assessment of the effectiveness of OMWBD's review process in encouraging the participation of minority- and woman-owned businesses in City contracting. Figure 7-3 presents those results. As shown in Figure 7-3, minority- and woman-owned businesses considered together showed a substantial disparity for both OMWBD-reviewed contracts (disparity index of 66) and no-review contracts (disparity index of 47). Results for individual groups indicated that:

- All groups showed substantial disparities on OMWBD-reviewed contracts except for Hispanic American-owned businesses (disparity index of 134) and Native American-owned businesses (disparity index of 200+).
- All groups showed substantial disparities on no-review contracts except for Native American-owned businesses (disparity index of 116).

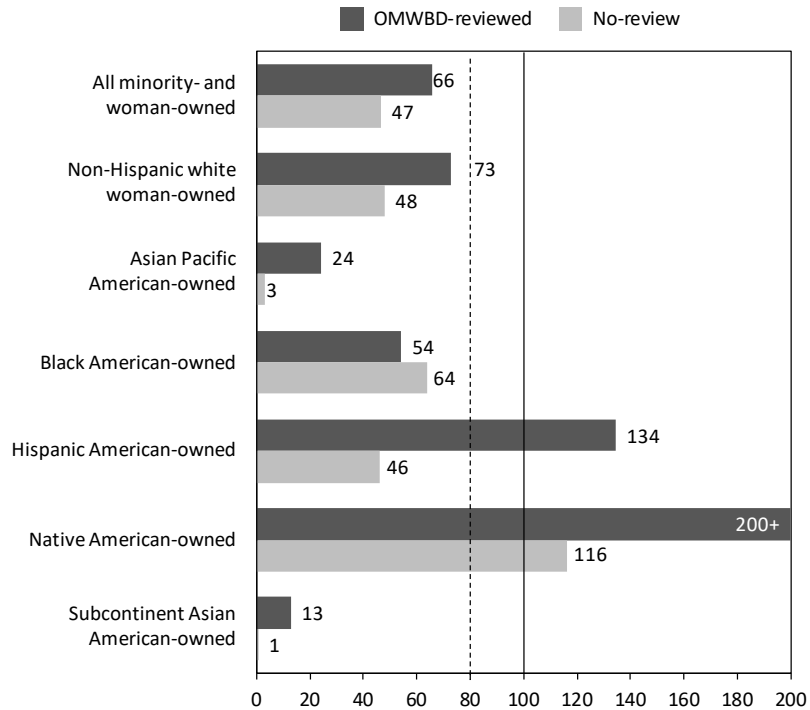
Figure 7-3.
Disparity indices by goals
review for City work

Note:

For more detail, see Figures F-11 and F-12 in Appendix F.

Source:

BBC Research & Consulting
disparity analysis.



Contract role. Subcontracts tend to be much smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to minority- and woman-owned businesses. Additionally, the City’s application of MBE/WBE goals is designed to encourage minority- and woman-owned business participation specifically in subcontracts. Thus, it might be reasonable to expect better outcomes for minority- and woman-owned businesses on City subcontracts than on prime contracts. Figure 7-4 presents disparity indices for all relevant groups for prime contracts and subcontracts. As shown in Figure 7-4, minority- and woman-owned businesses considered together showed a substantial disparity for prime contracts (disparity index of 48) but not subcontracts (disparity index of 166). Results for individual groups indicated that:

- All groups showed substantial disparities on prime contracts except for Native American-owned businesses (disparity index of 102).
- No groups showed substantial disparities on subcontracts except for Asian-Pacific American-owned businesses (disparity index of 71).

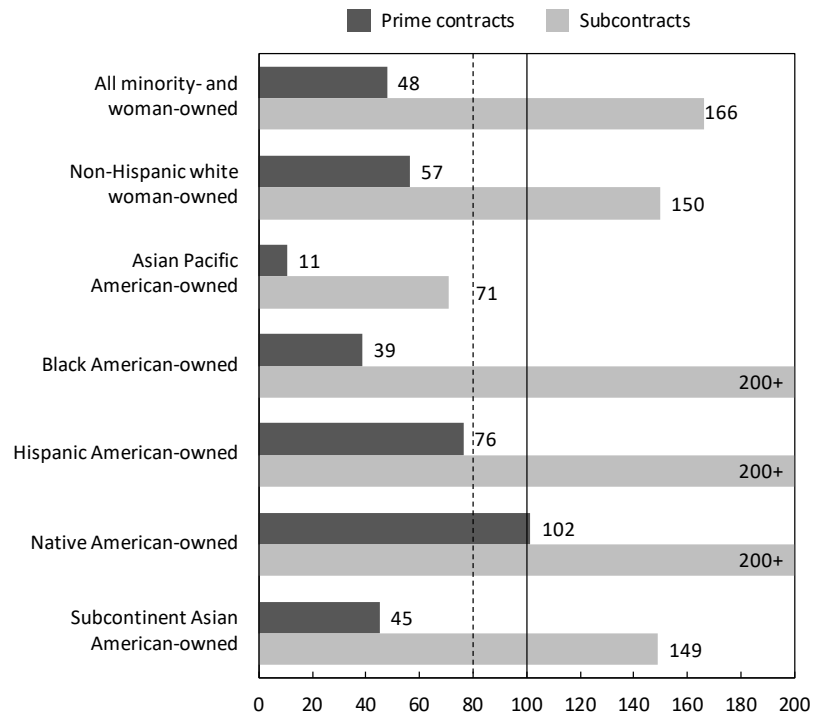
Figure 7-4.
Disparity indices by
contract role for City work

Note:

For more detail, see Figures F-9 and F-10 in Appendix F.

Source:

BBC Research & Consulting
disparity analysis.



Industry. BBC examined disparity analysis results separately for the City’s construction; architecture and engineering; other professional services; and goods and services contracts. Figure 7-5 presents disparity indices for all relevant groups by contracting area. As shown in Figure 7-5, minority- and woman-owned businesses considered together showed substantial disparities for other professional services (disparity index of 57) and goods and services (disparity index of 37). Disparity analysis results differed by industry and group:

- Three individual groups showed substantial disparities on construction contracts: Non-Hispanic white woman-owned businesses (disparity index of 74), Asian Pacific American-owned businesses (disparity index of 14), and Subcontinent Asian American-owned businesses (disparity index of 12).
- No individual group showed disparities on architecture and engineering contracts except for Asian Pacific American-owned businesses (disparity index of 2).
- All individual groups showed substantial disparities on other professional services contracts except for Asian Pacific American-owned businesses (disparity index of 108).
- All individual groups showed substantial disparities on goods and services contracts except for Native American-owned businesses (disparity index of 100) and Subcontinent Asian American-owned businesses (disparity index of 200+).

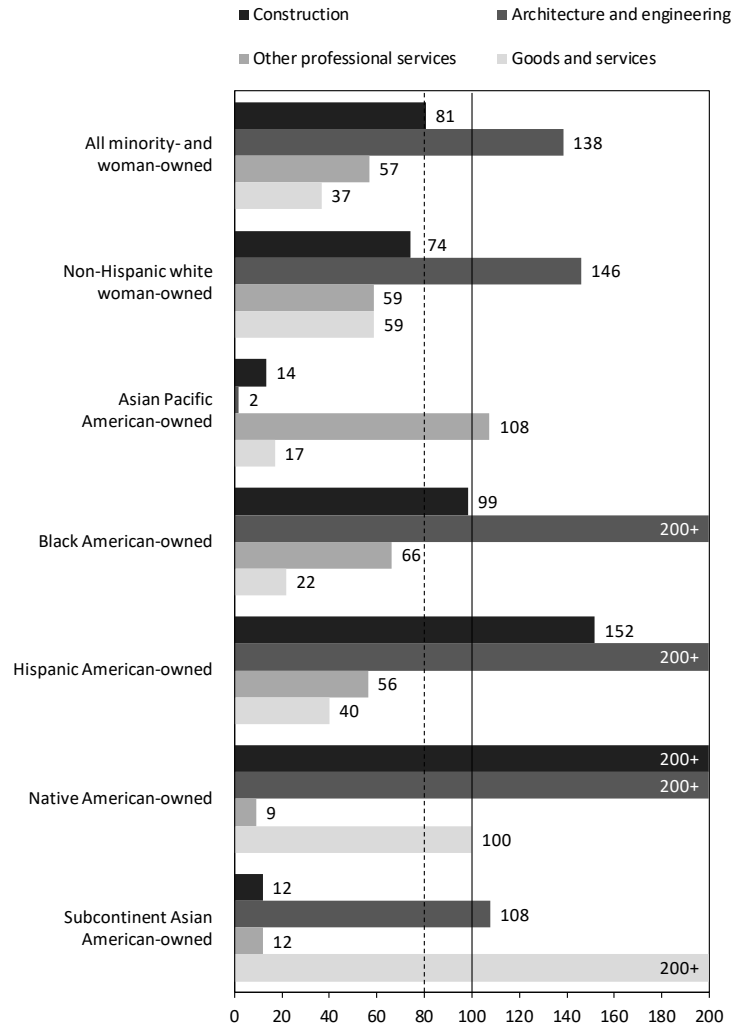
Figure 7-5.
Disparity analysis results by
relevant industry for City work

Note:

For more detail, see Figures
F-5, F-6, F-7, and F-8 in Appendix F.

Source:

BBC Research & Consulting
disparity analysis.



Time period. BBC also examined disparity analysis results separately for two separate time periods: the *early study period* (i.e., January 1, 2014 – December 31, 2016) and the *late study period* (i.e., January 1, 2017 – December 31, 2018). That information might help the City determine whether there were different outcomes for minority- and woman-owned businesses over time. Figure 7-6 presents disparity indices for all relevant racial/ethnic and gender groups separately for the early and late study periods. As shown in Figure 7-6, minority- and woman-owned businesses showed substantial disparities for contracts that the City awarded in the early study period (disparity index of 71), but not in the late study period (disparity index of 85). Results for individual groups indicated that that:

- All groups except Hispanic American-owned businesses (disparity index of 136) showed substantial disparities in the early study period.
- No group other than Asian Pacific American-owned businesses (disparity index of 30) showed a substantial disparity in the late time period.

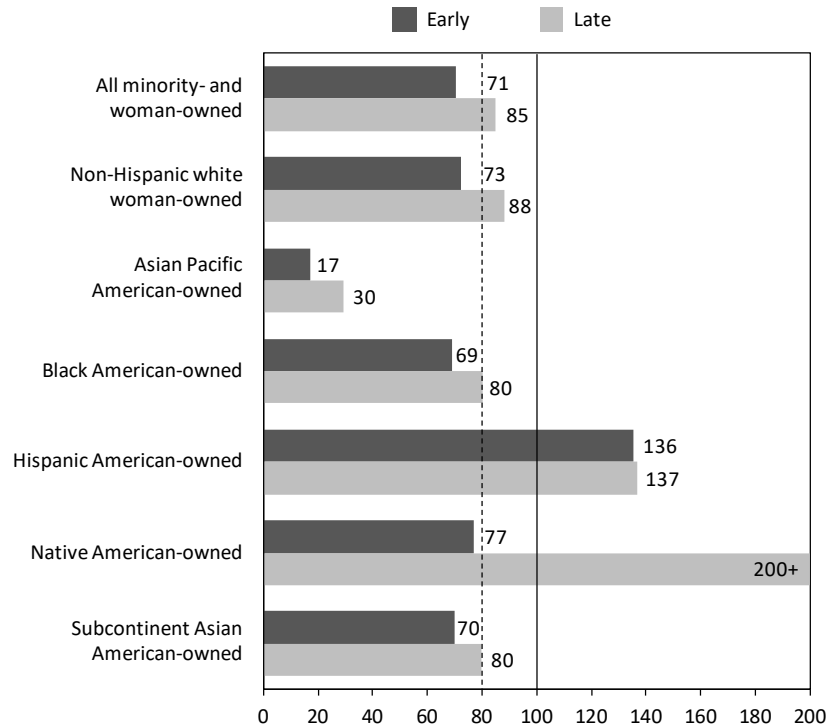
Figure 7-6.
Disparity indices by time
period for City work

Note:

For more detail, see Figures F-3 and F-4 in Appendix F.

Source:

BBC Research & Consulting
disparity analysis.



MCs. MCs are organizations that operate autonomously but are owned by Marion County. Figure 7-7 shows that, overall, the participation of minority- and woman-owned businesses in contracts that MCs awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work (disparity index of 77). Results for individual groups indicated that all groups except Hispanic American-owned businesses (disparity index of 200+) showed substantial disparities in MC contracts.

BBC also assessed disparities between participation and availability for minority- and woman-owned businesses separately for four key MCs:

- Capital Improvement Board (CIB): Minority- and woman-owned businesses considered together showed no disparity for CIB contracts and procurements (disparity index of 102);
- Indianapolis Airport Authority (IAA): Minority- and woman-owned businesses considered together showed no disparity for IAA contracts and procurements (disparity index of 111);
- Indianapolis Public Library (IPL): Minority- and woman-owned businesses considered together showed no disparity for IPL contracts and procurements (disparity index of 167); and
- Indianapolis Public Transportation Corporation (IndyGo): Minority- and woman-owned businesses considered together showed a substantial disparity for IndyGo contracts and procurements (disparity index of 18).

Detailed disparity results for those four MCs are provided in Appendix F, figures F-16, F-17, F-18, and F-19, respectively.

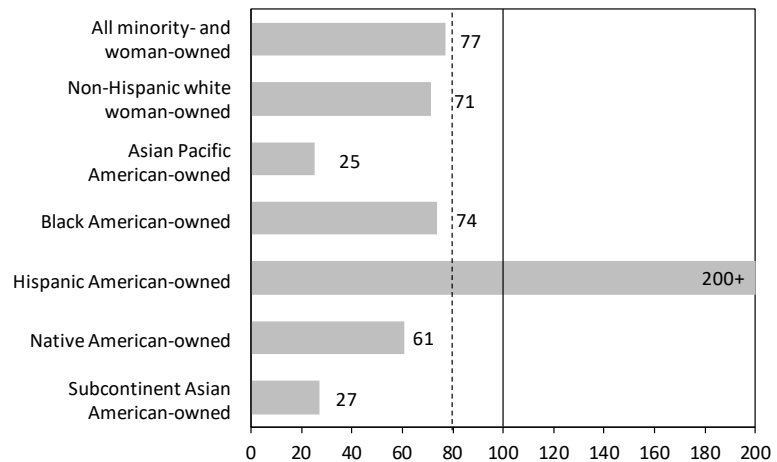
Figure 7-7.
Disparity indices for MC work

Note:

For more detail, see Figures F-15 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



Veteran-owned businesses. BBC compared participation to availability for veteran-owned businesses in City and MC work. The disparity analysis indicated that veteran-owned businesses exhibited a disparity index of 48 for City contracts and procurements, and a disparity index of 17 for MC contracts and procurements, indicating that their actual participation in both City and MC contracting was substantially less than their availability.

Disabled-owned businesses. BBC also compared participation to availability for disabled-owned businesses in City and MC work. The disparity analysis indicated that disabled-owned businesses exhibited a disparity index of 14 for City contracts and procurements, and a disparity index of 4 for MC contracts and procurements, indicating that their actual participation in both City and MC contracting was substantially less than their availability.

C. Statistical Significance

Statistical significance tests allow researchers to test the degree to which they can reject random chance as an explanation for any observed quantitative differences. In other words, a statistically significant difference is one that one can consider to be reliable or *real*. BBC used a process that relies on repeated, random simulations to examine the statistical significance of disparity analysis results. That approach is referred to as a *Monte Carlo* analysis. Figure 7-8 describes how the study team used Monte Carlo to test the statistical significance of disparity analysis results.

Figure 7-8.
Monte Carlo Analysis

BBC used a Monte Carlo approach to randomly select businesses to *win* each individual contract element that the study team included in its analyses. For each contract element, BBC's availability database provided information on individual businesses that are available for that contract element based on type of work, contractor role, and contract size. BBC assumed that each available business had an equal chance of winning the contract element, so the odds of a business from a certain group winning it were equal to the number of businesses from that group available for it divided by the total number of businesses available for it. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to win the contract element.

The Monte Carlo simulation repeated the above process for all contract elements in a particular contract set. The output of a single Monte Carlo simulation for all contract elements in the set represented the simulated participation of minority- and woman-owned businesses for that set of contract elements. The entire Monte Carlo simulation was then repeated 1 million times for each contract set. The combined output from all 1 million simulations represented a probability distribution of the overall participation of minority- and woman-owned businesses if contracts were awarded randomly based only on the availability of relevant businesses working in the local marketplace.

The output of the Monte Carlo simulations represents the number of simulations out of 1 million that produced simulated participation that was equal or below the actual observed participation for each racial/ethnic and gender group and for each set of contracts. If that number was less than or equal to 25,000 (i.e., 2.5% of the total number of simulations), then BBC considered the corresponding disparity index to be statistically significant at the 95 percent confidence level. If that number was less than or equal to 50,000 (i.e., 5.0% of the total number of simulations), then BBC considered that disparity index to be statistically significant at the 90 percent confidence level.

Results. As shown in Figure 7-9, results from the Monte Carlo analysis indicated that the substantial disparities on all City contracts were statistically significant at the 95 percent confidence level for the following groups:

- All minority- and woman-owned businesses considered together;
- Non-Hispanic white woman-owned businesses;
- Minority-owned businesses considered together;
- Asian Pacific American-owned businesses; and
- Black American-owned businesses.

The analysis also indicated that the substantial disparities on all MC contracts were statistically significant at the 95 percent confidence level for the following groups:

- All minority- and woman-owned businesses considered together;
- Non-Hispanic white woman-owned businesses;
- Asian Pacific American-owned businesses;
- Black American-owned businesses; and
- Subcontinent Asian American-owned businesses.

Figure 7-9.
Monte Carlo simulation results for disparity analysis results

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
City contracts			
Minority-owned and woman-owned	76	0	<0.1 %
Non-Hispanic white woman-owned	78	1,905	0.19 %
Minority-owned	74	0	<0.1 %
Asian Pacific American-owned	22	0	<0.1 %
Black American-owned	73	2	<0.1 %
Hispanic American-owned	136	N/A	N/A
Native American-owned	132	N/A	N/A
Subcontinent Asian American-owned	74	54,986	5.5 %
MC contracts			
Minority-owned and woman-owned	77	374	<0.1 %
Non-Hispanic white woman-owned	71	756	<0.1 %
Minority-owned	82	60,065	6.0 %
Asian Pacific American-owned	25	56	<0.1 %
Black American-owned	74	22,283	2.2 %
Hispanic American-owned	200+	N/A	N/A
Native American-owned	61	114,141	11.4 %
Subcontinent Asian American-owned	27	21	<0.1 %

D. Case Study Analysis

BBC completed a case study analysis to assess whether characteristics of the City's bid evaluation processes help explain any of the disparities that the study team observed for contracting opportunities. BBC analyzed bid information from a sample of the contracting opportunities that the City awarded during the study period. BBC examined bid information for a sample of 161 contracts that the City awarded during the study period. In total, the City received 558 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 44 of the 558 bids (8%) that the study team examined:

- Seventeen bids (3% of all bids) came from minority-owned businesses (six different businesses); and
- Twenty-seven bids (5% of all bids) came from non-Hispanic white woman-owned businesses (six different businesses).

Success of bids. BBC also examined the percentage of bids submitted by minority- and woman-owned businesses that resulted in contract awards. As shown in Figure 7-10, 35 percent of the bids submitted by minority-owned businesses resulted in contract awards, which was higher than the percent of bids submitted by majority-owned businesses that resulted in contract awards (29%). Of the bids submitted by non-Hispanic white woman-owned businesses, 26 percent resulted in contract awards, lower than the percent of bids submitted by majority-owned businesses that resulted in contract awards.

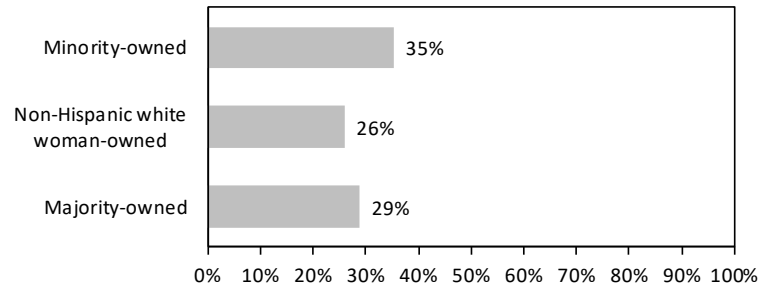
Figure 7-10.
Percentage of bids on
contract opportunities that
resulted in awards

Note:

Based on analysis of 558 bids on 161 City contracts.

Source:

BBC Research & Consulting from entity contracting data.



CHAPTER 8.

Program Measures

CHAPTER 8.

Program Measures

As part of implementing the Minority-owned Business Enterprise/Woman-owned Business Enterprise/Veteran-owned Business-Enterprise/Disabled-owned business enterprise (MBE/WBE/VBE/DOBE) Business Utilization Plan, the City of Indianapolis and Marion County (referred to together as *the City*) uses various *race- and gender-neutral* and *race- and gender-conscious* measures to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and municipal corporation (MC) contracts and procurements.^{1,2} Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an organization’s contracting. Participation in such measures is not limited to minority- and woman-owned businesses or other disadvantaged businesses. In contrast, race- and gender-conscious measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization’s contracting (e.g., using minority-owned business participation goals on individual contracts).

BBC Research & Consulting (BBC) reviewed measures that the City currently uses to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracting. In addition, BBC reviewed measures that other organizations in Indiana use. That information is instructive, because it allows an assessment of the measures that the City is currently using and additional measures that the organization could consider using in the future. BBC reviewed program measures in four parts:

- A. Program overview;
- B. Race- and gender-neutral measures;
- C. Race- and gender-conscious measures; and
- D. Other organizations’ measures.

A. Program Overview

The City implements the MBE/WBE/VBE/DOBE Business Utilization Plan to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC

¹ “Woman-owned businesses” refers to non-Hispanic white woman-owned businesses. Information and results for minority- and woman-owned businesses are included along with their corresponding racial/ethnic groups.

² MCs are organizations that operate autonomously but are owned by Marion County. As recipients of City funding, MCs are also required to use MBE/WBE/VBE/DOBE goals in awarding individual City-funded contracts and report MBE/WBE/VBE/DOBE participation in City-funded contracts to the City. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

contracting. As part of the program, the City certifies minority-, woman-, veteran-, and disabled-owned businesses as *XBEs*. In order to be XBE-certified, a business must be:

- At least 51 percent owned and controlled by minorities; women; veterans; or people with mental or physical disabilities who are citizens or permanent residents of the United States;
- A for-profit organization;
- In business for at least two years prior to application;
- Headquartered and domiciled in Indiana; and
- Registered with the Office of the Secretary of State.

The City's Office of Minority and Women Business Development (OMWBD) is responsible for certifying businesses as XBEs. After reviewing a certification application for completeness, OMWBD conducts an on-site review of the XBE applicant.³ Once the on-site review is completed, OMWBD's Business Enterprise Officer develops a narrative report of the applicant's file and makes a recommendation as to whether the business should be certified. OMWBD's Deputy Director must approve all certification recommendations. OMWBD is also responsible for maintaining a list of XBE-certified businesses, developing plans to increase the participation of XBEs, monitoring progress related to the participation of XBEs in City contracts, and communicating the MBE/WBE/VBE/DOBE Business Utilization Plan policies. Section 202-401 of the City's revised code establishes aspirational participation goals of 15 percent for minority-owned businesses, 8 percent for woman-owned businesses, 3 percent for veteran-owned businesses, and 1 percent for disabled-owned businesses in City contracts. The MBE/WBE/VBE/DOBE Business Utilization Plan must be reauthorized annually.

B. Race- and Gender-Neutral Measures

As part of meeting the *narrow tailoring* requirement of the strict scrutiny standard of constitutional review, organizations that implement minority- and woman-owned business programs must meet the maximum feasible portion of overall aspirational minority- and woman-owned business participation goals through the use of race- and gender-neutral measures (for details, see Chapter 2 and Appendix B). If an organization cannot meet its overall annual minority- or woman-owned business goals through the use of race- and gender-neutral measures alone, then it can also consider using race- and gender-conscious measures.

The City uses myriad race- and gender-neutral measures that can encourage the participation of all small businesses—including many minority-, woman-, veteran-, and disabled-owned

³ OMWBD conducts on-site reviews with all local XBE applicants located in Marion, Hamilton, Boone, Madison, Hancock, Hendricks, Shelby, Morgan, and Johnson counties in Indiana. Applicants located outside of those counties must apply for certification through the State of Indiana Department of Administration (IDOA) or the Indiana Department of Transportation (INDOT). OMWBD then accepts on-site reviews from IDOA and INDOT as part of non-local XBE applicants' applications.

businesses—in City and MC contracting.⁴ The City uses the following types of race- and gender-neutral measures:

- Business development programs;
- Advocacy and outreach efforts; and
- City process workshops.

Business development programs. The City offers business development opportunities to small businesses through a series of regular workshops and programs. The City often partners with other organizations to facilitate business development programs.

Financial wellness events. OMWBD partners with Regions Bank to host free financial wellness events. The events provide information related to starting a healthy small business; operating and growing a business; understanding how to apply for a loan; and learning how to build and maintain business credit.

Business Growth and Development Initiative. OMWBD partners with Faegre Baker Daniels, LLP to lead workshops to help businesses understand various aspects of business development. The workshops cover topics related to labor and employment law; human resources; employment agreements; business planning; bonding; procurement, bidding, and government contracting; and other various topics. The sessions are free to attend.

Advocacy and outreach efforts. The City regularly advertises City events, business programs, and upcoming contracting opportunities in local newspapers and via radio segments. The City also facilitates many advocacy and outreach events.

Annual Mayor’s Celebration of Diversity Luncheon. The City hosts an annual luncheon for businesses and organizations in Marion County that embrace, celebrate, and promote diversity and inclusion. Tickets range from \$65 for individuals to \$10,000 for executive sponsors, and proceeds are given to various groups that support diversity and inclusion throughout the region.

Year End Forum. The City hosts the Year End Forum annually to provide an opportunity for small businesses to network with prime contractors, developers, businesses, and certifying agencies. During the forum, the City also shares business success stories and provides information about upcoming projects and how to become certified with OMWDB.

Networking Soiree. Each year, OMWBD hosts the City’s Networking Soiree to provide an opportunity for minority-, woman-, veteran-, and disabled-owned businesses to connect with prime contractors. The event is free to attend.

Reverse Trade Show. OMWBD and the City’s Purchasing Division host an annual Reverse Trade Show to provide an opportunity for suppliers, consultants, and contractors to meet with and ask

⁴ Although the City does not certify small businesses or distinguish XBE businesses by size, race- and gender-neutral measures encourage the participation of small businesses, including many minority- and woman-owned businesses.

questions of procurement professionals from numerous government agencies and businesses to better understand how to do business with them.

Mayor's Advisory Council for Veterans (MACV). The City participates in MACV, which was established to build a stronger coalition of service providers to help solve common issues that veterans face in the region. MACV holds monthly networking meetings and forms research committees that gather information on topics related to the concerns and needs of veterans. MACV then identifies local service organizations that provide relevant services and programs to local veterans.

City process workshops. The City hosts and facilitates various workshops to help businesses better understand City contracting and procurement processes as well as OMWBD requirements.

Procurement 101. The City offers Procurement 101 workshops to help businesses understand City procurement and bid procedures. Procurement 101 workshops describe the City's procurement processes; provide examples of actual bid documents, provide tips for submitting successful bids; and explain the impact and advantages of becoming XBE certified. OMWBD and the City's Purchasing Division host the workshops throughout the year.

Certification workshops. OMWBD regularly hosts workshops to provide information about the City's certification application process, how to register as a vendor through the City's Purchasing Division, and upcoming bidding opportunities. During the workshops, OMWBD also provides one-on-one business consultation to businesses needing additional support. Certification workshops are held throughout the year in both English and Spanish.

Project information sessions. The City hosts project information sessions about upcoming and ongoing City projects as well as relatively large projects that partner agencies—including the Indiana Department of Transportation, IndyGo, and the Indianapolis Airport Authority—are awarding. The sessions typically provide information about bidding opportunities and opportunities for small businesses to network with City staff and prime contractors.

C. Race- and Gender-Conscious Measures

The City currently uses XBE goals to award individual construction and goods and services contracts worth \$50,000 or more. The City applies the same 15/8/3/1 XBE goals for all contracts and procurements of those types and of that size. OMWBD reviews those contract opportunities for subcontractor participation. Prime contractors can meet XBE contract goals by either making subcontracting commitments with certified XBEs or by submitting XBE program waivers showing that they made reasonable good faith efforts to fulfill the goals but could not do so. Good faith efforts include:

- Attending project pre-bid conferences;
- Advertising subcontracting opportunities in general circulation media, trade publications, or XBE-focused media for at least 10 working days prior to bid or proposal deadlines;
- Notifying XBEs of contracting opportunities via mail;

- Making efforts to identify portions of work that could be performed by XBEs;
- Making efforts to negotiate sub-bids with XBEs;
- Providing XBEs with rationale for rejecting any sub-bids; and
- Providing technical assistance to potential XBE subcontractors.

For construction and goods and services contracts worth \$50,000 or more, prime contractors must submit an XBE participation plan or good faith efforts either with their bid package or prior to contract award. OMWBD reviews those submissions and must approve all XBE participation plans or waivers based on good faith efforts. Although the City's use of XBE contract goals is ostensibly a race- and gender-conscious measure, XBE goals are typically met through good faith efforts in lieu of subcontractor participation. In general, the City does not use XBE goals to award professional services contracts or purchases worth less than \$50,000.⁵

D. Other Organizations' Measures

In addition to the measures that the City currently uses to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in its contracts and procurements, there are many program measures that other organizations in Indiana use to encourage the participation of disadvantaged businesses in their contracting that the City could consider implementing in the future. Figure 8-1 provides examples of those measures.

⁵ Individual City departments do apply XBE goals to some professional services contracts on a case-by-case basis, but OMWBD does not review those bids or monitor those contracts for XBE compliance.

Figure 8-1.
Examples of program measures that other organizations in Indiana use

Type	Examples of Program Measures
Advocacy and Outreach	The Indy Chamber is a membership organization that advocates for progressive, inclusive economic growth in Indianapolis. The Indy Chamber hosts monthly events to provide networking opportunities and support businesses in various business development areas. Events focus on topics such as business marketing and government procurement.
	The Indiana Black Expo's annual business conference comprises a series of capacity-building workshops and seminars designed to help minority-owned businesses compete for contract opportunities with public and private sector organizations. Attendees have the opportunity to hear directly from experts on sustaining and expanding their businesses and networking with key decision makers at events such as the Mayor's Breakfast and Governor's Award Reception.
	The Mid-States Minority Supplier Diversity Council's (Mid-State MSDC's) mission is to promote and cultivate successful minority-owned businesses in Illinois, Indiana, and Missouri. Mid-State MSDC serves as an advocate for the economic well-being and growth of certified minority-owned businesses while also providing a direct connection between those businesses and corporations that are committed to purchasing products and services from minority-owned businesses.
	<p>IDOA participates in various advocacy and outreach efforts, including hosting resource and vendor fairs and facilitating matchmaking events between prime contractors and subcontractors. IDOA hosts quarterly resource fairs around the state that are open to all businesses. The fairs are one- to two-day events that include workshops, networking opportunities, and public discussions designed around different technical assistance topics. The fairs also provide information and offer courses on business plan development, marketing strategies, and winning work with public agencies. IDOA also coordinates matchmaking opportunities during its resource fairs in which minority-, woman-, and veteran-owned businesses are provided the opportunity to meet with prime contractors looking to work with those businesses as well as with disadvantaged businesses. All types of businesses are invited to attend the matchmaking events. IDOA resource fairs are heavily promoted through various means including email invitations to thousands local businesses and organizations. IDOA also promotes its resource fairs through radio talk shows, press releases, social media, direct email mailings, print materials, and its website.</p> <p>IDOA distributes a monthly newsletter to its database of thousands business contacts. IDOA sends the newsletter to all businesses registered with the agency, including small businesses and minority-, woman-, and veteran-owned businesses. IDOA distributes the newsletter via email and includes articles related to work opportunities, resource fairs, and other outreach events. IDOA also posts the newsletter on its website.</p>
	The Indiana Latino Expo (ILE) is a nonprofit organization that offers a platform for Hispanic American-owned businesses to identify appropriate contracting opportunities. It is designed to create awareness and promote the economic development of Hispanic American-owned businesses; drive cultural advancement and educational opportunities; and provide support in health and wellness.

Figure 8-1. (continued)
Examples of program measures that other organizations in Indiana use

Type	Examples of Program Measures
Technical Assistance and Business Development	The Indiana Small Business Development Center (ISBDC) works to support the formation, growth, and sustainability of small businesses in Indiana. The ISBDC is a collaborative partnership between the Small Business Administration (SBA), the Indiana Economic Development Council, and 10 host institutions located across Indiana that support ISBDC's regional offices. The ISBDC also provides free business advice on topics including business strategy, market research, business planning, and business expansion. ISBDC also partners with Butler University to provide small business development programs, including business seminars, classes/lectures, and networking opportunities.
	The Indiana Procurement Technical Assistance Center (PTAC) provides Indiana companies with technical assistance, information, and counseling to foster small business development. PTAC hosts numerous training events and workshops throughout the year to help businesses understand contracting processes and compete for government contracts. PTAC also provides one-on-one business counseling to help businesses with specific agencies' contracting, certification, and registration processes. In addition, PTAC provides bid-matching services and subcontracting assistance to help small businesses identify appropriate contracting opportunities.
	The Indiana Department of Administration (IDOA) hosts and works with local partners to provide technical assistance on a variety of topics including business strategy, financing, and business certification. IDOA hosts several business development events, including four Indiana Business Conferences across the state, and offers business development meetings to minority- and woman-owned businesses and other businesses interested in learning how to do business with the agency. IDOA also hosts monthly certification workshops in which potential certification applicants can review the certification application and ask questions to IDOA staff. Certification events are also offered via webinar.
	The Minority Business Development Agency (MBDA), an agency of the United States Department of Commerce, has a program in place to help promote the growth and global competitiveness of small, medium, and large businesses that are owned and operated by members of minority communities. Through its network of more than 40 business centers—including one in Indianapolis—and its wide range of strategic partners, MBDA provides minority- and woman-owned businesses with technical assistance and access to capital, contracting opportunities, and new markets.
	Service Corps of Retired Executives (SCORE) is a national nonprofit association that offers free education, counseling, mentoring, training, and related services to small businesses. The organization also facilitates a variety of workshops online and in-person that address many of the essential areas necessary for establishing and managing successful businesses. SCORE is located throughout the United States and has a local chapter in Indianapolis.

Figure 8-1. (continued)
Examples of program measures that other organizations in Indiana use

Type	Examples of Program Measures
Mentor-Protégé Programs	The Indianapolis Hispanic Business Council's Mentor-Protégé Program aims to support growing Hispanic businesses by motivating and encouraging mentor firms to assist protégé businesses with business development; fostering the establishment of long-term business relationships between protégé businesses and majority corporations; and enhancing the capabilities of protégé businesses compete more successfully in the marketplace. Working together in quarterly meetings, mentors focus on assisting protégés develop business plans and marketing strategies; understand financial statements; and identify and implement other action items needed to meet business goals.
	The Indiana Construction Roundtable launched its Diversity Initiative (ICR DI) in the summer of 2007. One of the key components of the ICR DI is its Mentor Protégé Program that mirrors many of the foundational aspects contained in the Stempel Plan, which has become the model for a number of mentor-protégé programs in the construction industry across the nation. The ICR DI Mentor-Protégé Program is designed to increase the number of minority- and woman-owned businesses and their capacities; ensure the success of those businesses; and increase the number of women and minorities who work in the construction industry.
	The SBA's 8(a) Business Development 8(a) Mentor-Protégé Program was created to pair up-and-coming protégé businesses with established mentor businesses. Mentor businesses are tasked with providing protégé businesses with education, contracting assistance, and financial support.
Business Networking	Open In Indiana facilitates networking groups focused on connecting small businesses. The organization combines face-to-face networking groups with online communities to offer a
	Rainmakers is a business development organization in Indianapolis. The organization serves its 1,500 members through organized professional networking events, roundtable discussions, community service projects, and custom business development assignments. Rainmakers hosts dozens of events each month and most are free to first-time visitors.
	Business Networking International (BNI) is the world's largest business networking organization. The Indiana office works with dozens of BNI chapters throughout the state, all of which meet on a weekly basis.
	TechPoint is known for its ability to identify and empower high-growth Indiana technology businesses through education and networking programs; government advocacy; and strategic economic development initiatives. TechPoint holds networking and other events on a monthly basis.

Figure 8-1. (continued)
Examples of program measures that other organizations in Indiana use

Type	Examples of Program Measures
Capital, Bonding, and Insurance	Many traditional banks and credit unions throughout Indiana offer small business loans, most of which are fixed-rate loans. Within Indianapolis, Financial Center and Huntington offer SBA-guaranteed loans to provide small businesses with the working capital needed for equipment purchases and other business expenses. Huntington also offers SBA Express Loans, which provide expedited review processes.
	Small business financing is available through several local agencies within Indiana. For example, the Flagship Enterprise Center, an SBA Microloan Intermediary, supports small business growth by offering Indiana businesses loans of up to \$50,000. The Indy Chamber's Business Ownership Initiative (BOI) Microloan Fund also offers loans to microenterprises whose owners cannot obtain regular commercial credit due to their size or lack of credit history. BOI loans range in size from \$1,000 to \$50,000. BOI also offers one-on-one business coaching, classes, and other services to help loan recipients with business development.
	The United States Department of Transportation Bonding Education Program (BEP) partners with The Surety and Fidelity Association of America (SFAA) to help small businesses become bond-ready. The BEP is designed to address what businesses need to become bond-ready and includes one-on-one sessions to businesses compile the materials necessary to complete bond applications.
	The Indiana Department of Workforce Development established the Federal Bonding Program to help employers recruit and retain the most qualified workforce. The program benefits employers by enabling them to obtain workers' skills and abilities without carrying the risk of potential theft or dishonesty. The program also benefits job seekers by providing job opportunities for those who have been, or may be, denied commercial bonding coverage due to their previous personal or employment histories. The bond has no deductible and reimburses the employer for any loss due to employee theft within the specified bond period.
	IDOA's Division of Supplier Diversity (DSD) hosts a series of bonding workshops. IDOA partners with the Indiana Surety Association and other entities to facilitate those workshops. IDOA also partners with banking institutions and insurance companies to facilitate other financing and bonding workshops for small businesses including many minority-, woman-, and veteran-owned businesses.

CHAPTER 9.

Program Implementation

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Program Implementation

The disparity study provides substantial information that the City of Indianapolis and Marion County (referred to together as *City*) should consider to refine its implementation of the Minority-owned Business Enterprise/Woman-owned Business Enterprise/Veteran-owned Business-Enterprise/Disabled-owned business enterprise (MBE/WBE/VBE/DOBE) Business Utilization Plan and better encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracting.¹ Below, BBC presents several key considerations that the City and MCs should make.

Overall Annual Goals

Section 202-401 of the City's revised code establishes aspirational participation goals of 15 percent for minority-owned businesses, 8 percent for woman-owned businesses, 3 percent for veteran-owned businesses, and 1 percent for disabled-owned businesses in City contracts. The City attempts to meet those goals each year through a mix of *race- and gender-neutral* efforts—such as MBE/WBE/VBE/DOBE outreach and networking events—and *race- and gender-conscious* measures—such as using MBE/WBE/VBE/DOBE participation goals in awarding individual contracts. The City encourages MBE/WBE/VBE/DOBE participation in all City contracts and procurements but actively enforces participation goals on construction and goods and services contracts worth \$50,000 or more. The City's Office of Minority and Women Business Development (OMWBD) reviews those contract opportunities for subcontractor participation. As recipients of City funding, MCs are also required to use MBE/WBE/VBE/DOBE goals in awarding individual City-funded contracts as well as other race- and gender-neutral and race- and gender-conscious measures to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses.

The Federal Disadvantaged Business Enterprise (DBE) Program, which organizations often use as a model to set and adjust their overall annual goals, outlines a two-step process for establishing an overall goal:

- A. Establishing a base figure; and
- B. Considering an adjustment.

The City could consider following that two-step process to revise its current overall goals. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the City in revising its overall goals for

¹ MCs are organizations that operate autonomously but are owned by Marion County. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

minority-, woman-, veteran-, and disabled-owned business participation in its contracting and procurement. The City should consider information from the disparity study and other sources to decide whether it is appropriate to revise its current goals.

Establishing a base figure. The availability analysis provided information that the City can use for establishing base figures for its overall annual goals. Figure 9-1 presents the availability of minority-, woman-, veteran-, and disabled-owned businesses for prime contracts and subcontracts that the City awarded during the study period. As shown in Figure 9-1, the availability analysis indicated that minority-owned businesses might be expected to receive 10.8 percent of City contract dollars; woman-owned businesses might be expected to receive 8.5 percent of City contracting dollars; veteran-owned businesses might be expected to receive 5.3 percent of City contracting dollars; and disabled-owned businesses might be expected to receive 3.3 percent of City contract dollars based on their availability for that work. The City could consider those percentages as the base figures for its overall annual goals.

Figure 9-1.
Overall availability estimates by
racial/ethnic and gender group for
City work

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
White woman-owned	8.5 %
Minority-owned	10.8 %
Veteran-owned	5.3 %
Disabled-owned	3.3 %

Considering an adjustment. In setting overall annual goals, organizations often examine various information to determine whether an adjustment to their base figures are necessary to account for past participation of disadvantaged businesses in their contracting; current conditions in the local marketplace for disadvantaged individuals and businesses; and other relevant factors. The Federal DBE Program outlines several factors that organizations might consider when assessing whether to adjust their goals:

1. Volume of work relevant businesses have performed in recent years;
2. Information related to employment, self-employment, education, training, and unions;
3. Information related to financing, bonding, and insurance; and
4. Other relevant data.

1. Volume of work relevant businesses have performed in recent years. The United States Department of Transportation's (USDOT's) "Tips for Goal-Setting" suggests that organizations should examine data on past participation of relevant businesses in their contracts in recent years. USDOT further suggests that organizations should choose the median level of annual participation for those years as the measure of past participation:

Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because

the process of determining the median excludes all outlier (abnormally high or abnormally low) past participation percentages.²

If the City were to use an approach similar to the one that USDOT outlines in “Tips for Goals Setting” to adjust its overall annual goals, it might consider averaging its overall annual goals with the median participation of each relevant business group in contracts that it awarded in the recent past. Figure 9-2 presents the participation of certified MBE/WBE/VBE/DOBEs in City contracts in fiscal years 2014 through 2018, based on internal City utilization reports. According to City reports, median MBE participation in City contracts from FFYs 2014 through 2018 was 5.5 percent; median WBE participation was 8.3 percent; and median VBE participation was 1.0 percent. Median DOBE participation in City contracts from FFYs 2016 through 2018 was 0.1 percent. The information about past MBE/WBE/VBE/DOBE participation supports downward adjustments to the City’s base figures for minority-, woman-, veteran-, and disabled-owned businesses.

Figure 9-2.
Past MBE/WBE/VBE/DOBE participation in City contracts,
FYs 2014-2018

Fiscal Year	MBE Attainment	WBE Attainment	VBE Attainment	DOBE Attainment
2014	5.3 %	6.1 %	0.7 %	- %
2015	5.5	6.7	0.4	-
2016	7.1	8.7	1.1	0.1
2017	5.7	8.3	1.7	0.1
2018	5.5	8.7	1.0	0.1
Median attainment	5.5 %	8.3 %	1.0 %	0.1 %

Note: Past participation is passed on City of Indianapolis and Marion County data as collected by the City. The City did not start reporting DOBE participation until FFY 2016.

Source: City Utilization Reports.

2. Information related to employment, self-employment, education, training, and unions.

Chapter 3 summarizes information about conditions in the local contracting industry for minorities, women, veterans, people with disabilities as well as minority-, woman-, veteran-, and disabled-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices C and D. BBC’s analyses indicate that there are barriers that certain minority groups, women, and people with disabilities face related to human capital, financial capital, and business ownership in the local marketplace. For example, marketplace analyses indicated that certain minority groups are far less likely than non-Hispanic whites to earn a college degree in Indianapolis; women and certain minority groups are less likely to work as managers in various industries in Indianapolis; and women, people with disabilities, and certain minority groups earn substantially less than non-Hispanic white men in Indianapolis. Such barriers may decrease the availability of minority-owned

² Section III (A)(5)(a) in USDOT’s “Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program.” https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf

businesses, woman-owned businesses, and disabled-owned businesses to obtain and perform the contracts that the City awards. The City should consider that information carefully in determining whether any adjustments to its base figures are warranted.

3. Information related to financing, bonding, and insurance. BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities; women; and minority- and woman-owned businesses in the Indianapolis area do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men. For example, certain minority groups were less likely to own homes than non-Hispanic whites in Indianapolis, and minorities were more likely to be denied home loans. Qualitative information collected through public meetings, telephone surveys, and in-depth interviews with local businesses also indicated that minority- and woman-owned businesses often have difficulties obtaining business loans and credit. (For additional details, see Chapter 3 and Appendices C and D). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities, women, and other disadvantaged individuals to successfully form and operate businesses in the local marketplace. Such barriers would also place those businesses at a disadvantage in competing for City prime contracts and subcontracts. Thus, the City should also consider information about financing, bonding, and insurance in determining whether to make any adjustments to its base figures.

4. Other factors. The Federal DBE Program suggests that organizations also examine "other factors" when determining whether to adjust their overall annual goals. For example, there is quantitative evidence that businesses owned by minorities, women, and people with disabilities earn less than businesses owned by non-Hispanic white men and people without disabilities, respectively, and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix C presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of minority-owned, woman-owned, and other disadvantaged businesses, as presented in Appendix D. Many businesses reported experiencing stereotyping, double standards, and business networks that are closed off to minority-, woman-, veteran-, and disabled-owned businesses. Some of that information suggests that discrimination on the basis of race/ethnicity, gender, and other factors adversely affects certain types of businesses in the local market.

The City should also consider any changes it plans on making to business development programs, procurement processes, staff resources, or other processes and programs that might affect its ability to support the growth of minority-, woman-, veteran-, and disabled-owned businesses. The City should assess how those changes might affect the availability and capacity of those businesses to perform on City and MC contracts when deciding whether to make any adjustments to its base figures.

Other Considerations

BBC identified various considerations that the City should make based on disparity study results and the study team's review of the City's contracting practices and program measures. In making those considerations, the City should assess whether additional resources, changes in internal policy, or changes in law might be required.

OMWBD office. The City employs dedicated staff members to implement the MBE/WBE/VBE/DOBE Business Utilization Plan and monitor the participation of certified businesses in its contracts. However, interviews with City staff and anecdotal evidence collected from public meetings, in-depth interviews, and telephone surveys indicated that OMWBD does not have a large enough staff to fully implement monitoring activities, supportive services programs, and other program measures that improve the effectiveness of business programs. In particular, anecdotal evidence suggests that OMWBD lacks sufficient staff resources to regularly review businesses for certification eligibility and monitor whether MBE/WBE/VBE/DOBEs participate in contracts according to subcontractor plans that prime contractors submit to the City as part of their bid and proposal packages. In addition, the City relies largely on partnerships and external organizations to provide technical assistance and business development services to small and disadvantaged businesses. Establishing internal programs could allow the City to tailor technical assistance and other business development services to the specific needs of minority-, woman-, veteran-, and disabled-owned businesses in the local market area, but doing so would require substantial staff time. The City should consider expanding OMWBD's staff to carry out essential program functions. When considering how many additional OMWBD staff members it might need, the City should consider various functions, including:

- Certifying businesses, assisting businesses with certification requirements, and conducting required reviews to determine initial and ongoing eligibility;
- Developing program measures (e.g., annual overall aspirational goals, technical assistance programs, and outreach events) and supporting policy and process documents;
- Implementing business development programs, technical assistance programs, and other program measures;
- Conducting compliance reviews including collecting data and monitoring the participation of MBE/WBE/VBE/DOBEs in City and MC contracts on an on-going basis;
- Training City and MC staff on program policies, contract compliance, and data reporting requirements; and
- Working with City departments and MCs to host networking and outreach events.

Goal-setting process. The City should consider establishing and documenting a process for setting overall annual aspirational goals and determine how frequently it will revise those goals. The City could consider adopting the two-step goal-setting process presented at the beginning of this chapter. Many agencies review their goals every three years but measure participation annually to assess whether they are falling short of or exceeding their goals. The City might consider revising its overall goals every three years but review participation more frequently (e.g., quarterly, twice a year, or annually). The City should also regularly review its goal-setting process to ensure that it provides adequate flexibility to respond to recent changes in marketplace conditions; anticipated City work; new statistical or anecdotal evidence; and other factors.

Networking and outreach. The City hosts and participates in many networking and outreach events that include information about certification; doing business with the City and MCs; and upcoming bid opportunities. The City also hosts a number of large annual networking events. Anecdotal evidence indicated that businesses value pre-bid meetings, trade shows, and other such events. The City should consider continuing its current networking and outreach efforts and consider broadening those efforts to include more partnerships with local trade organizations and other public organizations and to offer more frequent events. The City might consider tailoring some events to specific industries or business groups to further maximize the value of networking events and provide opportunities to foster deeper connections among participants. In addition, the City should consider ways that it can better leverage technology to network with and provide information to businesses throughout the area. The City could consider making use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance.

Capacity building. Results from the disparity study indicated that there are many minority-, woman-, veteran-, and disabled-owned businesses throughout the Indianapolis area but that most of them have relatively low capacities for City and MC work. The City should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for City and MC contracts. (Chapter 8 presents information about similar programs that other organizations have implemented). Anecdotal evidence indicated that businesses find that such programs, when implemented effectively, are valuable in helping them grow and learn the necessary skills required to compete in their industries. Anecdotal evidence also indicated that businesses face various challenges—such as access to financing, bonding requirements, obtaining equipment, and back office accounting—that inhibit or slow their growth. In addition to considering programs that could be open to all minority-, woman-, veteran-, and disabled-owned business, the City could consider implementing a program to assist certain businesses with development and growth. As part of such a program, the City could have an application and interview process to select businesses with which it would then work closely to provide the specific support and resources they need to grow.

The City could work with other organizations or prime contractors to develop capacity-building program measures (e.g., the City could encourage prime contractors to implement their own mentor-protégé programs or provide technical assistance), but the City should consider how effectively programs implemented by organizations outside the City will meet the specific needs of potential City vendors.

Growth monitoring. The City might consider collecting data on the impact that the MBE/WBE/VBE/DOBE Business Utilization Plan has on the growth of minority-, woman-, veteran-, and disabled-owned businesses over time. Doing so would require the City to collect baseline information on MBE/WBE/VBE/DOBE-certified businesses—such as revenue, number of locations, number of employees, and employee demographics—and then continue to collect that information from each business on an annual or tri-annual basis. If it does not already do so, the City could consider collecting those data from businesses as part of XBE certification and renewal requirements. Such metrics would allow the City to assess whether the program is

helping businesses grow and refine the measures that it uses as part of the MBE/WBE/VBE/DOBE Business Utilization Plan.

Data collection. The City maintains comprehensive data on the prime contracts and procurements that it awards, and those data are generally well-organized and comprehensive. The City also maintains comprehensive subcontract information on contracts awarded by the Department of Public Works (DPW). However, DPW maintains subcontract information separately from the City's centralized procurement and contract system and appears to be the only City agency that maintains comprehensive subcontract information. MCs maintain subcontract information to varying degrees. The City should consider collecting comprehensive data on *all* subcontracts, regardless of characteristics of their owners and whether they are certified as MBE/WBE/VBE/DOBEs. Collecting data on all subcontracts will help ensure that the City monitors the participation of minority-, woman-, veteran-, and disabled-owned businesses as accurately as possible and help the City identify additional businesses that could become certified. The City should also consider working with MCs to help them collect comprehensive subcontract information on their contracts. Collecting the following data on all subcontracts would be appropriate:

- Subcontractor name, address, phone number, and email address;
- Type of associated work;
- Subcontract award amount;
- Subcontract paid-to-date amounts;
- Ownership status; and
- Certification status.

The City could consider collecting those data as part of bids but also requiring prime contractors to submit data on subcontracts as part of the invoicing process for all contracts. The City should train relevant department staff to collect and enter subcontract data accurately and consistently.

Subcontract opportunities. Subcontracts often represent accessible opportunities for small and diverse businesses to become involved in contracting. However, subcontracting accounted for a relatively small percentage of the total contracting dollars that the City awarded during the study period. To increase the number of subcontract opportunities, the City could consider implementing a program that requires prime contractors to subcontract a certain amount of project work as part of their bids and proposals, regardless of the race/ethnicity, gender, veteran, or disability status of subcontractor owners. For specific types of contracts where subcontracting or partnership opportunities might exist, the City could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed this threshold in order for their bids or proposals to be considered responsive. If the City were to implement such a program, it should include flexibility provisions similar to good faith efforts processes that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals for City contracts. The City should develop clear guidelines to determine whether contractors are making good faith efforts to meet the minimum subcontracting requirement.

Contract-specific goals. The City currently sets the same MBE/WBE/VBE/DOBE goals on all applicable contracts, and those goals are typically met through good faith efforts in lieu of subcontractor participation. In addition, disparity analysis results indicated that nearly all relevant groups showed substantial disparities on the contracts that the City awarded during the study period, indicating that they are facing barriers as part of the City’s contracting processes. The City could consider setting contract-specific goals for relevant contracts. Rather than apply the same goal to each contract, the City would determine contract-specific goals based on information about market availability, project size, type of work or service required, and other factors. Doing so may bring contract goals closer in line with market realities and decrease the use of good faith efforts to meet City goals. The City could use information from the availability analysis as a starting point for establishing contract-specific goals based on work type. However, the goals that the City would use to award individual contracts would vary, and the City would not use goals to award certain contracts. Figure 9-3 presents minority- and woman-owned business availability for City construction; architecture and engineering; other professional services; and goods and services contracts.

Because the use of contract-specific goals would be considered a race- and gender-conscious measure, the City would need to ensure that the use of those goals meets the strict scrutiny standard of constitutional review, including showing a compelling governmental interest for their use and ensuring that their use is narrowly tailored (for details, see Chapter 2 and Appendix B).

Figure 9-3.
Availability estimates by industry for City work

Business group	Industry			
	Construction	Architecture and engineering	Other professional services	Goods and services
Non-Hispanic white woman-owned	9.7 %	6.3 %	9.0 %	7.8 %
Asian Pacific American-owned	0.8	2.2	1.2	1.3
Black American-owned	5.3	2.9	4.1	10.2
Hispanic American-owned	1.1	0.0	0.2	1.3
Native American-owned	0.3	0.0	1.8	0.0
Subcontinent Asian American-owned	1.8	8.2	0.5	0.0
Total Minority-owned	9.2	13.4	7.8	12.8
Total Minority- and Woman-owned	19.0 %	19.7 %	16.8 %	20.6 %

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figure F-5, F-6, F-7, and F-8 in Appendix F.

Source: BBC Research & Consulting availability analysis.

Professional services contracts. Although the City encourages the participation of MBE/WBE/VBE/DOBEs in all City contracts, it only actively reviews and enforces business participation in construction and goods and services contracts worth \$50,000 or more. Disparity study results indicated that most minority- and woman-owned business participation on construction; architecture and engineering; and goods and services contracts came from certified MBE/WBEs. In contrast, most of the minority- and woman-owned business

participation on professional services contracts came from non-certified businesses. Disparity analysis results also indicated that nearly all relevant groups showed substantial disparities on the professional services contracts that the City awarded during the study period. In addition, a minority woman-owned professional services firm provided anecdotal evidence that suggests there is no benefit to becoming City-certified as a professional services firm. The City should consider enforcing and monitoring goals on professional services contracts worth \$50,000 or more. Doing so would require the City to incorporate language related to subcontracting requirements in request for proposals (RFPs) and contracting documents similar to the language it includes in construction and goods and services documents. It would also likely require additional Purchasing and OMWBD staff resources to review business utilization plans and monitor business participation.

Exclusive teaming. Anecdotal evidence indicated that subcontractors are sometimes asked to enter into exclusive partnerships to be considered as part of potential project teams. As indicated by businesses during in-depth interviews, such teaming requirements ultimately limit the work available to small businesses. The City should consider prohibiting exclusive subcontracting or teaming requests by integrating such language into its bid, RFP, and contract language. For example, the Dallas/Fort Worth International Airport explicitly prohibits exclusive teaming requirements as part of its RFP language.

Utilization of different subcontractors. The disparity study indicated that the vast majority of City dollars that were awarded to minority- and woman-owned businesses were largely concentrated with a relatively small number of businesses. The City could consider using RFP and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked. For example, the City might ask primes to document and submit information about the efforts they made to identify and team with businesses with which they have not worked as part of their bids.

Prequalification. Per Indiana state code, vendors who are interested in proposing on public works building construction contracts worth \$150,000 or more or highway, street, road, or alley construction contracts worth \$300,000 or more must be prequalified through the Indiana Department of Administration (IDOA) or the Indiana Department of Transportation (INDOT), respectively. Prequalification through IDOA is valid for 27 months, and prequalification through INDOT is valid for one year. Vendors applying for prequalification through INDOT must also submit a certified financial audit with their initial applications and renewal documents. City staff indicated that the costs associated with conducting annual certified financial audits has been a barrier for many small businesses. The City should consider ways to offset such costs (e.g., working with local accountants to offer audits at a reduced cost) and consider other ways it can work with IDOA and INDOT to make the prequalification less cumbersome for small businesses.

Unbundling large contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that the City awarded during the study period. In addition, as part of in-depth interviews and public meetings, several businesses owners reported that the size of government contracts often serves as a barrier to their success. To further encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses, the City should consider making efforts to unbundle relatively large prime contracts,

and even subcontracts, into several smaller contract pieces. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontracting opportunities into smaller contract pieces that are more feasible for small businesses to work on and accepts such attempts as good faith efforts as part of its contracting goals program. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority-, woman-, veteran, and disabled-owned business participation.

Prime contract opportunities. Overall, disparity analysis results indicated substantial disparities for all racial/ethnic and gender groups—with the exception of Native American-owned businesses—on the prime contracts that the City awarded during the study period. The City might consider setting aside select small prime contracts for small business bidding to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses as prime contractors. Indiana state code already allows state agencies to set aside certain public works and goods and services contracts for small businesses and allows state agencies to use small business price preferences for those purchases.^{3,4} To implement small business contracting programs, the City would need to develop a small business certification program. It might use the same economic eligibility criteria that already exist in Indiana state code.⁵

Prompt payment. As part of in-depth interviews, several businesses, including many minority-, woman, veteran, and disabled-owned businesses, reported difficulties with receiving payment in a timely manner on City contracts, particularly when they work as subcontractors. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. City contracts include language to ensure payment to the prime contractor within 30 days of an accepted invoice but do not include language to ensure prompt payment of subcontractors. The City should consider including prompt payment requirements for subcontracting in all of its contracts. For example, IDOA requires prime contractors to pay their subcontractors within 10 days of receiving payment from IDOA. Doing so might help ensure that subcontractors receive payment in a timely manner. It may also help ensure that minority-, woman-, veteran-, and disabled-owned businesses have enough operating capital to remain successful.

Summary

As detailed in Chapter 9, BBC identified a number of opportunities for the City to further encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses in City and MC contracting and procurement. Figure 9-4 summarizes key opportunities for the City to refine the MBE/WBE/VBE/DOBE Business Utilization Plan and other City processes. Figure 9-4 also highlights current City strengths that it can leverage, weaknesses, and potential threats the City should consider when refining the agency's programs and processes.

³ IC 4-13.6-2-11.

⁴ IC 5-22-15

⁵ IC 5-22-14.

Figure 9-4.
City strengths, weaknesses, opportunities, and threats

Strengths	Weaknesses
<p>OMWBD maintains close partnerships with local organizations and municipal corporations, which allow the City to reach a broad range of local businesses via networking and outreach events.</p> <p>OMWBD coordinates closely with the Purchasing Division allowing the two departments to implement program measures effectively and efficiently.</p> <p>The MBE/WBE/VBE/DOBE Business Utilization Plan has strong buy-in from the City's executive leadership and key agencies such as DPW.</p> <p>The City maintains autonomy over its MBE/WBE/VBE/DOBE certification process allowing it to carefully verify certification eligibility and revise certification requirements as needed.</p> <p>Many minority-, woman-, veteran-, and disabled-owned businesses in the Indianapolis area choose to become MBE/WBE/VBE/DOBE through the City indicating that there is perceived value in doing so. In addition, in general, businesses think that the City's certification requirements are reasonable.</p> <p>In general, businesses find value in the City's program. The business community believes the program provides opportunities for MBE/WBE/VBE/DOBEs to connect with prime contractors.</p> <p>Businesses find value in the City's signature networking events such as its reverse trade show.</p> <p>The City collects and maintains comprehensive information about the prime contracts and procurements it awards. Those data allow the City to easily measure MBE/WBE/VBE/DOBE participation in prime contracts.</p>	<p>The City relies largely on partnerships and external organizations to provide technical assistance and business development services to small and disadvantaged businesses. By relying on external organizations, the City loses some ability to respond directly to MBE/WBE/VBE/DOBEs' needs.</p> <p>OMWBD appears to be understaffed. Current staff do not always have the capacity to effectively carryout essential program functions, such as compliance monitoring, or to develop and implement new program measures.</p> <p>DPW collects comprehensive subcontract information about the contracts it administers, but those data are not captured in the City's centralized PeopleSoft system. In addition, no other City departments appear to collect comprehensive subcontract information. Those data would help the City more accurately measure MBE/WBE/VBE/DOBE participation.</p> <p>MBE/WBE/VBE/DOBE goals are largely met through good faith efforts in lieu of subcontractor participation. The extensive use of good faith efforts may indicate the need to establish more realistic goals for specific contracts based on market information.</p> <p>As currently implemented, the MBE/WBE/VBE/DOBE Business Utilization Plan is not applied to professional services contracts, and professional services firms have no incentive for becoming MBE/WBE/VBE/DOBE-certified.</p>
Opportunities	Threats
<p>The City could develop internal technical assistance programs and supportive services programs to more effectively meet the specific needs of MBE/WBE/VBE/DOBEs. Doing so might increase the capacity of those businesses, in turn making them more competitive for City contracts.</p> <p>The City could require prime contractors to submit information about the subcontractors they use as part of their invoicing packages. Doing so would allow the City to monitor contract compliance and more accurately measure MBE/WBE/VBE/DOBE participation.</p> <p>The City could host more frequent networking and outreach events and tailor some events to specific industries or business groups to further maximize the value of such events.</p> <p>The City could incorporating language into bid, requests for proposals, and contracting documents prohibiting exclusive teaming arrangements and enforcing prompt payment of subcontractors.</p> <p>The City could expand program measures to professional services to provide greater opportunities for professional services businesses in the local marketplace.</p> <p>The City could set contract-specific goals for relevant contracts rather than applying the same goal to each contract. Doing so may bring contract goals closer in line with market realities and decrease prime contractors' use of good faith efforts to meet them on individual contracts.</p>	<p>Potential budget cuts in future years could limit the number of staff OMWBD could hire. Without appropriate staff resources, OMWBD would be limited in terms monitoring and compliance and in terms of new program measures it can develop and effectively implement.</p> <p>Although relatively rare, legal challenges to minority- and woman-owned business programs do occur. The disparity study provides statistical and anecdotal information on which the City can rely to implement the MBE/WBE/VBE/DOBE Business Utilization Plan in a legally-defensible manner.</p> <p>Program efforts such as data collection and reporting largely rely on staff across individual City agencies and municipal corporations to administer. Relying on staff spread across departments and organizations can make collecting consistent and accurate information difficult. However, the City can build on its strong working relationships with City staff and municipal corporations to provide appropriate training and support to facilitate data collection and reporting.</p>

APPENDIX A.

Definitions of Terms

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the City of Indianapolis and Marion County Disparity Study report.

Anecdotal Information

Anecdotal information includes personal qualitative accounts and perceptions of specific incidents—including any incidents of discrimination—shared by individual interviewees, participants, and stakeholders.

Availability Analysis

An availability analysis assesses the percentage of dollars that one might expect a specific group of businesses to receive on contracts or procurements that a particular organization awards. The availability analysis in this report is based on the match between various characteristics of potentially available businesses and of prime contracts and subcontracts that the City of Indianapolis and Marion County and municipal corporations awarded during the study period.

Business

A business is a for-profit enterprise including all of its establishments or locations and including sole proprietorships, corporations, professional corporations, limited liability companies, limited partnerships, limited liability partnerships, or any other partnerships.

Business Listing

A business listing is a record in a database of business information. A single business can have multiple listings (e.g., when a single business has multiple locations that are listed separately).

City of Indianapolis and Marion County (City)

Indianapolis is the capital of Indiana and the seat of Marion County. It is the most populous city in Indiana and one of the 20 most populous cities in the United States. The City of Indianapolis and Marion County operate as a consolidated government organization and provides myriad services to the nearly 900,000 people who live and work in the region including police and fire protection; health and mental health services; road construction and maintenance; water and sewage services; and a variety of other social and economic services.

Compelling Governmental Interest

As part of the strict scrutiny standard of constitutional review, a government organization must demonstrate a compelling governmental interest in remedying past identified discrimination in order to implement race- or gender-conscious measures. An organization that uses race- or gender-conscious measures as part of a contracting program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use

of such measures. The organization must assess such discrimination within its own relevant geographic market area.

Consultant

A consultant is a business that performs professional services contracts.

Contract

A contract is a legally binding relationship between the seller of goods or services and a buyer. The study team often uses the term *contract* synonymously with *procurement*.

Contract Element

A contract element is either a prime contract or a subcontract.

Contractor

A contractor is a business that performs construction contracts.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

A custom census availability analysis is one in which researchers attempt surveys with potentially available businesses working in the local marketplace to collect information about key business characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts that an organization actually awarded during the study period to assess the percentage of dollars that one might expect a specific group of businesses to receive on contracts or procurements that the organization awards. A custom census availability approach is accepted in the industry as the preferred method for conducting availability analyses, because it takes several different factors into account, including businesses' primary lines of work and their capacity to perform on an organization's contracts.

Disabled-owned Business

A disabled-owned business is a business with at least 51 percent ownership and control by a person or persons with physical or mental disabilities.

Disabled-owned Business Enterprise (DOBE)

A DOBE is a disabled-owned business that is certified as such through the Office of Minority and Women Business Development.

Disparity

A disparity is a difference or gap between an actual outcome and some benchmark. In this report, the term *disparity* refers specifically to a difference between the participation of a specific group of businesses in City and municipal corporation contracting and the availability of that group for City and municipal corporation work.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation of a specific group of businesses in City and municipal corporation contracting and the availability of that group for City and municipal corporation work.

Disparity Index

A disparity index is computed by dividing the actual participation of a specific group of businesses in City and municipal corporation contracting by the availability of that group for City and municipal corporation work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Dun & Bradstreet (D&B)

D&B is the leading global provider of lists of business establishments and other business information for specific industries within specific geographical areas (for details, see www.dnb.com).

Firm

See *business*.

Industry

An industry is a broad classification for businesses providing related goods or services (e.g., *construction* or *professional services*).

Local Marketplace

See *relevant geographic market area*.

Marion County

See *City of Indianapolis and Marion County*.

Majority-owned Business

A majority-owned business is a for-profit business that is at least 51 percent owned and controlled by non-Hispanic white men who are not veterans and do not have disabilities.

Minority

A minority is an individual who identifies with one of the following racial/ethnic groups: Asian Pacific American, Black American, Hispanic Americans, Native Americans, or Subcontinent Asian American.

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the following racial/ethnic groups: Asian Pacific American, Black American, Hispanic American, Native American, or Subcontinent Asian American. A business does not have to be certified to be considered a minority-owned business

in this study. (The study team considered businesses owned by minority women as minority-owned businesses.)

Minority-owned Business Enterprise (MBE)

An MBE is a minority-owned business that is certified as such through the Office of Minority and Women Business Development.

Municipal Corporation (MC)

An MC is an organization that operates autonomously but is owned by Marion County. Several MCs were part of the disparity study, including the Indianapolis Airport Authority, the Capital Improvements Board, the Health and Hospital Corporation, the Indianapolis Public Library, and the Indianapolis Public Transportation Corporation.

Minority-owned Business Enterprise/Woman-owned Business Enterprise/Veteran-owned Business-Enterprise/Disabled-owned business enterprise (MBE/WBE/VBE/DOBE) Business Utilization Plan

The MBE/WBE/VBE/DOBE Business Utilization Plan is designed to help ensure that minority-, woman-, veteran-, and disabled-owned businesses have an equal opportunity to participate in City contracts and procurements. The program comprises myriad efforts to encourage the participation of those business in City contracting, including:

- Establishing overall aspirational goals for the participation of minority-, woman-, veteran-, and disabled-owned businesses in City contracting;
- Monitoring and reporting the participation of minority-, woman-, veteran-, and disabled-owned businesses in City contracts and procurements;
- Providing technical assistance to minority-, woman-, veteran-, and disabled-owned businesses and other businesses to help address any barriers associated with competing for City contracts and procurements;
- Facilitating and participating in various network and outreach efforts and events, including workshops, pre-bid conferences, local events, and bid notices;
- Maintaining a directory of minority-, woman-, veteran-, and disabled-owned businesses to increase awareness of those businesses among prime contractors and City staff;
- Requiring prime contractors to submit Equal Opportunity Forms and Affirmative Action plans with their bids, quotes, and proposals; and
- Using MBE/WBE/VBE/DOBE goals to encourage the participation of minority-, woman-, veteran-, and disabled-owned businesses on individual contracts and procurements.

Narrow Tailoring

As part of the strict scrutiny standard of constitutional review, a government organization must demonstrate that its use of race- and gender-conscious measures is narrowly tailored. There are several factors that a court considers when determining whether the use of such measures is narrowly tailored, including:

- a) The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;
- b) The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- c) The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- d) The relationship of any numerical goals to the relevant business marketplace; and
- e) The impact of such measures on the rights of third parties.

Non-response Bias

Non-response bias occurs in survey research when participants' responses to survey questions theoretically differ from the potential responses of individuals who did not participate in the survey.

Office of Minority and Women Business Development (OMWBD)

OMWBD implements the MBE/WBE/VBE/DOBE Business Utilization Plan and other measures to help ensure that minority-, woman-, veteran-, and disabled-owned businesses have an equal opportunity to participate in City contracts and procurements. OMWBD is also responsible for certifying minority-, woman-, veteran-, and disabled-owned businesses as MBEs, WBEs, VBEs, or DOBEs, respectively.

Participation

See utilization.

Prime Consultant

A prime consultant is a professional services business that performs professional services prime contracts directly for end users, such as the City.

Prime Contract

A prime contract is a contract between a prime contractor, or prime consultant, and an end user, such as the City.

Prime Contractor

A prime contractor is a construction business that performs prime contracts directly for end users, such as the City.

Procurement

See contract.

Project

A project refers to a construction; architecture and engineering; other professional services; or goods and services endeavor that the City or an MC bid out during the study period. A project could include one or more prime contracts and corresponding subcontracts.

Race- and Gender-conscious Measures

Race- and gender-conscious measures are contracting measures that are specifically designed to increase the participation of minority- and woman-owned businesses in government contracting. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but other businesses would not. Similarly, businesses owned by women might be eligible for such measures but businesses owned by men would not. An example of race- and gender-conscious measures is an organization's use of minority- or woman-owned business participation goals on individual contracts.

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses—or small or emerging businesses—attempting to do work with an organization, regardless of the race/ethnicity or gender of the owners. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles; simplifying bidding procedures; providing technical assistance; establishing programs to assist start-ups; and other methods open to all businesses, regardless of the race/ethnicity or gender of the owners.

Rational Basis

Government organizations that implement contracting programs that rely only on race- and gender-neutral measures to encourage the participation of businesses, regardless of the race/ethnicity or gender of business owners, must show a rational basis for their programs. Showing a rational basis requires organizations to demonstrate that their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government contracting programs. When courts review programs based on a rational basis, only the most egregious violations lead to programs being deemed unconstitutional.

Relevant Geographic Market Area

The relevant geographic market area is the geographic area in which the businesses to which the City and MCs award most of their contracting dollars are located. The relevant geographic market area is also referred to as the *local marketplace*. Case law related to contracting programs and disparity studies requires disparity study analyses to focus on the relevant geographic market area. The relevant geographic market area for the City and MCs is Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Morgan, and Shelby Counties in Indiana.

Statistically Significant Difference

A statistically significant difference refers to a quantitative difference for which there is a 0.95 or 0.90 probability that chance can be correctly rejected as an explanation for the difference

(meaning that there is a 0.05 or 0.10 probability, respectively, that chance in the sampling process could correctly account for the difference).

Strict Scrutiny

Strict scrutiny is the legal standard that a government organization's use of race- and gender-conscious measures must meet in order for it to be considered constitutional. Strict scrutiny represents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, an organization must:

- a) Have a compelling governmental interest in remedying past identified discrimination or its present effects; and
- b) Establish that the use of any such measures is narrowly tailored to achieve the goal of remedying the identified discrimination.

An organization's use of race- and gender-conscious measures must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard for it to be considered constitutional.

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. The City and MCs had to have awarded a contract during the study period for the contract to be included in the study team's analyses. The study period for the disparity study was January 1, 2014 through December 31, 2018.

Subconsultant

A subconsultant is a professional services business that performs services for prime consultants as part of larger professional services contracts.

Subcontract

A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of a larger contract.

Subcontractor

A subcontractor is a business that performs services for prime contractors as part of larger contracts.

Subindustry

A subindustry is a specific classification for businesses providing related goods or services within a particular industry (e.g., *highway and street construction* is a subindustry of *construction*).

Utilization

Utilization refers to the percentage of total contracting dollars that were associated with a particular set of contracts that went to a specific group of businesses. The study team uses the term *utilization* synonymously with *participation*.

Vendor

A vendor is a business that sells goods either to a prime contractor or prime consultant or to an end user such as the City.

Veteran-owned Business

A veteran-owned business is a business with at least 51 percent ownership and control by veterans of the United States military.

Veteran-owned Business Enterprise (VBE)

A VBE is a veteran-owned business that is certified as such through OMWBD.

Woman-owned Business

A woman-owned business is a business with at least 51 percent ownership and control by non-Hispanic white women. A business does not have to be certified to be considered a woman-owned business. (The study team considered businesses owned by minority women as minority-owned businesses.)

Woman-owned Business Enterprise (WBE)

A WBE is a woman-owned business that is certified as such through OMWBD.

XBE

An XBE is a minority-, woman-, veteran-, or disabled-owned business that is certified as such through OMWBD. The City collectively refers to MBE/WBE/VBE/DOBE businesses as XBEs.

APPENDIX B.

Legal Framework and Analysis

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APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise (“MBE/WBE/DBE”) programs. The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program¹ and the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,² and the implementation of the Federal DBE and ACDBE Programs by local and state governments. The Federal DBE Program recently was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act)³. The appendix provides a summary of the legal framework for the disparity study as applicable to the City of Indianapolis.

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.⁴ *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,⁵ (“*Adarand I*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, MBE/WBE/DBE Programs, the Federal DBE Program, the Federal ACDBE Program, and the strict scrutiny analysis. This analysis reviews Seventh Circuit Court of Appeals decisions, including *Dunnet Bay Construction Co. v. Illinois DOT*,⁶ *Northern Contracting, Inc. v. Illinois DOT*,⁷ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,⁸ *Builders Ass’n of Greater Chicago v. County*

¹ 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (“Federal DBE Program”). See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (“MAP-21,” “SAFETEA” and “SAFETEA-LU”), and the United States Department of Transportation (“USDOT” or “DOT”) regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act (“MAP-21”), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

² 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

³ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁴ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁶ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), cert. denied, 137 S. Ct. 31, 2016 WL 193809, (October 3, 2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir., 2015).

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

⁸ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). Midwest Fence filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, see 2017 WL 511931 (Feb. 2, 2017), which was denied, 2017 WL 497345 (June 26, 2017).

of *Cook, Chicago*⁹ and *Indianapolis Minority Corrections Assoc., Inc. v. Wiley*,¹⁰ regarding MBE/WBE/DBE programs, the Federal DBE Program, and local and state government recipients of federal funds in their implementation of the Federal DBE Program. The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study, including, *H.B. Rowe v. NCDOT*,¹¹ *Kossman Contracting Co. v. City of Houston*,¹² *Concrete Works of Colorado, Inc. v. City and County of Denver*,¹³ and *In Re City of Memphis*.¹⁴

In addition, the analysis reviews in Section F below other recent federal cases that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, which are instructive to the study, including: *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*,¹⁵ *Western States Paving Co. v. Washington State DOT*,¹⁶ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*,¹⁷ *M.K. Weeden Construction v. Montana, Montana DOT, et al.*,¹⁸ *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹⁹ *Geyer Signal, Inc. v. Minnesota DOT*,²⁰ *Geod Corporation v. New Jersey Transit Corporation*,²¹ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.²²

The analyses of these and other recent cases summarized below, including the Seventh Circuit decisions are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to disparity studies, MBE/WBE/DBE Programs, the Federal DBE Program and its implementation by local and state governments, and construing the validity of government programs involving MBE/WBE/DBEs.

In *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, Illinois State Toll Highway Authority*, the Seventh Circuit Court of Appeals in 2016 upheld the constitutionality of the Federal DBE Program and its implementation by the Illinois DOT, and upheld the Illinois DBE Program.²³

⁹ *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001).

¹⁰ *Indianapolis Minority Corrections Assoc., Inc. v. Wiley*, 1998 WL 1988826 (S.D. Ind. 1998).

¹¹ *H.B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010).

¹² *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari).

¹⁴ *In Re City of Memphis*, 293 F.3d 345 (6th Cir. 2002).

¹⁵ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); U.S.D., C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, F.3d 1187, (9th Cir. 2013).

¹⁶ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

¹⁷ *Mountain West Holding Co., Inc. v. Montana*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum, (Not for Publication) U.S. Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

¹⁸ *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹⁹ *Sherbrooke Turf, Inc. v. Minn. DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

²⁰ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

²¹ *Geod Corporation v. New Jersey Transit Corporation*, 766 F.Supp. 2d 642 (D. N. J. 2010).

²² *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

²³ *Midwest Fence*, 840 F.3d 932, 2016 W.L. 6543514 (7th Cir. 2016); *Midwest Fence*, 2015 W.L. 1396376 (N.D. Ill. March 24, 2015), affirmed in 840 F.3d 932 (7th Cir. 2016).

The court also upheld the validity of the DBE Program adopted by the Illinois Toll Highway Authority, which does not receive federal funds. The Toll Highway Authority adopted its own DBE Program, which although it mirrored the Federal DBE Program, does not implement the Federal DBE Program.²⁴

The court in *Midwest Fence* held the Illinois DOT's DBE Program was constitutional and satisfied the strict scrutiny test, which will be described below.²⁵ The court found that the Illinois DOT and the Toll Highway Authority followed the Seventh Circuit Court of Appeals' decision in *Northern Contracting, Inc. v. Illinois*.²⁶ *Midwest Fence* filed a Petition for a Writ of Certiorari with the United States Supreme Court, which was denied.²⁷

Also, the Seventh Circuit in 2015 in *Dunnet Bay Construction Co. v. Illinois DOT, et al.*, upheld the implementation of the Federal DBE Program by the Illinois DOT.²⁸ The court held Dunnet Bay lacked standing to challenge the Illinois DOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there was no evidence the Illinois DOT exceeded its authority under federal law.²⁹

The Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,³⁰ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*³¹, are the most recent Seventh Circuit decisions involving challenges to MBE/WBE/DBE type programs and upheld the implementation of the Federal DBE Program by the Illinois DOT.³² The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional applying the strict scrutiny standard. The court agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.³³

B. U.S. Supreme Court Cases

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)

In *Croson*, the U.S. Supreme Court struck down the City of Richmond's "set-aside" program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race-based" governmental programs.³⁴ J.A. Croson Co. ("Croson") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises ("MBE"). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* See U.S. Supreme Court, Docket No. 16-975, 2017 WL 511931 (Feb. 2, 2017), denied, 2017 WL 497345 (June 26, 2017).

²⁸ 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 137 S. Ct. 31, 2016 WL 193809 (2016); *Dunnet Bay Constr. Co. v. Illinois DOT, et al.*, 2014 WL 552213 (C.D. Ill. 2014), affirmed 799 F.3d 676 (7th Cir. 2015).

²⁹ *Id.*

³⁰ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

³¹ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

³² 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

³³ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

³⁴ 488 U.S. 469 (1989).

The Supreme Court held the City of Richmond’s “set-aside” action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the “strict scrutiny” standard, generally applicable to any race-based classification, which requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination and that any program adopted by a local or state government must be “narrowly tailored” to achieve the goal of remedying the identified discrimination.

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”³⁵ The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors.³⁶ The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was “narrowly tailored” for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.³⁷

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.³⁸ But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”³⁹

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that “the city does not even know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁴⁰ “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”⁴¹

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its

³⁵ 488 U.S. at 500, 510.

³⁶ 488 U.S. at 480, 505.

³⁷ 488 U.S. at 507-510.

³⁸ 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741.

³⁹ 488 U.S. at 501 quoting *Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

⁴⁰ 488 U.S. at 502.

⁴¹ *Id.*

jurisdiction.”⁴² The Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”⁴³

The Court said: “If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.”⁴⁴ “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”⁴⁵

The Court further found “if the City could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”⁴⁶

2. Adarand Constructors, Inc. v. Peña (“Adarand I”), 515 U.S. 200 (1995)

In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

The cases interpreting *Croson* and *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program and ACDBE Program by state and local government recipients of federal funds.

⁴² 488 U.S. at 509.

⁴³ Id.

⁴⁴ 488 U.S. at 509.

⁴⁵ Id.

⁴⁶ 488 U.S. at 492.

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE Program

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local MBE/WBE/DBE programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program, and its implementation by state and local governments, are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, an analysis of disparity studies, and implementation of the Federal DBE Program by local government recipients of federal financial assistance (U.S. DOT funds).

1. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁴⁷ The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.⁴⁸

a. The Compelling Governmental Interest Requirement.

The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program.⁴⁹ State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.⁵⁰ Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.⁵¹

⁴⁷ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña* (*Adarand I*), 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP I”), 6 F.3d 990 (3^d Cir. 1993).

⁴⁸ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP I”), 6 F.3d 990 (3^d Cir. 1993).

⁴⁹ *Id.*

⁵⁰ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver* (“*Concrete Works I*”), 36 F.3d 1513, 1520 (10th Cir. 1994).

⁵¹ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁵² The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).⁵³ The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.⁵⁴
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.⁵⁵
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.⁵⁶
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.⁵⁷
- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned

⁵² *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

⁵³ *See, e.g., Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); *see also Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵⁴ *Adarand VII*, 228 F.3d at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; *see Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

⁵⁵ *Adarand VII*, at 1170-72 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237.

⁵⁶ *Id.* at 1172-74 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁵⁷ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); *see, H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

businesses seeking to do business in federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.⁵⁸ Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.⁵⁹

The Federal DBE Program Implemented By State and Local Governments

It is instructive to analyze the Federal DBE Program and its implementation by state and local governments because the Program on its face and as applied by state and local governments has survived challenges to its constitutionality, concerned application of the strict scrutiny standard, and involved consideration of disparity studies. The cases involving the Program and its implementation by state and local governments are recent and applicable to the legal framework regarding MBE/WBE/DBE state and local government programs and disparity studies.

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁶⁰ Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁶¹ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁶² Most recently, in October 2018, Congress passed the FAA Reauthorization Act⁶³.

The Federal DBE Program as amended changed certain requirements for state and local government federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not

⁵⁸ Pub L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁵⁹ *Id.* at § 1101(b)(1).

⁶⁰ *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing *The Compelling Interest*.

⁶¹ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁶² Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁶³ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.⁶⁴

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE programs. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45.

Provided in 49 CFR § 26.45 are instructions as to how local and state governments as recipients of federal funds should set the overall goals for their DBE programs. In summary, the state or local government establishes a base figure for relative availability of DBEs.⁶⁵ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁶⁶ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁶⁷ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.⁶⁸ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.⁶⁹

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁷⁰ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁷¹

State and local governments are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁷²

⁶⁴ 49 CFR § 26.51; see 49 CFR § 23.25.

⁶⁵ 49 CFR § 26.45(a), (b), (c); 49 CFR § 23.51(a), (b), (c).

⁶⁶ *Id.*

⁶⁷ *Id.* at § 26.45(d); *Id.* at § 23.51(d).

⁶⁸ *Id.*

⁶⁹ 49 CFR § 26.45(b)-(d); 49 CFR § 23.51.

⁷⁰ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁷¹ 49 CFR § 26.51(b); 49 CFR § 23.25.

⁷² 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39

Thus, the implementation of the Federal DBE Program by state and local governments, the application of the strict scrutiny standard to the state and local government DBE programs, the analysis applied by the courts in challenges to state and local government DBE programs, and the evidentiary basis and findings by Congress regarding the Program are instructive to state and local governments and this study.

F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21. In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.⁷³ Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.⁷⁴

F.A.A. Reauthorization Act of 2018 (October 5, 2018)

SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.

(a) Findings. Congress finds the following:

(1) While significant progress has occurred due to the establishment of the airport disadvantaged business enterprise program (sections 47107(e) and 47113 of title 49, United States Code), discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets across the nation. These continuing barriers merit the continuation of the airport disadvantaged business enterprise program.

(2) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits. This testimony and documentation shows that race- and gender-neutral efforts alone are insufficient to address the problem.

(3) This testimony and documentation demonstrates that discrimination across the nation poses a barrier to full and fair participation in airport-related businesses of women business owners and minority business owners in the racial groups detailed in 49 C.F.R. Parts 23 and 26, and has impacted firm development and many aspects of airport-related business in the public and private markets.

(4) This testimony and documentation provides a strong basis that there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

⁷³ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁴ *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

Fixing America's Surface Transportation Act" or the "FAST Act" (December 4, 2015)

On December 3, 2015, the Fixing America's Surface Transportation Act" or the "FAST Act" was passed by Congress, and it was signed by the President on December 4, 2015, as the new five year surface transportation authorization law. The FAST Act continues the Federal DBE Program and makes the following "Findings" in Section 1101 (b) of the Act:

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States;

(B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;

(C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

Therefore, Congress in the FAST Act passed on December 3, 2015, found based on testimony, evidence and documentation updated since MAP-21 was adopted in 2012 as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.⁷⁵

⁷⁵ Pub L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat 1312.

MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.⁷⁶ In MAP-21, Congress specifically found as follows:

“(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets across the United States;

(B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;

(C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”⁷⁷

Thus, Congress in MAP-21 and the subsequent Acts noted above determined based on testimony and documentation of race and gender discrimination that there was “a compelling need for the continuation of the” Federal DBE Program.⁷⁸

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁷⁹ If the government makes its initial showing, the burden shifts to the

⁷⁶ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁷ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁸ *Id.*

⁷⁹ See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (“Adarand VII”)*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir.

challenger to rebut that showing.⁸⁰ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁸¹

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.⁸² It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.⁸³ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁸⁴

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."⁸⁵ "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"⁸⁶ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁸⁷

1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁸⁰ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸¹ See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸² *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸³ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁴ *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸⁵ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁶ See e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

⁸⁷ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁸⁸ Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.⁸⁹ Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.⁹⁰

To successfully rebut the government’s evidence, the courts hold that a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence for the necessity of remedial action.⁹¹ This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government’s data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.⁹² Conjecture and unsupported criticisms of the government’s methodology are insufficient.⁹³ The courts have held that mere speculation the government’s evidence is insufficient or methodologically flawed does not suffice to rebut a government’s showing.⁹⁴

The courts have stated that “it is insufficient to show that ‘data was susceptible to multiple interpretations,’ instead, plaintiffs must ‘present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.’”⁹⁵ The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers “both direct and

⁸⁸ *Adarand Constructors, Inc. v. Peña*, (“*Adarand III*”), 515 U.S. 200 at 235 (1995); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP II*”), 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP I*”), 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁸⁹ *Majeske*, 218 F.3d at 820; see, e.g., *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP II*”), 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP I*”), 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁹⁰ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁹¹ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁹² See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP II*”), 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP I*”), 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

⁹³ *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

⁹⁴ *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹⁵ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself.”⁹⁶

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”⁹⁷ The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.⁹⁸ Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.⁹⁹ It has been further held by the courts that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹⁰⁰

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”¹⁰¹ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”¹⁰²

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.¹⁰³

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.¹⁰⁴ “Where gross statistical disparities can be

⁹⁶ *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

⁹⁷ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁹⁸ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003); , *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁹⁹ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹⁰⁰ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰¹ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

¹⁰² See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

¹⁰³ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*, 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

¹⁰⁴ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218

shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹⁰⁵

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.¹⁰⁶ The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.¹⁰⁷ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹⁰⁸

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹⁰⁹ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹¹⁰ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹¹¹

(5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹⁰⁵ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹⁰⁶ *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁷ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁸ *Western States Paving*, 407 F.3d at 1001.

¹⁰⁹ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁰ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹¹ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.¹¹²
- **Disparity index.** An important component of statistical evidence is the "disparity index."¹¹³ A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as "The Rule of Thumb" or "The 80 percent Rule."¹¹⁴
- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.¹¹⁵

In terms of statistical evidence, the courts, including the Seventh Circuit, have held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence", but rather it may rely on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹¹⁶

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.¹¹⁷ The court rejected the district court's "erroneous" legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.¹¹⁸ The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area."¹¹⁹ In *Concrete Works II*, the court

¹¹² See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹¹³ *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹¹⁴ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹¹⁵ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

¹¹⁶ *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁷ *Id.* at 973.

¹¹⁸ *Id.*

¹¹⁹ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

stated that “we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.”¹²⁰

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.¹²¹ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹²²

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.¹²³ Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹²⁴

The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.¹²⁵ The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.¹²⁶

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹²⁷ (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*”¹²⁸ Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”¹²⁹ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹³⁰

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in

¹²⁰ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹²¹ *Id.* at 973.

¹²² *Id.*

¹²³ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹²⁴ *Id.*

¹²⁵ *Id.* at 974.

¹²⁶ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹²⁷ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹²⁸ *Id.* (emphasis added).

¹²⁹ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹³⁰ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

other private portions of their business.”¹³¹ The Tenth Circuit ruled that the local government can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹³²

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹³³

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality’s showing that it indirectly participates in industry discrimination.¹³⁴

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.”¹³⁵

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹³⁶

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.¹³⁷ But personal accounts of actual discrimination may complement empirical evidence and play an

¹³¹ *Id.*

¹³² *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹³³ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹³⁴ *Id.* at 977.

¹³⁵ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹³⁶ *Id.* at 979-80.

¹³⁷ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 924-25; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d. Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

important role in bolstering statistical evidence.¹³⁸ It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."¹³⁹

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹⁴⁰

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.¹⁴¹

b. The Narrow Tailoring Requirement.

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be "narrowly tailored" to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Seventh Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;

¹³⁸ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³⁹ *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹⁴⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹⁴¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹⁴²

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁴³

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”¹⁴⁴ Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁴⁵

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, ‘for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”¹⁴⁶

¹⁴² See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁴³ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁴⁴ *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

¹⁴⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

¹⁴⁶ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁴⁷ also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration.”¹⁴⁸ The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

Implementation of the Federal DBE Program: Narrow tailoring. The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by local and state government recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.¹⁴⁹ The narrow tailoring requirement has several components.

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”¹⁵⁰ The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT’s [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.¹⁵¹ The Seventh Circuit Court of Appeals analyzed IDOT’s compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.¹⁵² The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁵³ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court’s decision upholding the validity of IDOT’s DBE program.¹⁵⁴

¹⁴⁷ 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

¹⁴⁸ 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

¹⁴⁹ *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

¹⁵⁰ 473 F.3d at 722.

¹⁵¹ *Id.* at 722.

¹⁵² *Id.* at 723-24.

¹⁵³ *Id.*

¹⁵⁴ *Id.*; See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), affirmed, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁵⁵ The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.¹⁵⁶ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁵⁷ In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.¹⁵⁸

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁵⁹ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁶⁰

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity -conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.¹⁶¹

Race-, ethnicity-, and gender-neutral measures. To the extent a "strong basis in evidence" exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.¹⁶² And the courts have held

¹⁵⁵ *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁵⁶ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁵⁷ *Id.*

¹⁵⁸ 840 F.3d 932 (7th Cir. 2016).

¹⁵⁹ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁶⁰ *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

¹⁶¹ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁶² See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia* (CAEP II),

unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.¹⁶³

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”¹⁶⁴

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and

91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁶³ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁶⁴ *Croson*, 488 U.S. at 509-510.

- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁶⁵

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁶⁶

Additional factors considered under narrow tailoring.

In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.¹⁶⁷ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁶⁸ (2) good faith efforts provisions;¹⁶⁹ (3) waiver provisions;¹⁷⁰ (4) a rational basis for goals;¹⁷¹ (5) graduation provisions;¹⁷² (6) remedies only for groups for which there were findings of discrimination;¹⁷³ (7) sunset provisions;¹⁷⁴ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁷⁵

Several federal court decisions, including in the Seventh Circuit, have upheld the Federal DBE Program and its implementation by state and local government recipients of federal funds, including satisfying the narrow tailoring factors.¹⁷⁶

¹⁶⁵ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁶⁶ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁶⁷ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁶⁸ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

¹⁶⁹ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁷⁰ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁷¹ *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁷² *Id.*

¹⁷³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

¹⁷⁴ See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

¹⁷⁵ *Coral Constr.*, 941 F.2d at 925.

¹⁷⁶ See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of*

2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.¹⁷⁷ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁷⁸

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁷⁹

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.¹⁸⁰

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.¹⁸¹ The measure of evidence required to satisfy

Montana, Montana DOT, et al., 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

¹⁷⁷ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally, Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

¹⁷⁸ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, also Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993).

¹⁷⁹ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see, e.g., Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

¹⁸⁰ *Id.*

¹⁸¹ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹⁸²

The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs in connection with a challenge to the MBE Program involved in that case¹⁸³. The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

The Tenth Circuit in *Concrete Works*, stated with regard evidence as to woman-owned business enterprises as follows:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. See *Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”). Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁸⁴

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”¹⁸⁵ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.¹⁸⁶ The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court

¹⁸² *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁸³ 256 F.3d 642, 644-45 (7th Cir. 2001). But, see, *Hines v. Caston School Corp.* 651 N.E. 2d 330, 335-336 (Indiana App. 1995) (Indiana court recognized intermediate scrutiny for gender based classifications); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁸⁴ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

¹⁸⁵ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁸⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.¹⁸⁷

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.¹⁸⁸ Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.¹⁸⁹ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁹⁰ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.¹⁹¹ This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.¹⁹² When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.¹⁹³

Courts in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”¹⁹⁴ So long as a government

¹⁸⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d Cir. 1993).

¹⁸⁸ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d Cir. 1993).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254.

¹⁹³ See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); see, e.g., *City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹⁴ See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); see, e.g., *City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.¹⁹⁵

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”¹⁹⁶ Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality”.¹⁹⁷

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”¹⁹⁸ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”¹⁹⁹

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”)²⁰⁰.

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”²⁰¹

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.²⁰² The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²⁰³

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors....” Consequently, the court held one rational

¹⁹⁵ *Id.*; *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); see, e.g., *City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹⁶ *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); see, e.g., *City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹⁷ *Heller v. Doe*, 509 U.S. 312, 321 (1993).

¹⁹⁸ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); see, e.g., *City of Indianapolis v. Armour*, 946 N.E. 2d 553, 559-560 (Indiana S. Ct. 2011); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁹⁹ *Id.*

²⁰⁰ 2012 WL 5939228 (Fed. Cl. 2012).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.²⁰⁴ The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns...the maximum practicable opportunity to participate as subcontractors....”²⁰⁵

4. Pending cases (at the time of this report)

There are pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and that may potentially impact and be instructive to the study, including the following:

- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.**, U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019. This is a challenge to the Shelby County, Tennessee “MWBE” Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.*, the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, 1983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding. The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.
- **Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.**, Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida. In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

At the time of this report, MTA has filed a Motion to Dismiss, which is pending.

This list of pending cases is not exhaustive, but in addition to the cases cited previously may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, disparity studies, the Federal DBE Program and the implementation of the Federal DBE Program by state and local government recipients of federal funds, which are instructive to the study. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

SUMMARIES OF RECENT DECISIONS

D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE Program in the Seventh Circuit Court of Appeals

1. Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017)

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT’s implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway’s program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling

interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 citing *Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at *7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. *Id.* at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, citing 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals.

Id. Their use of contract goals is meant to remain fluid, reflecting a state's progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence “mismatch” argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state's compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states' overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “only on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on

contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs’ ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at *13. The study

found that DBEs made up 25.55% of prime contractors in the construction field, received 9.13% of prime contracts valued below \$500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5% of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

Tollway program. Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway's historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01% across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence’s criticisms. Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at *15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence’s strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence’s expert’s “speculation” that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and

that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic underutilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without

evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as “underdeveloped” Midwest Fence’s argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest’s “best argument” against narrowed tailoring is its “mismatch” argument, which was discussed above. *Id.* at *17. The court said Midwest’s broad condemnation of the IDOT and Tollway programs as failing to create a “light” and “diffuse” burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence’s point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors “is troubling.” *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely “theoretical.” *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract’s DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence “had presented evidence rather than theory on this point, the result might be different.” *Id.* at *18. “Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting.” *Id.* at *18. The court concluded that Midwest Fence “has shown how the Illinois program *could* yield that result but not that it actually does so.” *Id.*

In light of the IDOT and Tollway programs’ mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine

dispute of fact on this point. *Id.* at *18. The court stated that the “theoretical possibility of a ‘mismatch’ could be a problem, but we have no evidence that it actually is.” *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* “So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination”, according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact “on this point.” *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

2. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016).

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (See 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (See summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at 680. Under IDOT’s DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as “waivers.” *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* *Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which

the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own

legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability

of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

4. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside

programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties’ dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that “§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate.”

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham’s decision to hire Rapid Test’s competitor.

5. Builders Ass’n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis

of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, quoting in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority

persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

6. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive

damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program’s 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant’s report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all “likely to be influenced by the presence of discrimination if it exists” and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a “disparity index” for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep’t. of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government’s compelling interest in implementing a national program. *Id.* at 727, citing *Rothe*, 545 F.3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race- and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court quoting *Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a

program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program’s goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program’s presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become “overconcentrated” in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest’s primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE

subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study

must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified

DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the

methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

The study employed a “custom census” approach to calculate DBE availability, and examined the Tollway’s contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an “economy-wide analysis” examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person’s race or sex and their earning power and ability to form a business. *Id.*

Midwest’s challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an “economy-wide analysis” similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

7. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to

obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely “on the federal government’s compelling interest in remedying the effects of past discrimination in the national construction market.” *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is “insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority.” *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any “challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay’s challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded “because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*.” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The “no-waiver” policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that

IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id.* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

8. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007)

This decision is the district court’s order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments’ implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties’ Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the “plaintiff”), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations (“TEA-21”), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the “maximum feasible portion” of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder’s list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet’s *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects.

Id. The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. "Unbundling" large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at *16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at *19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal

evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.’

Id. at *21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “plausible lower-bound estimate” of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff’d* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of

the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

9. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal government’s compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT’s implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants’ Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court

agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a

recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeree that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

10. The Builders Ass'n of Greater Chicago v. The City of Chicago, 298 F. Supp.2d 725 (N.D. Ill. 2003)

This case is instructive because of the court's focus and analysis on whether the City of Chicago's MBE/WBE program was narrowly tailored. The basis of the court's holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago's construction Minority- and Women-Owned Business ("MWBE") Program. The court held that the City of Chicago's MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no "meaningful individualized review" of MBE/WBEs; it had no termination date nor did it have any means for

determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ...” *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City’s MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a “compelling interest in not having its construction projects slip back to near monopoly domination by white male firms.” The court ruled a brief continuation of the program for six months was appropriate “as the City rethinks the many tools of redress it has available.” Subsequently, the court declared unconstitutional the City’s MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

11. Milwaukee County Pavers, Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991).

State and federal programs challenged. In this case an association of highway contractors in Wisconsin brought suit to enjoin programs by which the State of Wisconsin “sets aside” certain highway contracts for firms that are certified as disadvantaged business enterprises (DBEs), and also requires highway contractors to give preferential treatment to subcontractors that are certified as DBE’s. 922 F.2d at 421. In the first type of program challenged by the highway

contractors, according to the Court, the State of Wisconsin is the principal, rather than an agent of federal highway authorities, because the state receives no money from the federal government. *Id.* The state program involving non-federal funds was enjoined by the district court. *Id.*

In a second type of program challenged by the highway contractors, the Court finds the State of Wisconsin is the administrator and disbursing agent of federal highway grants. *Id.* at 421. This federal program the district court refused to enjoin. *Id.*

State Program. The Court states that the majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities, unless the purpose is to provide a remedy for discrimination against the favored group. *Id.* at 421-422. The Court found that Wisconsin made no effort to show that its program was remedial in any sense. The Court rejected Wisconsin's argument that *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), does not apply because its program involved DBEs and not MBEs.

The Court affirmed the injunction against the State of Wisconsin Program because the state did not establish that the purpose was to remedy discrimination.

Role of states as agent under the federal program for DBEs. The Court states that the basic question raised by the contractors' appeal is the proper characterization of the state's role under the 1987 Congressional Act relating to providing financial assistance to states for highway construction. *Id.* at 422. The Court points out that the Congressional Act offers the states financial assistance, and the receipt of funds under the Federal Act is voluntary, but a state that decides to receive such funds is bound by the federal regulations. *Id.*

The contractors did not question the validity of the 1987 federal Act authorizing the DBE program, the validity of the "set-aside provision" in the Act, or the validity of the federal regulations that implement that provision. *Id.* at 423. The contractors challenged the 1987 Act neither on its face nor as applied. *Id.* But, they argued that the Supreme Court decision in *Croson* prevents the state from playing the role envisaged for it by the Act and federal regulations unless the state is able to show that the "set-aside program", as implemented in Wisconsin, is necessary to rectify invidious discrimination. *Id.* at 423.

The Court found that these arguments, whatever merit they have or lack, are inconsistent with the contractors' decision not to challenge the validity of the federal statute or regulations. *Id.* at 423. The Court held as follows: "Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal servants who drafted the regulations." *Id.* at 423.

The Court concludes the federal statute contemplates that states which decide to accept funds under it will reserve a portion of those funds for a class of disadvantaged contractors. *Id.* at 423. And, by virtue of a presumption created by federal regulations, which in this case were conceded to be valid, the disadvantaged contractors are likely to consist for the most part of enterprises controlled by members of the favored groups. *Id.* at 423. The Court held that if the state of Wisconsin does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, the state cannot have violated the Constitution. *Id.* at 423.

The federal statute does not “*require*” the states to accept funds under it, but it authorizes them to do so, and the Court states that an action pursuant to a valid authorization is valid. *Id.* at 423. The lesson of the U.S. Supreme Court decisions, including *Croson*, according to the Court, is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. *Id.* at 424. And, the Court finds one way the federal government can do that is by authorizing states to do things that they could not do without federal authorization. *Id.*

Vulnerable to challenge or impermissible collateral attack depending on if state complied with or exceeded its federal authority. The Court makes clear that the plaintiffs in this case did not challenge the federal “set-aside program”, a creature of federal statute and federal regulations. *Id.* at 424. Rather, they challenged the state’s role in the federal program. *Id.* The Court thus held as follows: “Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations.” *Id.* at 424.

The Court also held that if the state exceeded its federal authority, it would be vulnerable to challenge under *Croson*. *Id.* at 424. The Court concluded that the state is vulnerable to such challenge insofar as it took the presumption in the federal regulations and applied it to programs not funded under, and therefore not governed by, the federal statute. *Id.*

The district court found that the state exceeded its authority under the federal statute in two other minor ways in addition to applying the presumption in the federal regulations to state funded programs, and the lower court enjoined those violations. *Id.* at 425. The Court agreed with the district court in connection with the ruling that the state exceeded its authority under the federal statute. *Id.* at 425, *citing* the district court decision in *Milwaukee County Pavers*, 731 F.Supp. at 1413-15. The district court enjoined the State of Wisconsin program in which the state was acting as the principal, not an agent, under a program in which Wisconsin set aside certain exclusively state-funded highway contracts for firms certified as DBEs. *Id.* The state Program was in violation of equal protection based on the absence of showing by the state of Wisconsin that discrimination was necessary to rectify discrimination against such minorities. *Id.*

However, the Court found that the contractors complaint about the state’s *administration* of the racial presumption in the federal regulations was not sufficient to rebut the presumption. *Id.* at 425. The contractors acknowledged that they made no effort to present, in proceedings for the certification of DBEs, evidence rebutting the presumption accorded the members of the favored groups. *Id.* The contractors, the Court states, are quarreling with the federal regulation whose validity they have conceded. *Id.*

Holding. The Court held that the state funded program under which Wisconsin “set aside” certain state-funded contracts for firms certified as DBEs racially discriminates in favor of minorities in violation of the Equal Protection Clause because there was no evidence presented by the state showing that discrimination was necessary to rectify discrimination against such minorities. The Court also held that the state, by accepting federal funds under the federal statute and federal regulations, did not violate equal protection. The Court further held that the state, to the extent it exceeded its authority under the federal law and the federal regulations, its conduct was vulnerable to an equal protection challenge.

12. Indianapolis Minority Corrections Assoc., Inc. v. Wiley, 1998 WL 1988826 (S.D. Ind. 1998)

In this case, plaintiffs, an association of Indianapolis Minority Contractors, brought suit to challenge the manner in which the State of Indiana administered its program for minority and disadvantaged businesses that is a part of the federal DBE program, which is regulated by the United States DOT. The plaintiffs contended that state officials and others engaged in wrongful actions in disbursement of federal highway funds to undeserving businesses that did not qualify for the DBE program because they were not controlled by either minority individuals or financially disadvantaged individuals. In addition, the plaintiffs claimed that because of this wrongdoing, they did not receive their fair share of the federal highway funds as minority contractors. The district court stated that this case concerns whether the State of Indiana complied with federal law related to the receipt of Federal Highway funds or whether it engaged in a practice of discrimination with respect to those funds. 1998 WL 1988826 at *10. The district court noted the case did not involve a challenge concerning the State of Indiana Minority Business Enterprise Program that did not involve projects utilizing federal funds.

The district court rejected testimony submitted by the plaintiffs as not meeting standards for expert testimony with regard to claims that the defendants were discriminating against African Americans, because the court concluded the claims were conclusory allegations and opinions, based in part on speculation, hearsay and not on any sufficient probative evidence to support the opinions. 1998 WL 1988826 at *13-15. The court rejected the statistical analysis submitted regarding a disparate impact on African Americans, finding there was no evidence shown concerning any possible error rate, standard deviation or confidence levels related to the proffered results. *Id.* The court found there was no evidence related to whether the proper statistical pool was used to calculate the percentages proffered as evidence of a disparate impact. *Id.* The testimony submitted by the plaintiffs compared Indiana DOT's compliance with the mandatory Federal DBE Program with other states, and concluded that Indiana ranked as one of the worst based on the testimony that Indiana's demographics were eight to nine percent black. *Id.* at *14. But, the district court found the state-wide demographic utilized may be a statistical universe larger than the number of firms actually qualified, willing and able to work on the construction contracts. *Id.*

The district court also found that the testimony proffered was not sufficient in connection with the claim that the defendants were discriminating against African Americans. *Id.* at *13. The court stated plaintiffs "merely" concluded that the State was discriminating based upon a review of the percentages of payments which the plaintiffs' witness considered to be "legitimate black companies," as compared to the payments made to what the witness considered to be "front" companies. *Id.* at *13. The court found that these were conclusory opinions based only on the witness's knowledge of "legitimate black companies," and deemed the opinions "problematic." The court stated the witness admitted he had not been involved in activities within the State for many years, and he did not show any basis for his knowledge as to which companies that were paid funds by Indiana DOT were "legitimate black companies" and which were not. *Id.*

The court rejected plaintiffs' witness's opinion concerning his finding that only 3.8 percent of the total contracts went to "legitimate black-owned businesses." The court noted that the regulations do not provide for a 10 percent participation by African Americans, but a 10 percent participation by many groups, including African Americans, and that the witness did not testify as to whether he performed any study of the federal reports to test Indiana

DOT's compliance with the 10 percent goal based on all DBE as defined by federal law. *Id.* at *13. The district court concluded that unsupported, conclusory testimony is not sufficient. *Id.*

The court also considered the issue raised by the plaintiffs as to whether the then existing federal regulations, 49 C.F.R. Part 23, provided enforceable rights subject to a 42 U.S.C. § 1983 action brought by the plaintiffs. The court concluded that the federal regulations do not provide a basis to conclude that they were intended to provide rights enforceable under Section 1983. *Id.* at *28. The district court found that the federal regulations provide a means to assure that the federal DBE program benefits legitimate DBEs, and provides the Secretary of the United States DOT a means to ensure its integrity. *Id.*

The court stated these regulations provided a method for the USDOT to oversee the services provided by the States, rather than a means to ensure that individual DBEs receive funds for services. *Id.* at *28. The federal regulations do not create an individual entitlement to services, but are a yardstick for the USDOT to measure the system-wide performance of the program. *Id.* Therefore, the district court concluded that although the plaintiffs may benefit from their State's plan implemented in order to receive federal transportation funds, they are only indirect beneficiaries. *Id.* at *29. Further, the court held that as the DBE program is not an entitlement program, the regulations implementing the program do not provide enforceable rights under § 1983.

In conclusion, the court held that the plaintiffs may utilize § 1983 to enforce their right to a state-wide plan that complies with the federal requirements for the receipt of federal transportation and highway funds. *Id.* at *29. The plaintiffs, the court held, do not have rights under § 1983 to remedy isolated violations of requirements under the plan, which includes claims that certain companies should not have been certified under the DBE program. The court dismissed all claims under 42 U.S.C. § 1983 brought against the State, Indiana DOT and the Indiana Department of Administrative Services and all claims for damages against the State officials sued in their official capacity.

The court then found that Indiana's DBE program met all federal requirements, including ensuring that DBEs have an equitable opportunity to compete for contracts and subcontracts as mandated by 49 C.F.R. § 23.45(c). The court pointed out that Indiana DOT arranges solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules to facilitate participation by DBEs. *Id.* at *35. The district court pointed out that Indiana DOT requires prime contractors to solicit bids from certified DBEs as part of its good-faith efforts requirements, that certified DBEs are provided notices of bids and that these notices are also posted on the Internet and in Indiana Contractors' Association publications. *Id.*

The court also indicated Indiana DOT's Civil Rights Division had a Supportive Services Division that provided managerial and technical assistance to DBEs, training workshops and one-on-one consultations in estimating, bidding, bookkeeping, marketing, financial issues and other areas directed by Indiana DOT. The DBE assistance provided for business planning, bookkeeping, marketing, accounting, estimating, bidding, employee relations, contract negotiations, computerization, financial decisions and other business related issues. Consultants were contracted to perform selected training or individualized assistance to DBEs. *Id.* at *35-36.

Specifically, Indiana DOT provided services to assist DBEs, at no cost to them, including conducting internal orientation sessions for newly certified DBEs; provided training on the metric system through Ivy Tech State College; consulting one-on-one with individual DBE firms to improve their business operations, provided training in finance and bookkeeping analysis, business plan preparation, job cost, cash flow preparation and analysis, bid estimation, computerization, strategic planning, loan packaging assistance and other operations; attended trade fairs, organized meetings, and performed other outreach functions for the purpose of reaching non-certified DBE firms, informing them of Indiana DOT DBE programs, and encouraging them to become certified; referred DBEs to establish state and federal business assistance organizations when appropriate; encouraged DBE firms to contact the civil rights office regarding any problems that arise on the job site or with respect to any aspect of their relationship with Indiana DOT and prime contractors and responded and sought to resolve the problems and complaints in a prompt manner; and provided classroom style training workshops including a twelve-day workshop to instruct 25 to 30 Indiana DBEs on all aspects of operations of the construction business. *Id.* at *35-36.

The court also found that Indiana DOT strived to remove barriers DBEs frequently encountered in other states by not requiring subcontractors to be bonded, and exploring using Supportive Services funding to provide direct financial assistance to DBEs, utilizing funds from the FHWA exclusively for the recruitment of DBEs, managerial and technical assistance to DBEs, and monitoring DBE activities. Indiana DOT also established a mentor-protégé program for contractors on Indiana DOT contracts. *Id.* at *37.

The district court stated that Indiana DOT met its overall 10 percent DBE goal and set practical contract goals on individual contracts complying with the requirements of the federal acts and regulations. In setting the individual contracts goal, the Indiana DOT evaluated each contract individually, including factors such as geographic location of the contract, its size, the number of items that can be performed by certified DBEs, the number of certified DBEs that can perform the work, the relative location of certified DBEs who can and are willing to work in the area, the current workload of those DBEs and DBE prequalification limits. *Id.* at *39.

The district court found that the individual contract goals were not rigid requirements that contractors must meet under all circumstances. The bidder that fails to achieve an individual contract DBE goal may remain eligible to be awarded the contract if it can demonstrate that it has made good faith efforts to meet the goal. *Id.* at *39. The district court pointed out that Indiana DOT's methods to ensure compliance with the federal regulations, reporting and recordkeeping requirements were met by Indiana DOT and that Indiana DOT's Civil Rights Office responded to requests for assistance as a part of its daily activities. *Id.* at *42.

The district court noted that none of the plaintiffs complained to Indiana DOT that he bid on a subcontract to a construction contract administered by Indiana DOT and was denied the bid on the basis of race-based discrimination. *Id.* at *42. The district court analyzed plaintiff's claims that the State does not have a bonding or financial assistance program in place, did not always conduct site visits as part of the DBE certification process, and never met the 10 percent goal requirement. *Id.* at *43. The court in reviewing the federal regulations concluded that the bonding and financial assistance programs were not mandatory requirements of state wide plans, although they were mentioned in the federal regulations. *Id.* at *44.

The district court found that although the State may not always conduct site visits in the certification process, the testimony did not conclusively establish that site visits were not conducted. The court also found that plaintiffs did not establish that Indiana failed to meet the 10 percent goal that existed at this time in the federal regulations. In light of the evidence, the court found that the plaintiffs failed to show any genuine issues of fact regarding the State's compliance with the requirements for the DBE plan necessary to receive federal transportation funds and granted the defendants' Motion for Summary Judgment. *Id.* at *45.

The district court also considered plaintiffs' claims under § 1983 that the State's administration of the required DBE program violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The court found that the plaintiffs produced no evidence that showed a race-based or discriminatory policy of the State, or barrier otherwise imposed by the State, that impeded the plaintiffs' ability to bid on contracts. *Id.* at *48. The district court found that the plaintiffs did not show how they were treated differently from all other qualified DBEs in their efforts to obtain contracts, and that the State of Indiana does not have the power to modify the Congressional mandate that all certified DBEs are to compete on an equal basis. *Id.* Thus, the court rejected the plaintiffs' argument that because women-owned DBEs are receiving a disproportionate share of federally funded contracts, a discriminatory practice must be in place. *Id.*

The district court held that the plaintiffs could not show any discriminatory intent by the State of Indiana. Plaintiffs alleged that defendants had raised barriers to their participation in contracts funded by federal dollars and that they had not received their fair percentage of the contracts compared to non-African American DBEs. The court found the plaintiffs failed to demonstrate that such barriers exist, and that they did not demonstrate how they had been treated differently than the other similarly situated minority and disadvantaged enterprises served by the DBE program. *Id.* at *49. The court held that a showing of a disproportionate impact is not enough, as a state's "official action will not be held unconstitutional solely because it results in a racially disproportionate impact ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at *49. (citations omitted).

Lastly, the district court pointed out that the plaintiffs did not challenge the constitutionality of the federal DBE program, but only challenged the State's administration of that program. *Id.* at *50. Thus, the court held "If the DOA and INDOT are only doing 'what federal law requires, [their] conduct is constitutional, at least where, as here, the constitutionality of the federal program is not challenged.'" *Id.* at *50, quoting *Converse Construction Co., Inc. v. Massachusetts Bay Transportation Authority*, 899 F.Supp. 753, 761 (D.Mass. 1995)(citing *Milwaukee Co. Pavers*, 922 F.2d at 423). The court noted that the Second, Sixth, and Tenth Circuits reached the similar conclusion that insofar as the State is merely complying with federal law, it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations. *Id.* at *50 (citations omitted).

Therefore, the court granted summary judgment to the defendants finding that they were complying with federal law and could not be enjoined under the Equal Protection Clause or under a claim based on Title VI.

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

1. H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al., 615 F.3d 233 (4th Cir. 2010)

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation (“NCDOT”). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute

further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 *quoting* *Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remediating the effects of past or present racial discrimination.” *Id.*, *quoting* *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting*, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, *quoting* *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing* *Concrete Works*, 321 F.3d at 958. “Instead, a

state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.*, *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id.* at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id.* at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 *quoting Hogan*, 458 U.S. at 726.

Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.*

at 243, *quoting West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, *quoting Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, *citing Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3)

contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit

bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs' challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension.” *Id.* at 248, citing *Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white

contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy

discrimination against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State’s evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State’s anecdotal evidence of discrimination against these two groups sufficiently supplemented the State’s statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by “disturbing” anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State’s compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” but a state need not “exhaust [] ... every conceivable race-neutral alternative.” 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain

small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, *citing* *Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting* *United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program’s goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

Women-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Asheville, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id.* at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in

question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id.*

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

2. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006)

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of

persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of “Hispanic” was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis “allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program.” *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of “Hispanic,” finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the “federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the “District”) to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the “Board”) and the Superintendent (both individually and in his official capacity) (collectively “defendants”) pursuant to 42 U.S.C. §§ 1981 and 1983 and the

Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.'" *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the "District was only looking for 'black-owned firms.'" *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase

III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious ... policies must be limited in time.” *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court’s order pertaining to the facial constitutionality of the MVP’s racial goals, and affirmed the district court’s order granting defendants’ motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

4. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)

This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the

narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. (“CWC”) challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver (hereinafter the “City” or “Denver”). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its

interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, *quoting Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, *quoting Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, *quoting Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be

one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed

than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the

Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose

of disadvantaging minorities and women. The *Croson* majority concluded that a “city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, *citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not

discrimination by the City itself. *Id.* at 974. The court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, "'public or private, with some specificity.'" *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*" (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination." *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*" was relevant to Denver's burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court's mandate in *Concrete Works II*, the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id.* The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for

construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, *quoting Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, *quoting Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court’s criticism did not undermine the study’s reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took “judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects.” *Id.* at 978, *quoting Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinance conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

Variables. CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study

using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, *quoting Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver's initial burden. *Id.* at 989-90, *citing Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id.* at 991, *quoting Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id.*, *quoting Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace

disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found *Concrete Works* did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, citing *Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

5. In re City of Memphis, 293 F.3d 345 (6th Cir. 2002)

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, citing *Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik*

indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

6. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, *citing Croson*, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, *quoting Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, *quoting Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio’s most “compelling” statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio’s statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. *Id.* at 736. “If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of

certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.” *Id.* at 736.

The Court stated the only cases found to present the necessary “compelling interest” sufficient to justify a narrowly tailored race-based remedy, are those that expose “pervasive, systematic, and obstinate discriminatory conduct. ...” *Id.* at 737, *quoting Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting” *Id.* at 737, *quoting Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from “overinclusiveness.” *Id.* at 737, *quoting Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. *Id.*

In addition, the Court found that Ohio’s own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state’s 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state’s existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court’s hearing. *Id.* at 738. The Court stated that under

Croson, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was “not reconcilable” with the Ohio Supreme Court’s decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

7. *W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999)*

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5% of all city contracts. 199 F.3d at 208. *Id.* The 5% goal was not based on any objective data. *Id.* at 209. Instead, it was a “guess” that was adopted by the City. *Id.* The goal was later increased to 15% because it was found that 10% of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program’s adoption, the City’s Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15% participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5% participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20% of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City’s adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15%. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15% MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5% WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1%. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City’s Financial Legal Departments, approved Scott’s bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15% minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id.* at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15% DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15% of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the “relevant statistical pool,” of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* at 218, n.11. The sufficiency of a municipality’s findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study’s findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City’s Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City’s construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City’s construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City’s 15% DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott’s low bid because Scott failed to meet the Special Notice’s DBE-participation goal, not because Scott’s bid exceeded the City’s budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

8. Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term “goals” as opposed to “quotas,” the Ninth Circuit rejected such a distinction, holding “[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” The case also is instructive because it found the use of “goals” and the application of “good faith efforts” in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the “plaintiff”) submitted the low bid for a construction project for the California Polytechnic State University (the “University”). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff’s bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme ‘[did] not involve racial or gender quotas, set-asides or preferences,’” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University’s trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff’s motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court’s finding, such a difference was not *de minimis*. *Id.*

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive

constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

9. *Eng’g Contractors Ass’n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the “plaintiffs”) filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the “County”) as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking

discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”

Id. at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected

firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.* The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." *Id.* "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males." *Id.*

With respect to the first conclusion, Wainwright controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial

choices. Blacks may be disproportionately attracted to industries other than construction.” Id., quoting Croson, 488 U.S. at 503. Following the Supreme Court in Croson, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” Id., quoting Croson, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. Id. at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBes, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict

scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, *citing Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit

flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, *citing Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that

those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

10. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51% owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the

Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance’s preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered

evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a

“passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff’s theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City's expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting." *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be "cursory," Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City's Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer's log. The court found Mr. Macklin's testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin's testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City’s “standard requirements warn [would-be prime contractors] that discrimination will be deemed a ‘substantial breach’ of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due.” Like the Supreme Court in *Croson*, the Court stated the district court found significant the City’s inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin’s conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court’s conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of “extremely low” membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must “link [low MBE membership] to the number of local MBEs eligible for membership.” *Id.* at 601.

The City’s expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join

these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in

order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court’s suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City’s Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study’s analysis was without

probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study’s analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market “was a close call.” *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the “fit” between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made “necessary” by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City’s program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain

decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia's program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race-neutral or less burdensome to non-minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification

is not “merely the product of unthinking stereotypes or a form of racial politics.” *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

11. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994)

The court considered whether the City and County of Denver’s race- and gender-conscious public contract award program complied with the Fourteenth Amendment’s guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. (“Concrete Works”) appealed the district court’s summary judgment order upholding the constitutionality of Denver’s public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance (“Ordinance”) to enable certified racial minority business enterprises (“MBEs”)¹ and women-owned business enterprises (“WBEs”) to participate in public works projects “to an extent approximating the level of [their] availability and capacity.” *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC’s findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver’s summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver’s program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

Standing. At the outset, the Tenth Circuit on appeal considered Denver’s contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance’s constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated “injury in fact” because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance’s requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned

prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating “injury in fact,” Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver’s race- and gender-conscious contract program. *Id.*

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance’s race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id. citing, Croson* at 492.

A. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works (“DPW”) construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body’s strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver’s contracting activity, insofar as construction work was concerned, was closely related to the Denver

MSA. *Id.* at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

B. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id.* at 1520, *quoting*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

C. Post-Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief." *Id.* at 1521, *quoting*, *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson*'s evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal

treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

D. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond’s minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, citing, *Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments “must identify that discrimination ... with some specificity before they may use race-conscious relief.” *Id.*, citing *Croson*, at 504. The court said that the Supreme Court’s benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation was whether there exists a “*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.” *Id.*, quoting, *Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a “strong basis in evidence” that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, citing, *Wygant*, 476 U.S. at 292 (O’Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, citing, *Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, quoting, *Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, citing, *Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, quoting, *Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not

narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

E. Evidentiary Predicate Underlying Denver’s Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid-1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties’ competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office (“GAO”), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because “the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business.” *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report’s empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works’ conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver’s showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation (“US DOT”) to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights’ study of Denver’s discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had “denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting

opportunities at Stapleton,” in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver’s adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT’s allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT’s information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT’s report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver’s contract awards supported Denver’s contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

(b) Denver’s Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW “Major Bond Projects Final Report,” which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report’s description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained “no information about the number of minority or women owned firms that were used” on these bond projects. *Id.* at 1525. However, the court concluded the Report’s description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver’s data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore “tainted” and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. “non-goals public projects.” *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control

group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services (“DGS”) contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. Nevertheless, the court concluded Denver’s data indicated significant WBE underutilization such that the Ordinance’s gender classification arose from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

Empirical data. The third evidentiary item supporting Denver’s contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver’s program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further

supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver's data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted Croson impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id.* at 1527 *citing*, *Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id.* at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from "financ[ing] the evil of private prejudice." *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive

participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1529, *quoting, Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

12. Contractor's Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993)

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for "disadvantaged business enterprises" owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the [contractors 739 F.Supp. 227](#), and denied the City's motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court's decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court's ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery,

the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17-503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17-501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors’ motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors’ equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co.](#), 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not “narrowly tailored” to a “compelling government interest.” *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a “compelling government interest.” *Id.* at 995, *quoting*, [735 F.Supp. at 1295-98](#). The court also held the Ordinance was not “narrowly tailored,” emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298-99](#). The court held the Ordinance’s preferences for businesses owned by women and

handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, 735 F.Supp. [at 1299–1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court’s ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. [Id. at 1268](#). On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged. *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under [Mississippi University for Women v. Hogan, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, citing, *Hogan* [458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, citing, *Coral Constr. Co. v. King County*, [941 F.2d 910, 930 \(9th Cir.1991\)](#), cert. denied, [502 U.S. 1033 \(1992\)](#); *Michigan Road Builders Ass’n, Inc. v. Milliken*, [834 F.2d 583, 595 \(6th Cir.1987\)](#), *aff’d mem.*, [489 U.S. 1061\(1989\)](#); *Associated General Contractors of Cal. v. City and County of San Francisco*, [813 F.2d 922, 942 \(9th Cir.1987\)](#); *Main Line Paving Co. v. Board of Educ.*, [725 F.Supp. 1349, 1362 \(E.D.Pa.1989\)](#).

Application of intermediate scrutiny to the Ordinance’s gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County*, [908 F.2d 908 \(11th Cir.\)](#), cert. denied, [498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 \(1990\)](#). *Id.* at 1000-1001. The Court agreed with the district court’s choice of intermediate scrutiny to review the Ordinance’s gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, citing [735 F.Supp. at 1307](#). That standard validates the classification if it is “rationally related to a legitimate governmental purpose.” *Id.* at 1001, citing *Cleburne*, [473 U.S. at 445](#). The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, quoting, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at [1002, quoting, 488 U.S. at 492](#).

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the

number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. [Id. at 1002, citing 488 U.S. at 502.](#)

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," [Id. at 1002, quoting, 735 F.Supp. at 1298.](#) As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. [Id. at 1002, quoting, 1295-98.](#)

In a footnote, the Court pointed out the district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. [735 F.Supp. at 1295.](#) The Court said this reading overlooked the statement in *Croson* that a City can be a "passive participant" in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice." [Id. at 1002, n. 10, quoting, 488 U.S. at 492.](#)

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. [Id. at 1002.](#) In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." [Id., quoting, 488 U.S. at 480.](#)

Although the district court acknowledged the minority contractors' testimony was relevant under *Croson*, it discounted this evidence because "other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers." [Id. at 1002, quoting, 735 F.Supp. at 1296.](#)

The Third Circuit held, however, given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. [Id. at 1003, quoting, Coral Constr., 941 F.2d at 919](#) ("anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. [Id.](#) But because the combination of "anecdotal and statistical evidence is potent," [Coral Constr., 941 F.2d at 919,](#) the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre-Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post-Enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [*Cone Corp.*, 908 F.2d at 916 \(10.78 disparity index\)](#); [*AGC of California*, 950 F.2d at 1414 \(22.4 disparity index\)](#); [*Concrete Works*, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [*Stuart*, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [*O'Donnell*, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson*’s reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian-American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian-American, Pacific-Islander, and “other” minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the “significant statistical disparity”. *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, *quoting*, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s fifteen percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, [488 U.S. at 507.](#)

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.*, at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this

intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.* But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of

discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [Heller v. Doe, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court’s grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court’s grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

13. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin

enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the

study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited

in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

14. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and

was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Id.* at 918, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, *quoting International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of

discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program’s narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court

pointed out that King County used a “percentage preference” method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County’s program provided waivers in both instances, including where neither minority nor a woman’s business is available to provide needed goods or services and where available minority and/or women’s businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County’s MBE program fails this third portion of “narrowly tailored” requirement. The court found the definition of “minority business” included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County’s business community. *Id.* Because King County’s program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County’s WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The

court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

15. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of [18 U.S.C. § 371](#), in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, [49 C.F.R. § 26.55\(c\)](#), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for

defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of \$1.89 million." *Id.* at 746. These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746.

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

Motion to Dismiss—challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that [49 C.F.R. § 26.55\(c\)](#) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other

relevant factors.” *Id.* at 755, *citing*, [49 C.F.R. § 26.55\(c\)](#). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see* [Midwest Fence Corp. v. United States Dep’t of Transp.](#), 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to [49 C.F.R. § 26.53\(a\)](#) and “good faith efforts” language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase “commercially useful function,” the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in [§ 26.55\(c\)\(1\)](#); and, (2) are beyond the scope of the definition of that phrase in [§ 26.55\(c\)\(2\)](#). *Id.* at 755, *citing*, [49 C.F.R. §§ 26.55\(c\)\(1\)–\(2\)](#). The phrases “industry practices” and “other relevant factors” are undefined, the court said, but “an undefined word or phrase does not render a statute void when a court could ascertain the term’s meaning by reading it in context.” *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, *citing*, [49 C.F.R. § 26.55\(c\)](#).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by [§ 26.55\(c\)\(2\)](#), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, *quoting*, [49 C.F.R. § 26.55\(c\)](#).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in [United States v. Maxwell](#). *Id.* at 756. The court noted that in [Maxwell](#), the defendant argued in a post-trial motion that [§ 26.55\(c\)](#) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, *quoting*, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that

of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. [49 C.F.R. § 26.55\(c\)\(2\)](#). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

Id. at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in [Maxwell](#) found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, [49 U.S.C. § 322\(a\)](#) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); [23 U.S.C. § 304](#) (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); [23 U.S.C. § 315](#) (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, [Midwest Fence Corp.](#), 840 F.3d at 942 (citing [Western States Paving Co. v. Washington State Dep’t of Transportation](#), 407 F.3d 983, 993 (9th Cir. 2005); [Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation](#), 345 F.3d 964, 973 (8th Cir. 2003); [Adarand Constructors, Inc. v. Slater](#), 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant’s motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the

amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

16. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston’s Minority and Women Owned Business Enterprise (“MWBE”) program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston’s construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman’s expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston’s motion to exclude Kossman’s expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman’s proposed expert properly excluded. The district court first rejected Kossman’s objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court’s affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman’s proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman’s proposed expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the

study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

Native-American-owned businesses. The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston

consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman's proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the

opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years.

Id. Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60.

Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

17. *H. B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.* ("Rowe"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh

Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 19A, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs

and WBEs in subcontracting before submitting bids to NCDOT.” 589 F.Supp.2d 587. In determining whether the lowest bidder is “responsible,” NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

18. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business

owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that

plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

19. Thompson Building Wrecking Co. v. Augusta, Georgia, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status

among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined “Georgia’s racist history” in contracting and procurement, and examined certain data related to Augusta’s contracting and procurement. *Id.* at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City’s implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a “good faith effort” to ensure DBE participation. *Id.* at *6. The court rejected this argument noting that bidders were required to submit a “Proposed DBE Participation” form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: “Because a person’s business can qualify for the favorable treatment based on that person’s race, while a similarly situated person of another race would not qualify, the program contains a racial classification.” *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing to Croson*), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at *8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the

plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at *9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

20. Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a

participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must

(1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of

proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic

preferences “must be limited in time.” *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

21. Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors*

Association. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng’g Contractors Ass’n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

22. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 218 F. Supp.2d 749 (D. Md. 2002)

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC

did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

23. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenor who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenor did not actually offer any of the evidence to the court in this case. The Intervenor submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenor have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenor’s evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenor did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of

deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Crosby* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not

shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that

the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.*

The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

24. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000)

Plaintiff Associated Utility Contractors of Maryland, Inc. ("AUC") filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance ("the Ordinance"). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. ("MMCA") opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment ("the December injunction"). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City's 1999 numerical set-aside goals for Minority- and Women-Owned Business Enterprises ("MWBES"), which had been established at 20% and 3%, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff's facial attack on the constitutionality of the Ordinance, concluding that there existed "a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action." *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt

revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

Facts and Procedural History. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20% of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3% to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises....” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20% MBE and 3% WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20% MBE and 3% WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20% and 3% goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “ ‘injury in fact’ is the inability to compete on an equal footing in the bidding process ...” *Id.* at 617, *quoting Northeastern Florida Chapter*, 508 U.S. at 666, and *citing Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 *quoting, Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id. quoting Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City’s set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City’s set-aside goals required AUC members to “select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors” in order to bid successfully on City public works contracts for work exceeding \$25,000 (“City public works contracts”). *Id.* at 618. AUC claimed, therefore, that the City’s set-aside goals violated the Fourteenth Amendment’s guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, *citing United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 619, *quoting Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id. citing Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so

apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, quoting *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, citing *Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 619, quoting *Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a “two step analysis for evaluating a race-conscious remedy.” *Id.* at 619 citing *Maryland Troopers Ass’n*, 993 F.2d at 1076. “First, the [government] must have a ‘strong basis in evidence for its conclusion that remedial action [is] necessary....’ ‘Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ ” *Id.* at 619, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076 (citing *Croson*).

The second step in the *Croson* analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 quoting *Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, *quoting Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, *quoting Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying Croson’s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, *quoting Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, *quoting Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, *quoting Contractors Ass’n*, 6 F.3d at 1010.

Preenactment versus postenactment evidence. In evaluating the first step of the Croson test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, *quoting Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE participation in City construction subcontracts, and for analogous reasons, the 3% WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* “strong basis in evidence.” *Id.* at 621, n.6, *citing Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-

American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case, the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20% for MBEs and 3% for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20% preference is not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3% preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting

construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20% MBE and 3% WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

Holding. The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City's motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

25. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a

neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data.” *Id.*, citing *Eng’g Contractors Ass’n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng’g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County’s pre-1994 disparity study (the “Brimmer-Marshall Study”) and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a “passive participant” in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are “exacerbating a pattern of prior discrimination that can be identified with specificity.” *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, citing *Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that

its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program’s gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present “sufficient probative evidence” of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County’s M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court’s opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

26. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

The district court in this case pointed out that it had struck down Ohio’s MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant’s appealed this court’s decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state’s purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court’s decision related to construction contracts and the Ohio Supreme Court’s decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court’s decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a “blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio’s MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court’s holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio’s MBE program as applied to the state’s purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

Strict Scrutiny. The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

(1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

(2) a program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id.*

(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." *Id.* at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

Narrow Tailoring. The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to "race-based quotas". *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise "dooms Ohio's program of race-based quotas". *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

27. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments

There are several recent cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

Recent Decisions in Federal Circuit Courts of Appeal

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019

Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor’s discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor’s claims.

Having granted summary judgment on Taylor’s claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor’s state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

Note: The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as

among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana's transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert

report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in

Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study’s analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender-based preferences are halted is not necessarily evidence of discrimination against DBEs.

Mountain West, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and *quoting*, *Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to *Mountain West*’s case, it concluded that the record provides an inadequate basis for summary judgment in Montana’s favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

3. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9th Cir. 2013)

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business Enterprise (“DBE”) program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans’ DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans’ DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans’ substantial statistical and anecdotal evidence from a

disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned

businesses should be expected to receive 13.5 percent of contract dollars from Caltrans administered federally assisted contracts.” *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm’s findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans’ DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans’ DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans’ DBE program until in 2009, the DOT approved Caltrans’ DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-999).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination ...

may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.”

Id. The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States*." *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime and subcontractors." *Id.*

Consideration of race-neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

4. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only.

81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with

bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a

prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision

denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

5. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona’s former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein’s overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id.* at 1182. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id.* at 1182.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein’s claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein’s damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id.* at 1183.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT’s DBE program had affected him personally. The court noted that “Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract.” *Id.* at 1183. The district court found that Braunstein’s inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185*. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

6. Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006)

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Equity Act for the 21st Century (“TEA-21”). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff's challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it "would not yield a different result." *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in "ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that "[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination." *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) ("DOT's regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota

and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id.* The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id.* (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, citing *Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account

for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State’s transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action’s component. *Id.* The court found that the State’s methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State’s argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress’s compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court’s grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State’s liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

7. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that

goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim.

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does

not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, citing *Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, citing 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous

DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*.).

9. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court’s vacation of the Tenth Circuit’s dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government’s challenge to the district court’s grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause (“SCC”), which employs race-conscious presumptions designed to favor minority enterprises and other “disadvantaged business enterprises” (“DBEs”). The court’s evaluation of the SCC program utilizes the “strict scrutiny” standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id.* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

“Compelling Interest” in race-conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O’Connor explicitly states: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that “remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions” (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that “the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry’ by allowing tax dollars ‘to finance the evil of private prejudice.’” *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as “remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups.” *Id.*

Evidence required to show compelling interest. While the government’s articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The “benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation [i]s whether there exists a ‘*strong basis in evidence*’ for [the government’s] conclusion that remedial action was necessary.” *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, citing *Concrete Works*, 36 F.3d at 1520–21.

After the government’s initial showing, the burden shifted to Adarand to rebut that showing: “Notwithstanding the burden of initial production that rests” with the government, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* at 1166, quoting, *Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, citing, *Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166–67 citing, *Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O’Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program.

Id. at 1167, *quoting, Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government’s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government’s evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to “old boy” networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors’ unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government’s evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government’s evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the

government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up “anticipated costs, and therefore the bid, for minority-owned businesses.” *Id.* at 1172.

Contrary to Adarand’s contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government’s evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not “the same problems faced by any new business, regardless of the race of the owners.” *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court’s decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government’s review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area “minority firms still receive only 87 cents for every dollar they would be expected to receive” based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government’s] prime contractors, an inference of discriminatory exclusion could arise.” *Id.* quoting, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

The court said that it was mindful that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 1172, quoting, *Croson* at 501–02. But the court found that here, it was unaware of such “special qualifications” aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, citing, *Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number

of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting, Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, *quoting, Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing, Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Adarand’s rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* "Race" the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O'Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government's initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court's finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, *quoting*, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O’Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, citing, *Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.” 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O’Connor’s majority opinion in *Croson* added a further factor to the court’s analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because “there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, quoting, *Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, quoting, *Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of

race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186.

The court stated that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” *Id.* The court found that the “Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” *Id.*

Holding. Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III*'s strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id.* at 1178.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff *Adarand* “conceded that its challenge in the instant case is to ‘the federal program, implemented by federal officials,’ and not to the letting of federally-funded construction contracts by state agencies.” 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188. Therefore, the court did not address the constitutionality of an as applied attack on the implementation of the federal program by the Colorado DOT or other local or state governments implementing the Federal DBE Program.

The court thus reversed the district court and remanded the case.

Recent District Court Decisions

10. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's

Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017)

Plaintiffs, Orion Insurance Group (“Orion”), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise (“DBE”) under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation (“USDOT”) and the Acting Director of USDOT, (collectively the “Federal Defendants”) move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises (“OMWBE”), (collectively the “State Defendants”) moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he “embraced his Black culture.” *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a “Negro,” who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, “the presumption of disadvantage has been

rebutted,” and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) “Discrimination under 42 U.S.C. § 1983” (reference is made to Equal Protection), (C) “Discrimination under 42 U.S.C. § 2000d,” (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: (“[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE,” and a declaration the “definitions of ‘Black American’ and ‘Native American’ in 49 C.F.R. § 26.5 to be void as impermissibly vague,”) and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff's application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that

the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and race based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their “class of one” equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of “Black American” and both the definition of “Native American” that was applied to Plaintiffs and a new definition of “Native American” are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness

“doctrine is a poor fit.” *Id.* at *14, *citing, Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs’ claims that the definitions of “Black American” and of “Native American” in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a “well founded” question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of “socially and economically disadvantaged individual” as a “citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities,” the court determined, gives further meaning to the definitions of “Black American” and “Native American” here. *Id.* at *14. “Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity.” *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, *citing*, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs’ void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs’ claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations’ requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at *17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

11. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the

plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued

that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court's evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a "statute's race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that

minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government’s compelling interest. *Id.* at *15.

2. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs’ claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court

notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

1. Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

2. Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court

found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

3. Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection

Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

12. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify

favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that it was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, “the Ninth Circuit held that California’s DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.” *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

13. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9th Cir. 2013)

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. (“AGC”) against the California Department of Transportation (“Caltrans”), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a

program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law.” Slip Opinion Transcript at 52.

The court rejected the plaintiff’s arguments that anecdotal evidence failed to identify specific acts of discrimination, finding “there are numerous instances of specific discrimination.” Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans’ program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an “extensive disparity study, anecdotal evidence, both of which is what was missing” in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans “did exactly what the Ninth Circuit required” and that Caltrans has gone “as far as is required.” Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, “clearly constitutional,” and “narrowly tailored.” Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans’ program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight “because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work.” Slip Opinion Transcript at 55. Whereas, the district court held the “disparity study used by Caltrans was much more comprehensive and accounted for this and other factors.” *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, “is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional.” *Id.* at 56.

The court held that because “Caltrans’ DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional.” Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans’ DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

14. *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government’s compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, *citing Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT’s DBE program was narrowly tailored to further that compelling interest in

accordance with “its grant of authority under federal law.” *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that “a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state’s program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation “exceeded its grant of authority under federal law.” *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit’s analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit’s discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, “only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge.” *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT’s DBE program was constitutionally defective, the district court focused on the basis of plaintiffs’ argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs’ arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT’s use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples

listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT’s list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT’s division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only “when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal.” *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT’s DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT

DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must “undertake an as-applied inquiry into whether [the state’s] DBE program is narrowly tailored.” *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs’ argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff’s expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant’s determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs’ argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT’s expert identified “prime contracting” as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the “relationship of the numerical goals to the relevant labor market.” *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not

provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

15. *Geod Corporation v. New Jersey Transit Corporation, et seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a

demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff’s Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff’s claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT’s Motion for Summary Judgment was granted as to that claim.

16. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County’s implementation of the Federal DBE Program and Broward County’s issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court’s consideration of the merits of plaintiffs’ claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, “whether compliance with the federal regulations is all that is required of Defendant Broward County.” *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County’s implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in

Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, citing *Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, quoting *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: *Milwaukee County* and *Northern Contracting*. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that “where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations.” 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that “the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program.” 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is “simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations.” *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

17. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002)

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation (“DOT”) from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT’s implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants’ (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

18. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), affirmed 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part,

by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

19. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* *2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court’s discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id*. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id*.

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id*. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id*. Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id*.

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id*.

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

2. Rothe Development Corp. v. U.S. Dept. of Defense, et al., 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal

evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized”

evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a "bright-line rule for determining staleness." *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id.* at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by *Rothe*, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed

willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does

not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise mathematical formula' to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark." 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049.

Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

3. Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016).

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic’s* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other’s expert witnesses. The court concludes that Defendants’ experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe’s motion to exclude Defendants’ expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff’s experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants’ motions to exclude plaintiff’s expert testimony.

In addition, the court in *Rothe* agrees with the court’s reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff’s motion for summary judgment and grants Defendants’ cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion

that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.*

The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal

that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large,

statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at *3-4; 13 CFR 124.501(b).

Plaintiff’s business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at *5.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at *9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at *9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at *11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from

28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across

racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program

constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the

sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the

evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

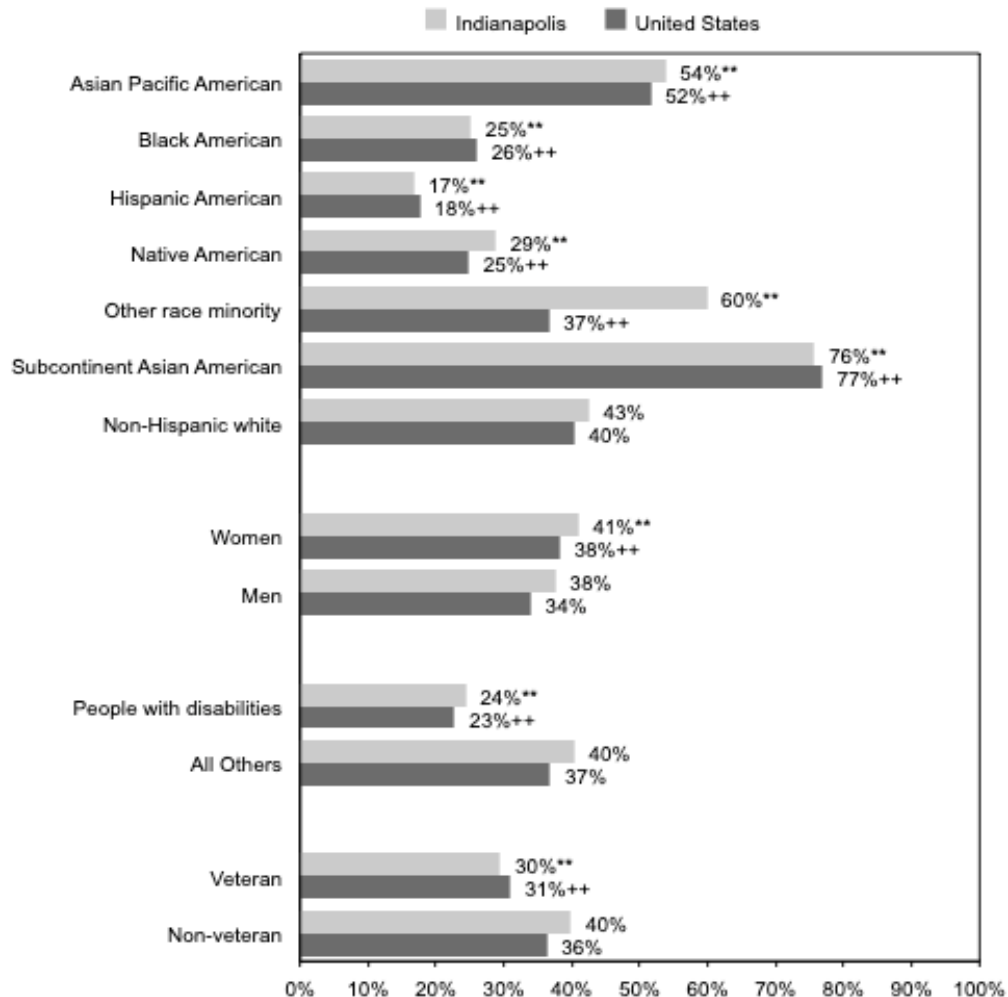
APPENDIX C.

Quantitative Analysis of Marketplace

APPENDIX C.

Quantitative Analysis of Marketplace

Figure C-1.
Percentage of all workers 25 and older with at least a four-year degree in Indianapolis and the United States, 2013-2017



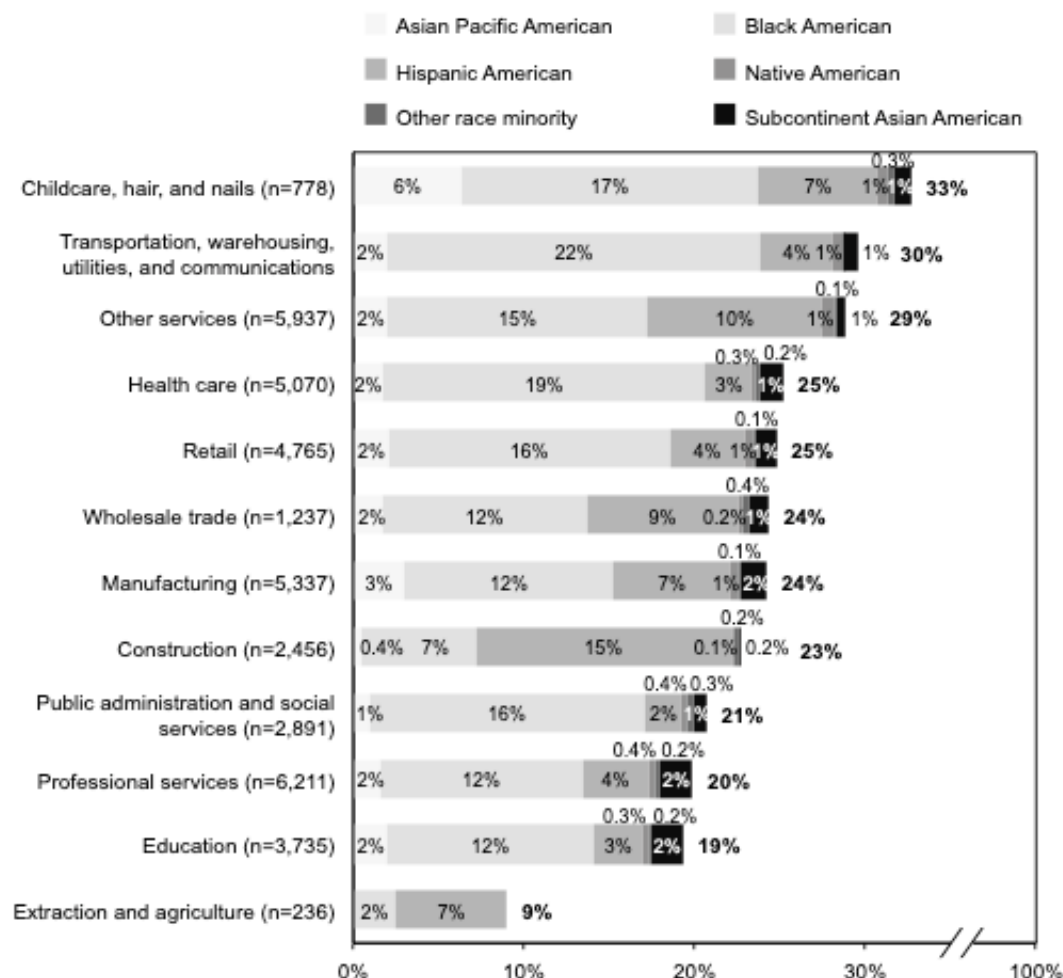
Note: **, ++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men; people with disabilities and people without disabilities; or veterans and non-veterans) is statistically significant at the 95% confidence level for Indianapolis and the United States, respectively.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-1 indicates that, compared to non-Hispanic white Americans working in the Indianapolis marketplace, smaller percentages of Black Americans, Hispanic Americans, and Native Americans have four-year college degrees. In addition, a smaller percentage of people

with disabilities have four-year college degrees than people without disabilities, and a smaller percentage of veterans have four-year college degrees than non-veterans.

Figure C-2.
Percent representation of minorities in various industries in Indianapolis, 2013-2017



Note: ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 95% confidence level.

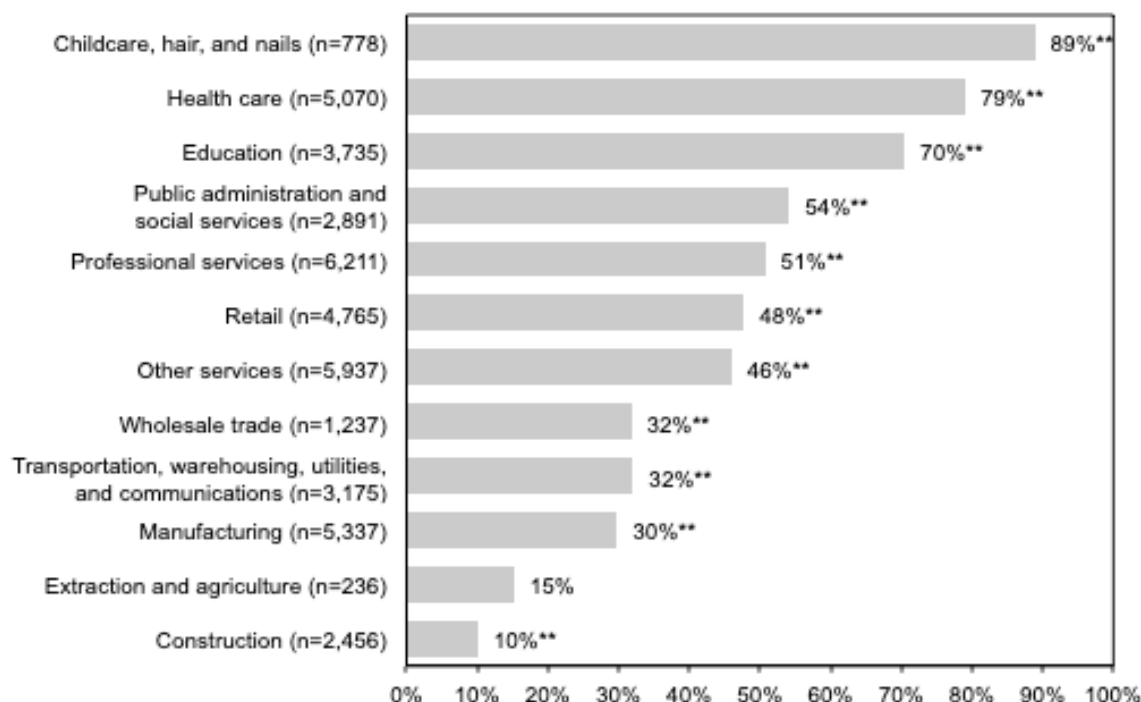
The representation of minorities among all Indianapolis workers is 15% for Black Americans, 2% for Asian Pacific American, 1% for Subcontinent Asian American, 6% for Hispanic Americans, and 25% for all minorities considered together.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-2 indicates that the industries in the Indianapolis marketplace with the highest representations of minority workers are childcare, hair, and nails; transportation, warehousing, utilities, and communications; and other services. Industries in the Indianapolis marketplace with the lowest representations of minority workers are professional services; education; and extraction and agriculture.

Figure C-3.
Percent representation of women in various industries in Indianapolis, 2013-2017



Note: ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 95% confidence level.

The representation of women among all Indianapolis workers is 48%.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services; Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-3 indicates that the industries in the Indianapolis marketplace with the highest representations of women workers are childcare, hair, and nails; health care; and education. Industries in the Indianapolis marketplace with the lowest representations of women workers are manufacturing; extraction and agriculture; and construction.

Figure C-4.**Demographic characteristics of workers in study-related industries and all industries in Indianapolis and the United States, 2013-2017**

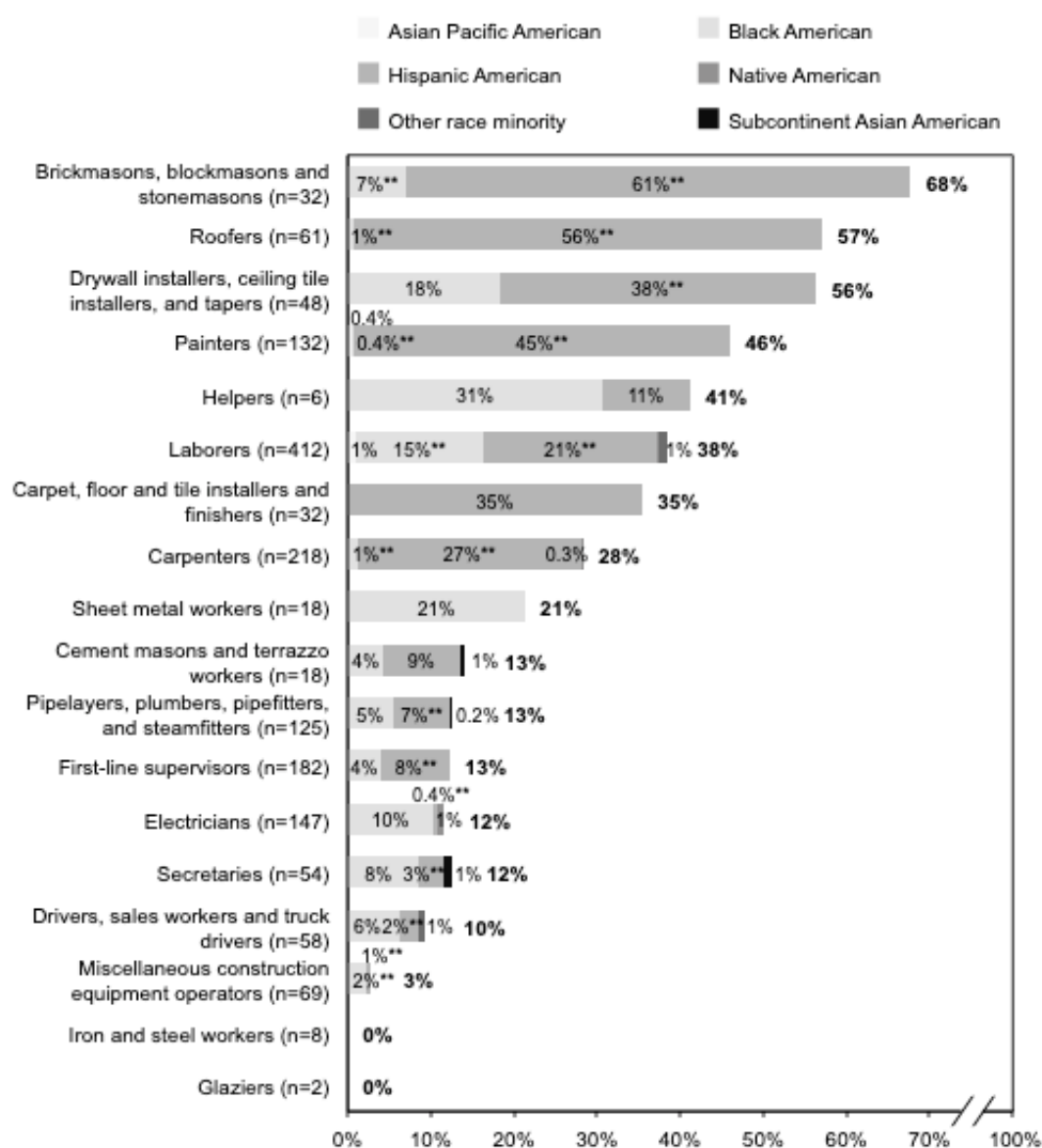
Indianapolis	All Industries (n= 42,313)	Construction (n= 2,456)	Professional Services (n= 2,201)	Goods & Services (n= 2,257)
Race/ethnicity				
Asian Pacific American	1.9%	0.4% **	1.6%	1.7%
Black American	15.0%	6.7% **	8.2% **	15.7%
Hispanic American	5.8%	15.0% **	3.9% **	6.9%
Native American	0.5%	0.1% **	0.3%	0.5%
Other race minority	0.2%	0.2%	0.2%	0.3%
Subcontinent Asian American	1.2%	0.2% **	1.5%	0.9%
Total minority	24.5%	22.7%	15.7%	26.0%
Non-Hispanic white	75.5%	77.3%	84.3% **	74.0%
Total	100.0%	100.0%	100.0%	100.0%
Gender				
Women	48.4%	10.1% **	49.5%	33.4% **
Men	51.6%	89.9% **	50.5%	66.6% **
Total	100.0%	100.0%	100.0%	100.0%
Disability Status				
People with disabilities	6.8%	7.0%	6.2%	7.3%
All Others	93.2%	93.0%	93.8%	92.7%
Total	100.0%	100.0%	100.0%	100.0%
Veteran Status				
Veteran	5.9%	8.5% **	4.7% **	7.0%
Non-veteran	94.1%	91.5% **	95.3% **	93.0%
Total	100.0%	100.0%	100.0%	100.0%
United States	All Industries (n= 7,695,205)	Construction (n= 464,906)	Professional Services (n= 413,291)	Goods & Services (n= 375,745)
Race/ethnicity				
Asian Pacific American	4.8%	1.7% **	5.3% **	3.6% **
Black American	12.4%	5.9% **	8.2% **	12.2% **
Hispanic American	16.7%	27.3% **	10.3% **	20.6% **
Native American	1.2%	1.3% **	0.8% **	0.9% **
Other race minority	0.2%	0.2%	0.2% **	0.2%
Subcontinent Asian American	1.4%	0.3% **	2.0% **	0.9% **
Total minority	36.8%	36.8%	26.8%	38.5%
Non-Hispanic white	63.2%	63.2%	73.2% **	61.5% **
Total	100.0%	100.0%	100.0%	100.0%
Gender				
Women	47.2%	9.2% **	49.0% **	33.7% **
Men	52.8%	90.8% **	51.0% **	66.3% **
Total	100.0%	100.0%	100.0%	100.0%
Disability Status				
People with disabilities	6.1%	6.1%	5.1% **	6.8% **
All Others	93.9%	93.9%	94.9% **	93.2% **
Total	100.0%	100.0%	100.0%	100.0%
Veteran Status				
Veteran	5.5%	6.5% **	5.6% **	7.3% **
Non-veteran	94.5%	93.5% **	94.4% **	92.7% **
Total	100.0%	100.0%	100.0%	100.0%

Note: ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that compared to all industries considered together, there are smaller percentages of Asian Pacific Americans, Black Americans, Native Americans, Subcontinent Asian Americans, and women working in the Indianapolis construction industry. Similarly, there are smaller percentages of Black Americans, Hispanic Americans, and veterans working in the Indianapolis professional services industry than all industries considered together. Finally, there is a smaller percentage of women working in the Indianapolis goods and services industry than all industries considered together.

Figure C-5.
Percent representation of minorities in selected construction occupations
in Indianapolis, 2013-2017



Note: ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of minorities among all Indianapolis construction workers is 4% for Asian Pacific American, 7% for Black American, 15% for Hispanic Americans, and 23% for all minorities considered together.

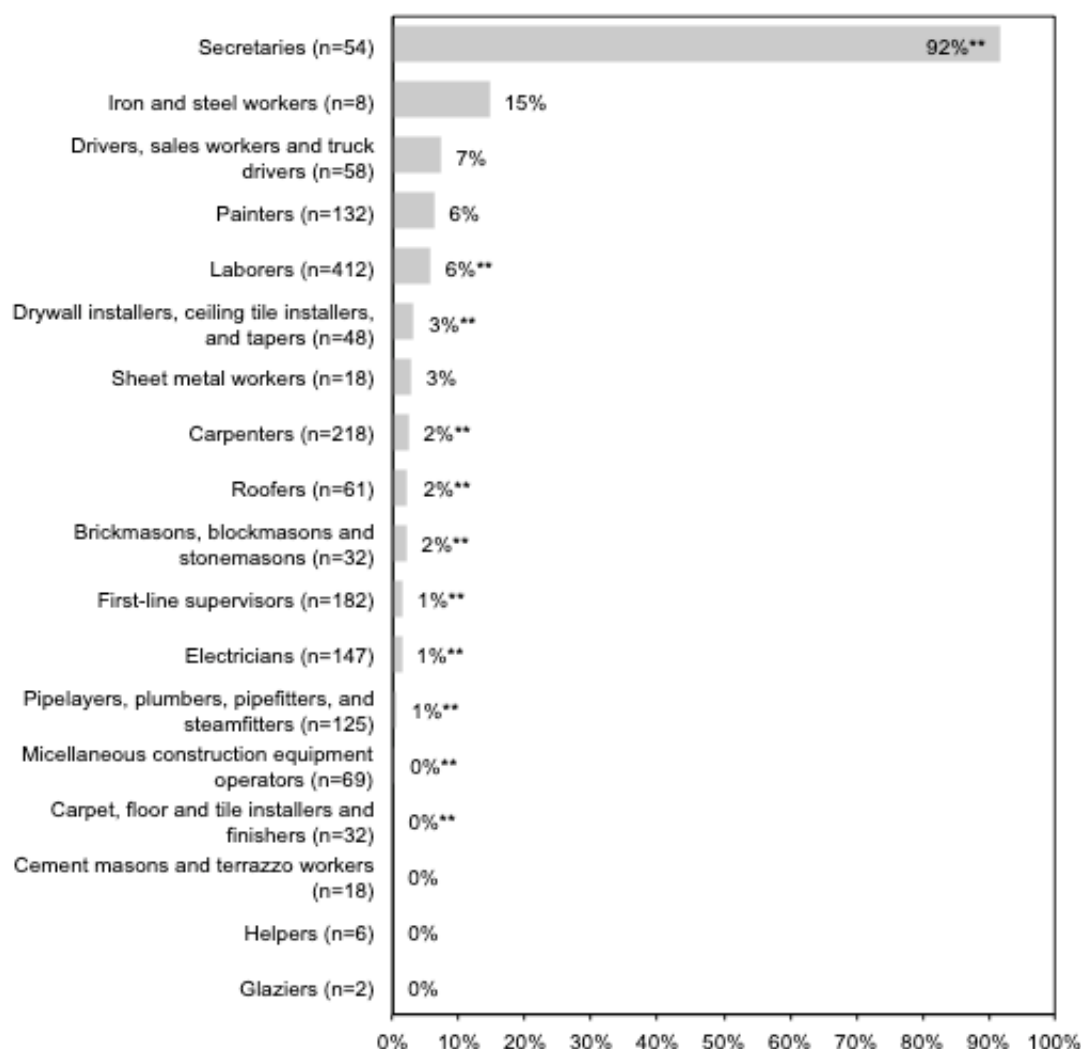
Plasterers and stucco masons are not depicted because none were not found in the Study Area's sample.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2013-2017 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-5 indicates that the construction occupations with the highest representations of minority workers in the Indianapolis marketplace are brickmasons, blockmasons, and stonemasons; roofers; and drywall installers, ceiling tile installers, and tapers. The construction occupations with the lowest representations of minority workers in the Indianapolis marketplace are miscellaneous construction equipment operators; iron and steel workers; and glaziers.

Figure C-6.
Percent representation of women in selected construction occupations
in Indianapolis, 2013-2017



Note: ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of women among all Indianapolis construction workers is 10%.

Plasterers and stucco masons are not depicted because none were not found in the Study Area's sample.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2013-2017 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that the construction occupations in the Indianapolis marketplace with the highest representations of women workers are secretaries; iron and steel workers; and drivers, sales workers, and truck drivers. The construction occupations with the lowest representations of women workers in the Indianapolis marketplace are cement masons and terrazzo workers; helpers; and glaziers.

**Figure C-7.
Percentage of
workers who worked
as a manager in
study-related
industries in
Indianapolis and the
United States, 2013-
2017**

Note:

* ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men; people with disabilities and people without disabilities; or veterans and non-veterans) is statistically significant at the 95% confidence level.

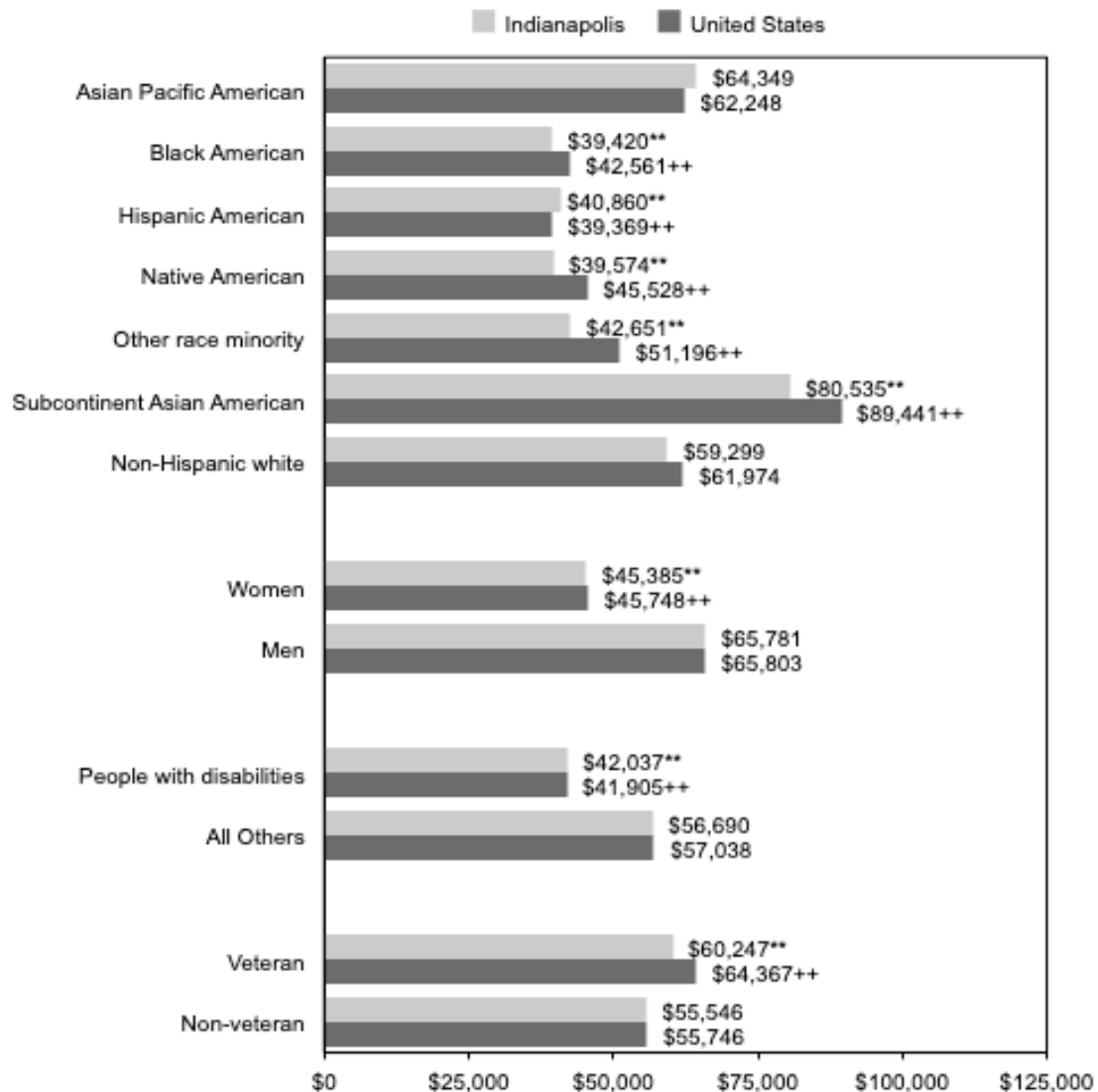
Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center:
<http://usa.ipums.org/usa/>.

Indianapolis	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	19.1%	0.0%	3.0%
Black American	4.2% **	0.4% **	0.8% **
Hispanic American	0.9% **	3.0%	1.3% **
Native American	10.1%	0.0%	0.0%
Other race minority	0.0%	0.0%	0.0%
Subcontinent Asian American	0.0%	7.5%	0.0%
Non-Hispanic white	9.4%	3.7%	4.5%
Gender			
Women	4.0% **	2.2% **	2.6%
Men	8.2%	4.6%	4.1%
Disability Status			
People with disabilities	12.5%	3.2%	2.1%
All Others	7.4%	3.4%	3.7%
Veteran Status			
Veteran	12.3%	4.6%	3.4%
Non-veteran	7.4%	3.3%	3.6%
All individuals	7.8%	3.4%	3.6%
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	9.7%	3.1% **	4.9%
Black American	4.3% **	2.1% **	1.5% **
Hispanic American	3.0% **	2.5% **	1.6% **
Native American	5.5% **	3.4%	2.9% **
Other race minority	5.8% **	3.1%	2.3% **
Subcontinent Asian American	12.3% **	5.1% **	5.7%
Non-Hispanic white	9.6%	4.0%	4.9%
Gender			
Women	6.8% **	2.4% **	2.6% **
Men	7.5%	4.8%	4.4%
Disability Status			
People with disabilities	6.9% **	2.8% **	2.6% **
All Others	7.5%	3.7%	3.9%
Veteran Status			
Veteran	9.6% **	4.9% **	4.1%
Non-veteran	7.3%	3.6%	3.8%
All individuals	7.5%	3.7%	3.8%

C-7 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans and Hispanic Americans work as managers in the Indianapolis construction industry. Similarly, a smaller percentage of Black Americans work as managers in the Indianapolis professional services industry. In addition, smaller percentages of Black Americans and Hispanic Americans work as managers in the Indianapolis goods and services industry. Compared to men, a smaller percentage of women work as managers in the construction industry and the professional services industry.

Figure C-8.
Mean annual wages in Indianapolis and the United States, 2013-2017



Note: The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), from all others (for people with disabilities), and from non-veterans (for veterans) at the 95% confidence level for Indianapolis and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-8 indicates that, compared to non-Hispanic white Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities in the Indianapolis marketplace have lower mean annual wages. In addition, non-Hispanic white women in the Indianapolis marketplace exhibit lower mean annual wages than men, and people with disabilities exhibit lower mean annual wages than people without disabilities.

Figure C-9.
Predictors of annual wages
in Indianapolis, 2013-2017

Note:

The regression includes 24,309 observations.

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, male for the gender variable; high school diploma for the education variables, all others for the disability variable; non-veteran for the military experience variable; and manufacturing for industry variables.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	7463.750 **
Asian Pacific American	0.925
Black American	0.816 **
Hispanic American	0.918 **
Native American	0.812 **
Other minority group	0.876
Subcontinent Asian American	0.935
Women	0.783 **
Less than high school education	0.881 **
Some college	1.229 **
Four-year degree	1.691 **
Advanced degree	2.289 **
Disabled	0.812 **
Military experience	0.963 *
Speaks English well	1.543 **
Age	1.052 **
Age-squared	1.000 **
Married	1.130 **
Children	1.024 **
Number of people over 65 in household	0.864 **
Public sector worker	1.105 **
Manager	1.303 **
Part time worker	0.361 **
Extraction and agriculture	0.726 **
Construction	0.857 **
Wholesale trade	0.970
Retail trade	0.675 **
Transportation, warehouse, & information	0.895 **
Professional services	0.938 **
Education	0.580 **
Health care	0.965 *
Other services	0.659 **
Public administration and social services	0.727 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in the Indianapolis marketplace, being Black American, Hispanic American, or Native American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.82 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man; having a disability is related to lower annual wages compared to not having a disability; and being a veteran is related to lower annual wages compared to non-veterans.

Figure C-10.
Predictors of annual wages
in the United States, 2013-
2017

Note:

The regression includes 4,070,460 observations.

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, male for the gender variable; high school diploma for the education variable; all others for the disability variable; non-veteran for the military experience variable; and manufacturing for industry variables.

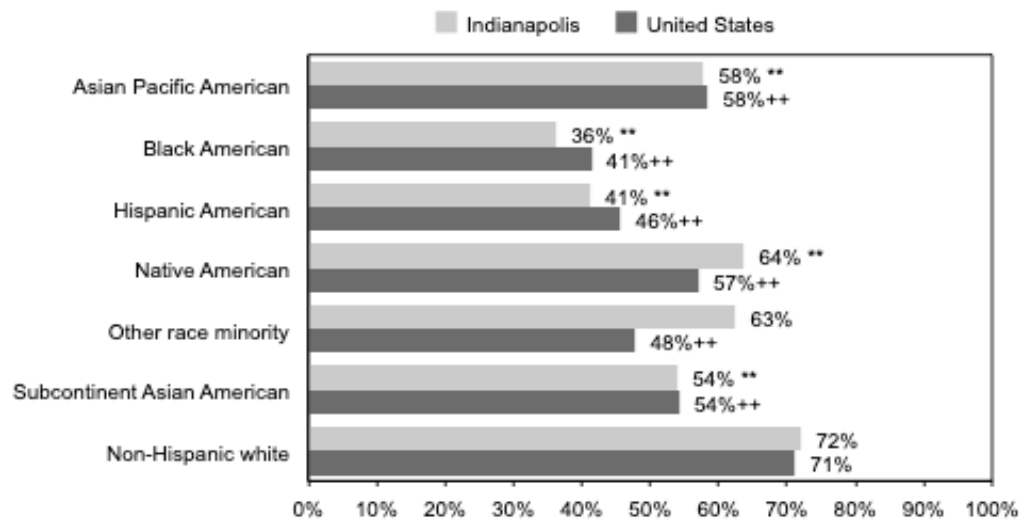
Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	8127.486 **
Asian Pacific American	0.958 **
Black American	0.853 **
Hispanic American	0.910 **
Native American	0.880 **
Other minority group	0.907 **
Subcontinent Asian American	0.984 **
Women	0.780 **
Less than high school education	0.856 **
Some college	1.196 **
Four-year degree	1.667 **
Advanced degree	2.304 **
Disabled	0.794 **
Military experience	1.001
Speaks English well	1.353 **
Age	1.057 **
Age-squared	0.999 **
Married	1.122 **
Children	1.010 **
Number of people over 65 in household	0.906 **
Midwest	0.884 **
South	0.895 **
West	0.992 **
Public sector worker	1.104 **
Manager	1.301 **
Part time worker	0.362 **
Extraction and agriculture	0.956 **
Construction	0.937 **
Wholesale trade	0.970 **
Retail trade	0.750 **
Transportation, warehouse, & information	1.029 **
Professional services	1.068 **
Education	0.656 **
Health care	0.998
Other services	0.713 **
Public administration and social services	0.821 **

Figure C-10 indicates that, compared to being a non-Hispanic white American in the United States, being Asian Pacific American, Black American, Hispanic American, Native American, other race minority, or Subcontinent Asian American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.85 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man, and having a disability is related to lower annual wages compared to not having a disability.

Figure C-11.
Home Ownership Rates in Indianapolis and the United States, 2013-2017



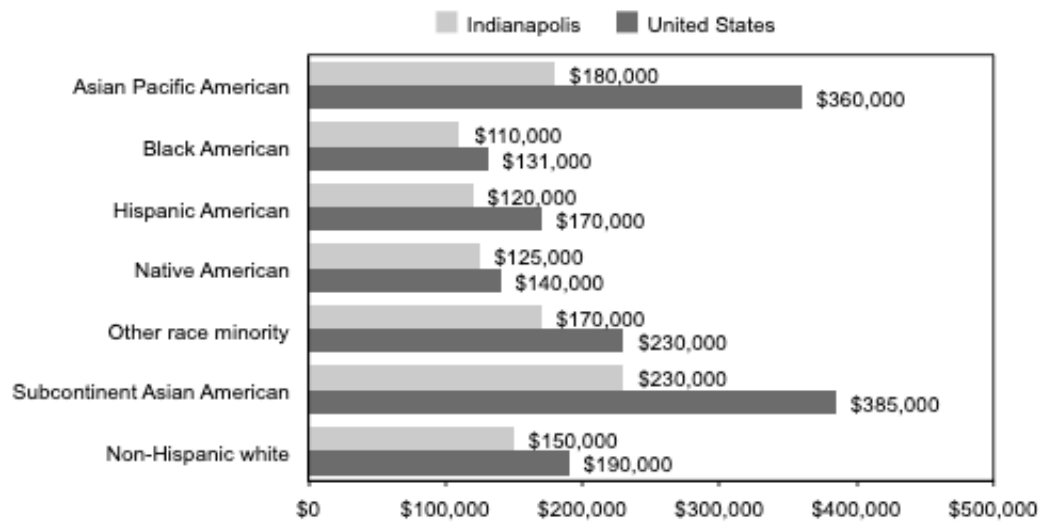
Note: The sample universe is all households.

**, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for Indianapolis and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-11 indicates that, compared to non-Hispanic white Americans, smaller percentages of Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans own homes in the Indianapolis marketplace.

Figure C-12.
Median home values in Indianapolis and the United States, 2013-2017



Note: The sample universe is all owner-occupied housing units.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-12 indicates that Black American, Hispanic American, and Native American homeowners in the Indianapolis marketplace own homes of lower median value than non-Hispanic white American homeowners.

Figure C-13.
Denial rates of
conventional
purchase loans for
high-income
households in
Indianapolis and the
United States 2017

Note:

High-income borrowers are those households with 120% or more of the HUD area median family income (MFI).

Source:

FFIEC HMDA data 2017. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool:
<http://www.consumerfinance.gov/hmda/explore>.

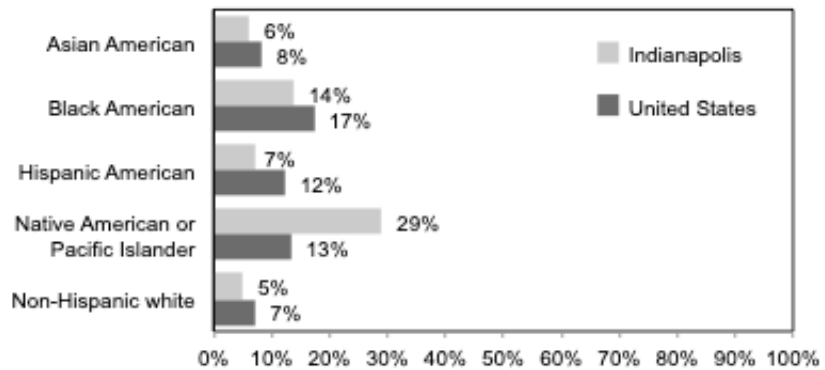


Figure C-13 indicates that Black Americans, Hispanic Americans; and Native Americans or Other Pacific Islanders in the Indianapolis marketplace were denied conventional home purchase loans at higher rates than non-Hispanic white Americans.

Figure C-14.
Percent of
conventional home
purchase loans that
were subprime in
Indianapolis and the
United States, 2017

Source:
 FFIEC HMDA data 2016. The raw
 data extract was obtained from
 the Consumer Financial
 Protection Bureau HMDA data
 tool:
<http://www.consumerfinance.gov/hmda/explore>.

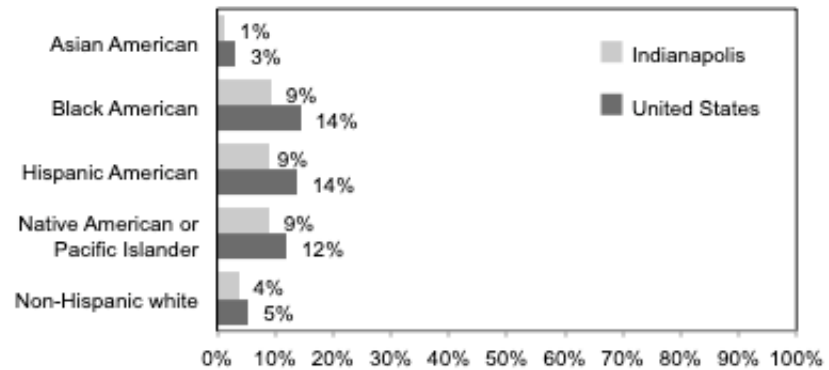


Figure C-14 indicates that Black Americans; Hispanic Americans; and Native American or Pacific Islanders in the Indianapolis marketplace were awarded subprime conventional home purchase loans at greater rates than non-Hispanic white Americans.

Figure C-15.
Business loan denial
rates in the East
North Central
Division and the
United States, 2003

Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The East North Central Division consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

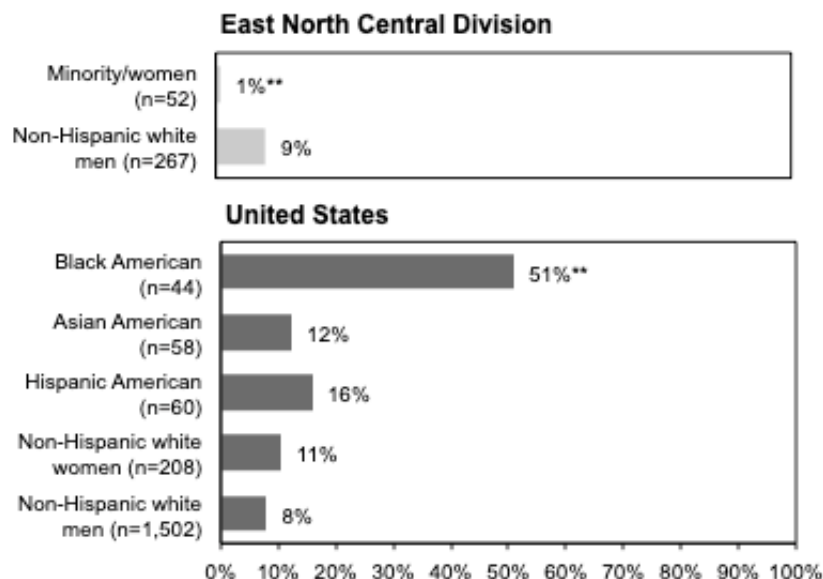


Figure C-15 indicates that, in 2003, minority- and woman-owned businesses in the East North Central Division were denied business loans at a lower rate than businesses owned by non-Hispanic white men. In the United States as a whole, Black American-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

Figure C-16.
Businesses that did
not apply for loans
due to fear of denial
in the East North
Central Division and
the United States,
2003

Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The East North Central Division consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

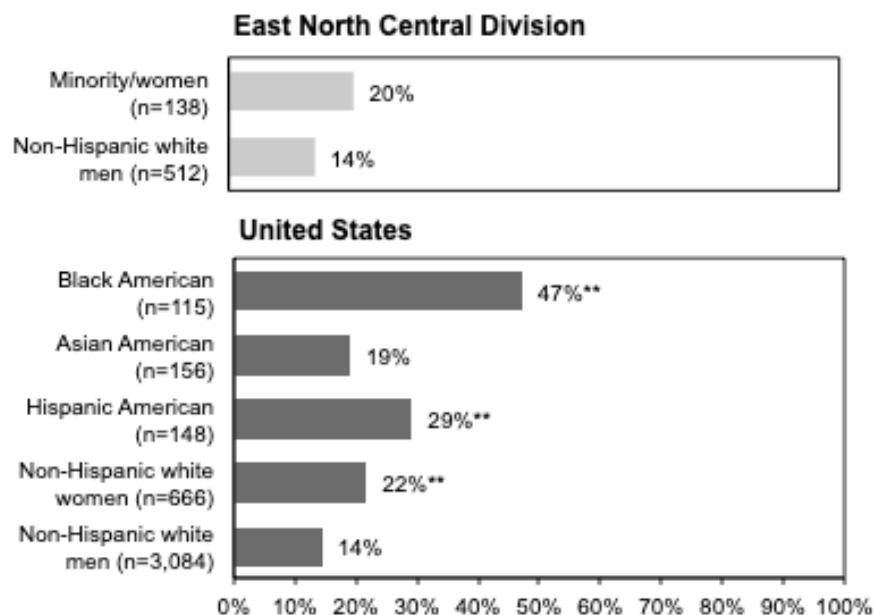


Figure C-16 indicates that, in 2003, Black American-, Hispanic American- and non-Hispanic white woman-owned businesses were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial, considering the United States as a whole.

Figure C-17.
Mean values of
approved business
loans, East North
Central Division and the
United States, 2003

Note:

** Denotes statistically significant differences from non-Hispanic white men (for minority groups and women) at the 95% confidence level.

The East North Central Division consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from
 2003 Survey of Small Business
 Finance.

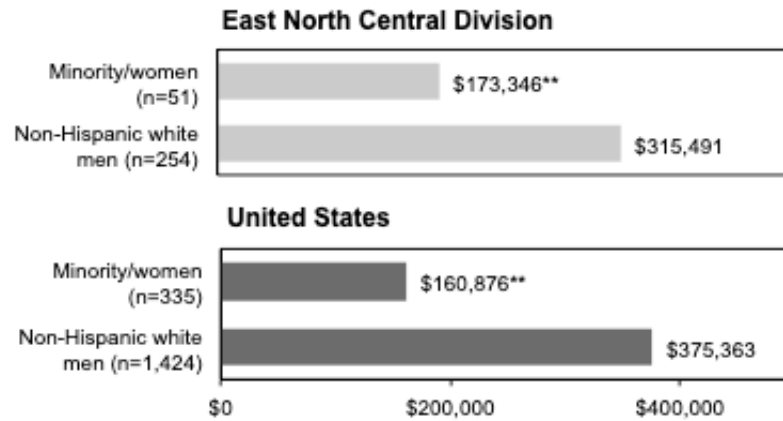


Figure C-17 indicates that, in 2003, minority- and woman-owned businesses in the East North Central Division and the United States who received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

Figure C-18.
Self-employment rates in study-related industries
in Indianapolis and the United States, 2013-2017

Indianapolis	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	11.7%	9.4%	10.0%
Black American	23.3%	10.9% **	5.8% *
Hispanic American	30.8%	12.2%	8.4%
Native American	36.0%	64.4%	0.0%
Other minority group	0.0%	25.7%	0.0%
Subcontinent Asian American	43.5%	12.5%	0.0%
Non-Hispanic white	23.7%	19.7%	9.0%
Gender			
Women	14.6% **	13.4% **	12.4% **
Men	25.8%	23.6%	6.2%
Disability Status			
People with disabilities	36.5% **	21.9%	6.3%
All Others	23.8%	18.3%	8.5%
Veteran Status			
Veteran	23.3%	27.6% **	6.8%
Non-veteran	24.8%	18.1%	8.4%
All individuals	24.7%	18.6%	8.3%
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	23.1% **	15.8% **	9.4% **
Black American	17.6% **	13.1% **	6.0% **
Hispanic American	17.7% **	15.2% **	11.0% **
Native American	18.1% **	22.0% **	10.9% **
Other minority group	23.6%	16.6% **	13.8%
Subcontinent Asian American	21.8% **	13.1% **	10.3% **
Non-Hispanic white	25.9%	24.4%	12.2%
Gender			
Women	16.2% **	18.2% **	14.8% **
Men	23.7%	25.3%	9.2%
Disability Status			
People with disabilities	27.8% **	27.6% **	13.0% **
All Others	22.7%	21.5%	11.0%
Veteran Status			
Veteran	26.6% **	29.1% **	9.8% **
Non-veteran	22.7%	21.4%	11.2%
All individuals	23.0%	21.8%	11.1%

Note: *, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites, between women and men, between people with disabilities and all others, or between veterans and non-veterans is statistically significant at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-18 indicates that Black Americans working in the Indianapolis professional services industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. Similarly, Black Americans working in the Indianapolis goods and services industry also exhibited lower self-employment rates than non-Hispanic white Americans. In addition, women working in the Indianapolis construction and professional services industries exhibited lower self-employment rates than men.

Figure C-19.
Predictors of business
ownership in construction
in Indianapolis, 2013-2017

Note:

The regression included 2,193 observations.

** Denotes statistical significance at the 95% confidence level.

Other race minority omitted from the regression due to small sample size.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, male for the gender variable; high school diploma for the education variables; all others for the disability variable; and non-veteran for the military experience variable.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.6927 **
Age	0.0662 **
Age-squared	-0.0005
Married	-0.1065
Disabled	0.2700 *
Number of children in household	0.0658
Number of people over 65 in household	-0.0180
Owns home	-0.1687
Home value (\$000s)	0.0005 *
Monthly mortgage payment (\$000s)	-0.0058
Interest and dividend income (\$000s)	0.0019
Income of spouse or partner (\$000s)	-0.0005
Speaks English well	0.1354
Less than high school education	0.1504
Some college	-0.0548
Four-year degree	-0.0707
Advanced degree	-0.2952
Asian Pacific American	-0.0878
Black American	0.0267
Hispanic American	0.2947
Native American	0.4579
Other minority group	0.0000 **
Subcontinent Asian American	1.1274
Women	-0.4021 **
Veteran	-0.3129 **

Figure C-19 indicates that being a woman working in the Indianapolis construction industry is related to a lower likelihood of owning a construction business than being a man, even after accounting for various other personal characteristics. In addition, being a veteran working in the Indianapolis construction industry is related to a lower likelihood of owning a construction business than being a non-veteran, even after accounting for various other personal characteristics.

Figure C-20.
Disparities in business ownership rates for
Indianapolis construction workers, 2013-2017

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	10.4%	25.4%	41
Veteran	21.1%	30.3%	70

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-20 indicates that non-Hispanic white women own construction businesses in the Indianapolis marketplace at a rate that is 41 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics). Similarly, veterans own construction businesses in the Indianapolis marketplace at a rate that is 70 percent that of similarly-situated non-Hispanic white men who are not veterans.

**Figure C-21.
Predictors of business
ownership in professional
services in Indianapolis,
2013-2017**

Note:

The regression included 2,052 observations.

** Denotes statistical significance at the 95% confidence level.

Speaks English well omitted from the regression due to small sample size.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables; male for the gender variable; high school diploma for the education variables; all others for the disability variable; and non-veteran for the military experience variable.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.4468 **
Age	0.0437
Age-squared	-0.0001
Married	0.1420
Disabled	0.1376
Number of children in household	0.1315 **
Number of people over 65 in household	-0.1695
Owns home	-0.0242
Home value (\$000s)	0.0005 **
Monthly mortgage payment (\$000s)	0.0454
Interest and dividend income (\$000s)	0.0133 **
Income of spouse or partner (\$000s)	0.0010 *
Speaks English well	0.0000 **
Less than high school education	-0.4296
Some college	0.0747
Four-year degree	0.3901 **
Advanced degree	0.7670 **
Asian Pacific American	-0.1288
Black American	-0.0296
Hispanic American	0.3675
Native American	1.4182 **
Other minority group	0.1897
Subcontinent Asian American	-0.9565 **
Women	-0.2490 **
Veteran	-0.1992

Figure C-21 indicates that being Subcontinent Asian American working in the Indianapolis professional services industry is related to a lower likelihood of owning a professional services business than being non-Hispanic white American, even after accounting for various other personal characteristics. In addition, being a woman working in the Indianapolis professional services industry is related to a lower likelihood of owning a professional services business than being a man, even after accounting for various other personal characteristics.

Figure C-22.
Disparities in business ownership rates for
Indianapolis professional services workers, 2013-2017

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Subcontinent Asian American	5.4%	23.9%	23
Non-Hispanic white women	14.1%	22.5%	63

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-22 indicates that Subcontinent Asian Americans own professional services businesses in the Indianapolis marketplace at a rate that is 23 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Similarly, non-Hispanic white women own professional services businesses in the Indianapolis marketplace at a rate that is 63 percent that of similarly-situated non-Hispanic white men.

Figure C-23.
Predictors of business
ownership in goods and
services in Indianapolis,
2013-2017

Note:

The regression included 1,991 observations.

** Denotes statistical significance at the 95% confidence level.

Native American, Other race minority, and Subcontinent Asian American omitted from the regression due to small sample size.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, male for the gender variable; high school diploma for the education variables; all others for the disability variable; and non-veteran for the military experience variable.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-4.0022 **
Age	0.0530 *
Age-squared	-0.0004
Married	0.0167
Disabled	-0.1650
Number of children in household	0.1056 *
Number of people over 65 in household	0.1417
Owens home	-0.0459
Home value (\$000s)	0.0001
Monthly mortgage payment (\$000s)	-0.0291
Interest and dividend income (\$000s)	0.0051
Income of spouse or partner (\$000s)	0.0009
Speaks English well	0.9652 **
Less than high school education	0.0709
Some college	-0.0866
Four-year degree	-0.0972
Advanced degree	-0.0238
Asian Pacific American	0.3230
Black American	-0.2036
Hispanic American	0.2071
Native American	0.0000 **
Other minority group	0.0000 **
Subcontinent Asian American	0.0000 **
Women	0.4160 **
Veteran	-0.1776

Figure C-23 indicates that being a minority, a woman, a person with a disability, or a veteran is not related to the likelihood of owning a goods and services business in the Indianapolis marketplace after accounting for various other personal characteristics.

Figure C-24.
Rates of business
closure, expansion,
and contraction,
Indiana and the United
States, 2002-2006

Note:

Data include only non-publicly held businesses.

Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

Statistical significance of these results cannot be determined, because sample sizes were not reported.

Source:

Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

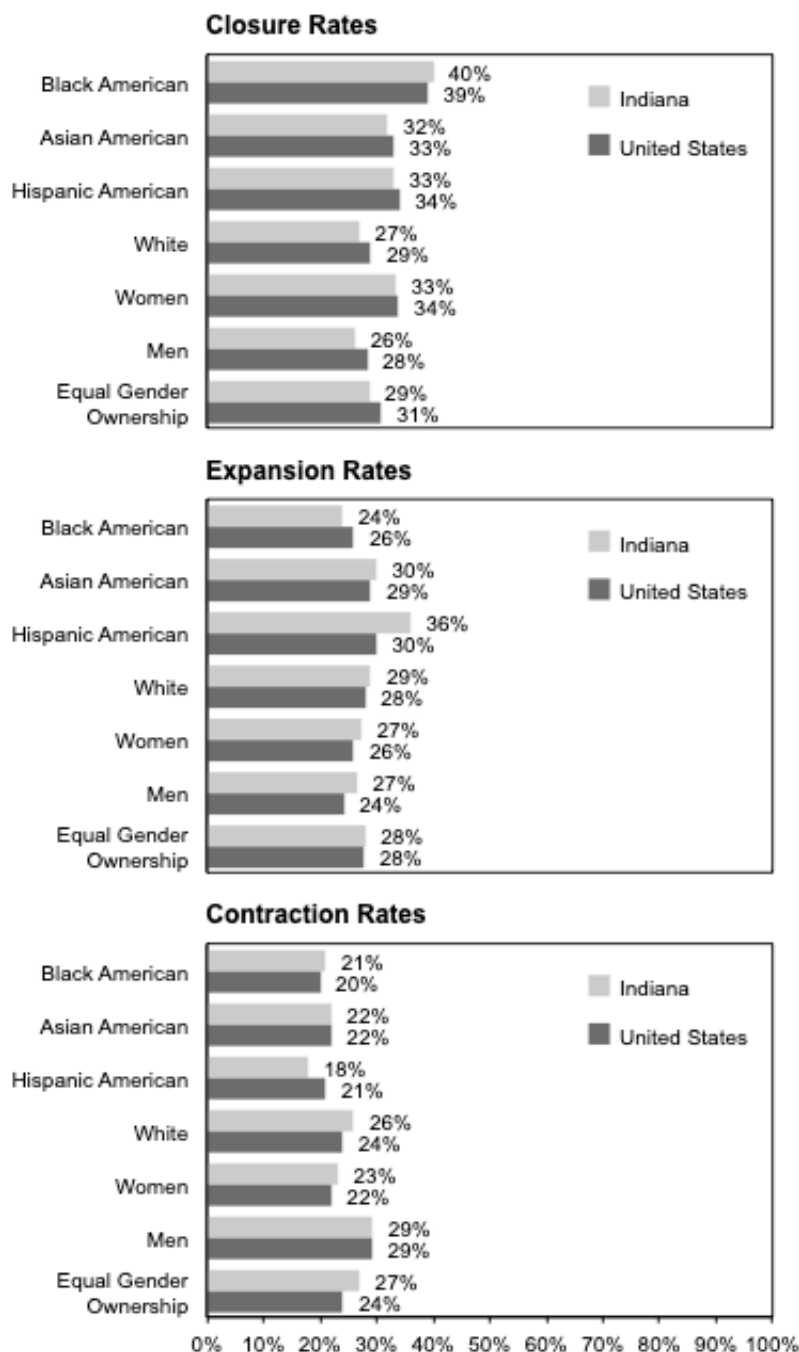
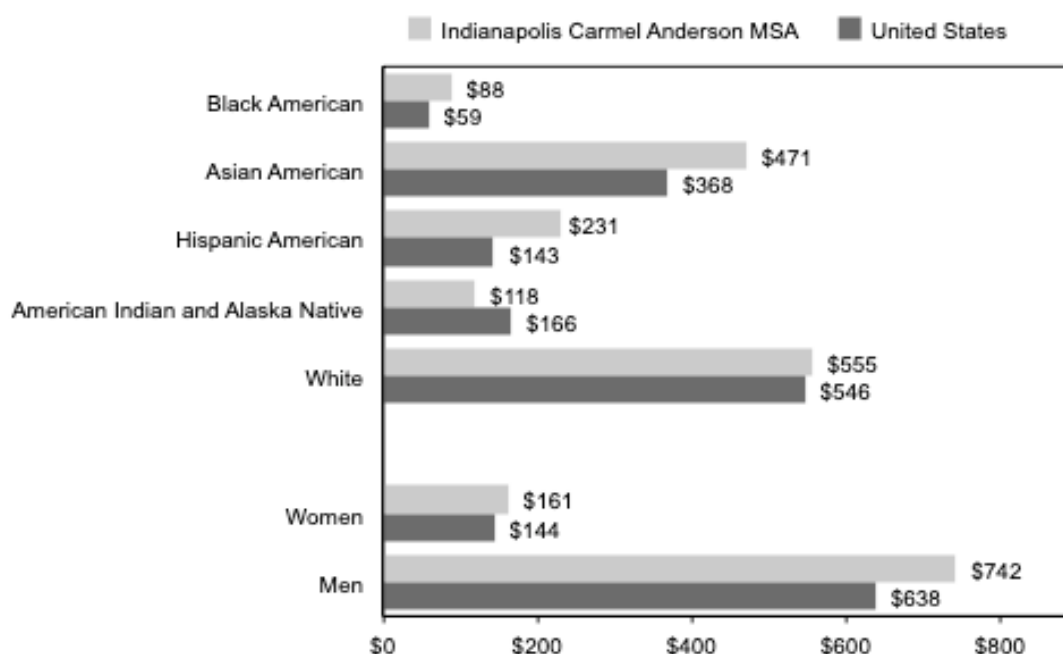


Figure C-24 indicates that Black American-, Asian American-, and Hispanic American-owned businesses in Indiana show higher closure rates than white American-owned businesses. Woman-owned businesses in Indiana also show higher closure rates than businesses owned by men. In addition, Black American-owned businesses in Indiana show lower expansion rates than white American-owned businesses.

Figure C-25.
Mean annual business receipts (in thousands) in the
Indianapolis Carmel Anderson MSA and the United States, 2012



Note: Includes employer and non-employer firms.

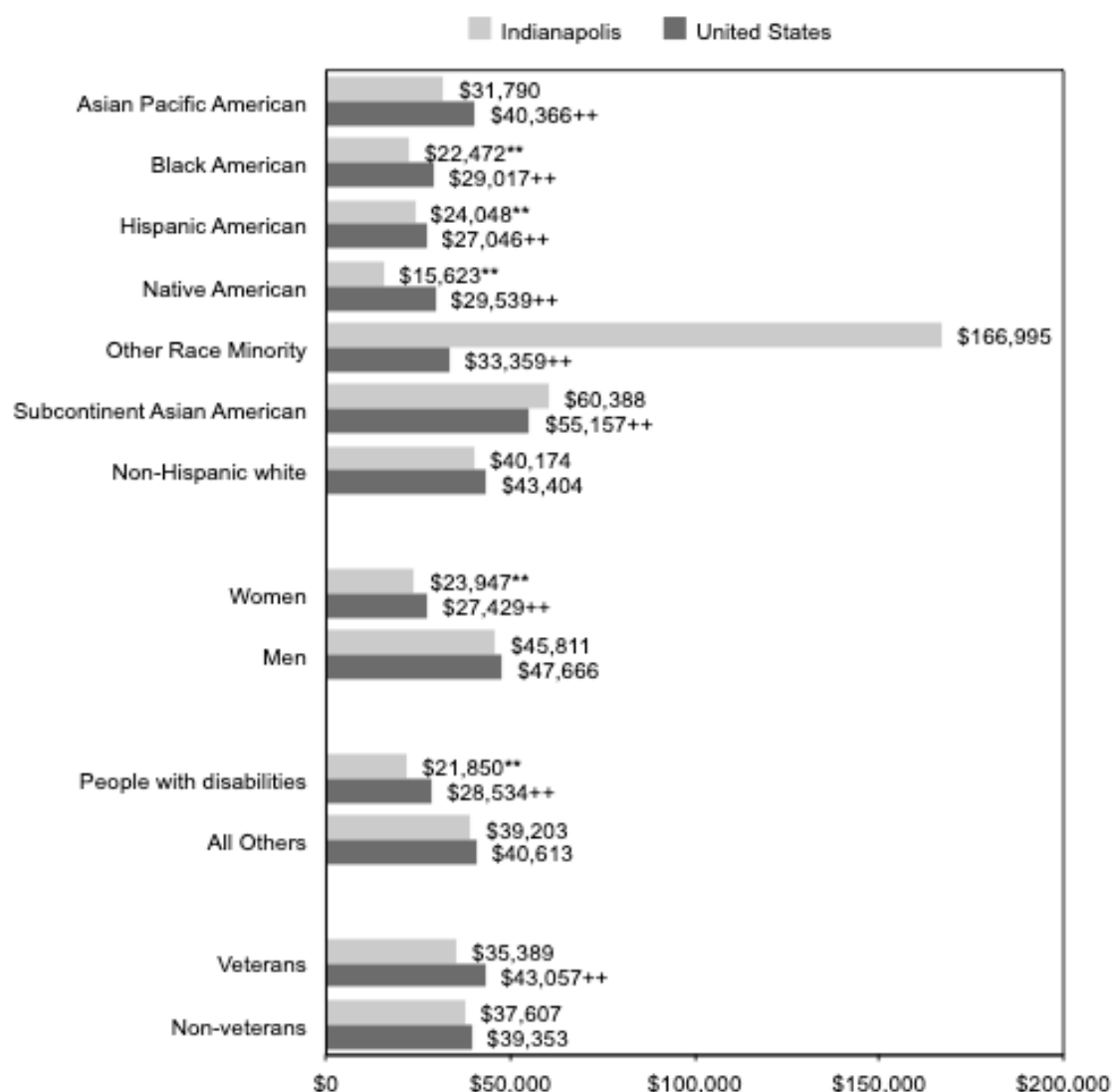
Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Data on Native Hawaiian and other Pacific Islander withheld for Indianapolis Carmel Anderson MSA because it did not meet the publication standards of the U.S. Census Bureau.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Figure C-25 indicates that, in 2012, Black American-; Asian American-; Hispanic American-; and American Indian and Alaskan Native-owned businesses in the Indianapolis region showed lower mean annual business receipts than non-Hispanic white American-owned businesses. In addition, woman-owned businesses in the region showed lower mean annual business receipts than businesses owned by men.

Figure C-26.
Mean annual business owner earnings in
Indianapolis and the United States, 2013-2017



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), from all others (for people with disabilities), and from non-veterans (for veterans) at the 95% confidence level for Indianapolis and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-26 indicates that the owners of Black American-owned businesses, Hispanic American-owned businesses, and Native American-owned businesses in the Indianapolis marketplace earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses and businesses owned by people with disabilities in the Indianapolis marketplace earn less on average than the owners of businesses owned by men and people without disabilities, respectively.

Figure C-27.
Predictors of business owner
earnings in Indianapolis,
2013-2017

Note:

The regression includes 1,873 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, male for the gender variable; high school diploma for the education variables; all others for the disability variable; and non-veteran for the military experience variable.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center:
<http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	680.152 **
Age	1.136 **
Age-squared	0.999 **
Married	1.242 **
Speaks English well	1.067
Disabled	0.555 **
Less than high school	0.594 **
Some college	0.831
Four-year degree	1.149
Advanced degree	1.697 **
Asian Pacific American	1.309
Black American	0.613 **
Hispanic American	1.288
Native American	0.454
Other Race Minority	4.948 **
Subcontinent Asian American	1.386
Women	0.517 **
Veteran	0.725

Figure C-27 indicates that, compared to being the owner of a non-Hispanic white owned business in the Indianapolis marketplace, being the owner of a Black American-owned business is related to lower business earnings, even after accounting for various other business and personal characteristics. Similarly, compared to being the owner of a non disabled-owned business, being the owner of a disabled-owned business is related to lower business earnings. Finally, being the owner of a woman-owned business is related to lower business earnings.

Figure C-28.
Predictors of business
owner earnings
(regression), United States,
2013-2017

Note:

The regression includes 440,023 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, male for the gender variable; high school diploma for the education variables; all others for the disability variable; and non-veteran for the military experience variable.

Variable	Exponentiated Coefficient
Constant	633.896 **
Age	1.143 **
Age-squared	0.999 **
Married	1.230 **
Speaks English well	1.134 **
Disabled	0.591 **
Less than high school	0.753 **
Some college	1.041 **
Four-year degree	1.309 **
Advanced degree	1.836 **
Asian Pacific American	1.067 **
Black American	0.817 **
Hispanic American	1.046 **
Native American	0.697 **
Other Race Minority	1.063
Subcontinent Asian American	1.140 **
Women	0.528 **
Veteran	0.873 **

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-28 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being an owner of a Black American- or Native American-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. In addition, compared to being the owner of a male-owned business in the United States, being the owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. Similarly, being the owner of a disabled-owned or veteran-owned business is related to lower earning.

APPENDIX D.

Anecdotal Information about Marketplace Conditions

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Anecdotal Information about Marketplace Conditions

Appendix D describes the public engagement process used in the City of Indianapolis and Marion County (referred to together as *City*) Disparity Study, and presents the qualitative information that the study team collected and analyzed as part of the public engagement process. This appendix is divided into the following sections:

A. Introduction describes the public engagement process for gathering and analyzing the qualitative information summarized in Appendix D. *(page 2)*

B. Business Background summarizes information about how businesses become established, what products and services they provide, the growth of the firm and how the firm markets itself. *(page 3)*

C. Race/Ethnicity/Gender/Veteran/Disability Ownership and Certification presents information about the business's race/ethnicity/gender, veteran, and disability status of ownership, the certification the firm holds, and business owners' experiences with the City's XBE certification program. *(page 24)*

D. Experiences in the Private Sector and Public Sector presents business owners' experiences pursuing private and public sector work. *(page 37)*

E. Doing Business as a Prime Contractor or as a Subcontractor summarizes information about the mix of businesses' prime contract and subcontract work, how they obtain that work and experience working with other certified firms. *(page 47)*

F. Doing Business with Public Agencies describes business owners' experiences working with or attempting to work with the City and public agencies in the Indianapolis area, and identifies potential barriers to doing work for public agencies. *(page 54)*

G. Marketplace Conditions presents information about business owners' and representatives' current perceptions of local marketplace conditions and what it takes for firms to be successful. *(page 57)*

H. Barriers or Discrimination Based on Race/Ethnicity/Gender/Disability or Veteran status describes the barriers and challenges firms face in the local marketplace, and details if and how race/ethnicity-, gender-, disability-, or veteran-based discrimination may be contributing to these issues. *(page 63)*

I. Additional Information Regarding whether any Race/Ethnicity/Gender/Veteran or Disability Owned Discrimination Affects Business Opportunities presents information about any

experiences business owners or representatives have with discrimination in the local marketplace, and how this behavior affects minority-, woman-, veteran-, or disabled-owned firms. *(page 83)*

J. Insights Regarding Business Assistance Programs or Other Neutral Measures describes business owners' and representatives' awareness of, and opinions about business assistance programs, and other steps to remove barriers for all businesses or small businesses in the Indianapolis area. *(page 93)*

K. Insights Regarding Any Other Race-/Ethnicity-/Gender-/Disability- or Veteran-based Measures includes business owners' comments about other current or potential race/ethnicity, gender-, disability-, or veteran-based programs. *(page 109)*

L. Any Other Insights and Recommendations presents additional comments and recommendation for the City of Indianapolis to consider. *(page 111)*

A. Introduction

During the study, business owners and representatives had the opportunity to discuss their experiences working in the Indianapolis area and provide public testimony. From March through October 2019, the study team facilitated several public engagement events and used a variety of methods to gather comments related to the disparity study. The qualitative data were collected through the following channels:

- Oral testimony provided during public meetings;
- Written testimony provided via fax or email;
- In-depth interviews;
- Availability telephone surveys; and
- Focus groups.

Public meetings. The study team solicited written and verbal testimony at three public forums for the disparity study held at various Indianapolis Public Library locations throughout the City. The meetings were held on March 18th, 19th and 20th of 2019. The study team reviewed and analyzed all public comments from the three meetings and included many of those comments in Appendix D. The comments chosen for Appendix D highlight key themes from the public testimony. Public form comments are denoted by the prefix "PT" throughout Appendix D.

Written testimony. Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or email. All written testimony received by email or fax (3 responses) were then analyzed by the study team and exemplary quotes are included in Appendix D. Written testimony is indicated by the prefix "WT" throughout Appendix D.

In-depth interviews. From April through October 2019, the study team conducted 30 unique in-depth interviews with owners and representatives of 30 businesses in the Indianapolis area. The interviews included discussions about interviewee's perceptions of and experiences with the local contracting industry; the City's diverse business (XBE) program; businesses' experiences working or attempting to work with the City and other public agencies in the Indianapolis area; and various other topics. Interviews were conducted by Brilljent and Bingle Research Group (BRG), Indianapolis-based consulting firms.

Interviewees included individuals representing construction businesses, professional services firms, and goods and services suppliers. The study team identified interview participants primarily from a random sample of businesses stratified by business type and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. Some of the businesses that the study team interviewed indicated that they work exclusively as prime contractors or subcontractors, and some indicated that they work as both. All of the businesses that participated in the interviews conduct work in the Indianapolis area.

All interviewees are identified in Appendix D by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a small business enterprise-, an XBE-certified business, a Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), Disabled-owned Business Enterprise- (DOBE-) or Veteran-owned Business Enterprise- (VBE-), or other certified business and reports the race/ethnicity and gender of the business owner.

Availability surveys. The study team conducted availability surveys for the disparity study from March through October 2019. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the Indianapolis marketplace. The study team then analyzed those responses, and included illustrative examples of the different comment types and themes in Appendix D. Availability survey comments are indicated throughout Appendix D by the prefix "AV".

Focus groups. The study team conducted two focus groups, one for construction and one for trucking. During the focus groups the study team asked participants to share their individual experiences working in the Indianapolis marketplace and working with the City and other public agencies. Comments from the focus group are included in Appendix D, and denoted by the prefix "FG."

B. Business Background.

Part B describes the firms interviewed and includes the following information:

- Business characteristics (*page 4*);
- Business formation and establishment (*page 10*);
- Types, locations, and sizes of contracts (*page 15*);

- Employment size of businesses (*page 18*); and
- Growth of the firm (*page 21*).

Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, they were from well-established firms to newly established firms, and worked on small-to-large contracts in the Indianapolis marketplace.

Types of work. Interviewees described the types of work that their firm performs. The study team interviewed #30 construction firms, #9 firms providing professional services, and #8 firms supplying goods and services.

Thirty firms worked in the construction industry. [#1, #2, #4, #7, #10, #11, #12, #15, #21, #22, #23, #27, #29, #30, FG#1, FG#2, FG#3, FG#4, FG#7, FG#8, FG#9, FG#10, FG#11, FG#12, FG#13, FG#14, FG#15, FG#16, FG#17, FG#18] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company stated his company provides trucking and hauling services in the Indianapolis area. [#1]
- The Black American male owner of an MBE-, and DBE-certified construction company explained the type of work the company performs stating, “We are a concrete reinforcing steel fabricator.” [#2]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained the type of services the company provides, “On the site side, we offer everything from pipes to stripes, meaning underground all the way up to stripes at the top of the lot. We just completed a job putting in 1,700 feet of fence. As a company grows, you evolve by picking up new skill sets, and you have to evolve otherwise, every time you turn around, you're in the same set of people. The percentage of business is asphalt, we're probably 60 percent, concrete 30 percent, and sealcoat and stripe about 10 percent.” [#4]
- The non-Hispanic white female owner of a WBE-certified construction company mentioned the type of work her company performs, “We do construction signage and pavement markings.” [#10]
- The Native American male owner of an MBE-certified construction company mentioned, “We're a specialty contractor. Our main areas are caulking, joint sealants, concrete repair, basement waterproofing, and we do some residence flooring.” [#11]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained the type of work his company performs, “What we do is hydro excavation, and that's 90 percent of our business, and 10 percent of it is jetting the sewer lines. We do what's called hydro excavation, and what that is, we remove the dirt and soil away from gas lines, fiber lines, water lines, et cetera, that still can be fully charged. So, by us exposing the lines, it makes it safe for the guys that come in and do it the general way using excavators, and backhoes, and excavating equipment.” [#12]

- The Hispanic American male owner of an MBE-certified landscaping company stated the company performs landscaping and resurfacing services. [#15]
- The owners of a majority owned electrical construction company explained the types of services the company provides, “We offer residential, commercial and industrial [electrical work]. We have experience in those fields, we can do low voltage, phone data stuff, coax, we are not certified to terminate fiber optics, but if we are pulling fiber that already has terminated ends then we can accommodate that.” [#21]
- The non-Hispanic white male owner of an architecture firm described their business, “We do design planning, documentation, construction administration, more some interior architectural interiors. We don't get into engineering and stuff like that. We'll provide full services on that in regards to exterior, interiors, detailing.” [#22]
- The non-Hispanic white male owner of a construction company described the type of work his company performs, “We don't do a lot of wall work, but everything in between we do. We do almost every bit of concrete work that there is. Most any time that we do the job, we take the whole building on. At site work, we do everything from A to B on a site, when we go in and do jobs. We do some wall work, but as I age, I'm not so keen on carrying heavy forms around anymore.” [#23]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company explained, “We are a landscape architecture planning and design firm.” [#27]
- The Asian Pacific American male owner of a construction company described his company as “about 75-80 percent” roofing, with “60 percent residential, 40 percent commercial. Like siding, stucco work. We do gutters. We do the flat rubber roofs, basically all types of roofs. And then interior-wise, we do painting. We do flooring. And we do get into plumbing and stuff, but that's all stuff that's completely subbed out.” [#29]
- The female owner of a WBE-certified construction services company mentioned the type of work her company performs, “We're a commissioning provider, we do test and balances, perform construction quality, and provide construction safety services.” [FG#1]
- The Black American female owner of a DBE-, MBE-, and WBE-certified construction company mentioned the type of work her company performs, “We do fabrication of steel stairs and railing of various sorts. Sometimes we fabricate balconies and special support framework. we support the steel construction trades, and most of our fabricated components go into new construction. We do a good deal of renovation type construction work as well. Recently we've been doing a lot of welding of dumpsters and plates.” [FG#2]
- The female owner of a WBE-certified construction company described her company, “. I work directly as an owner's rep with private developers, the airport authority. So it's kind of funny, because really construction management is what I provide, development management is what I would love to provide, but I personally do owner's representation.” [FG#3]

- The Black American male owner of an MBE-certified construction company stated, “We do general contracting, construction management and subcontracting. Mainly focusing ourselves on interior build outs. We're able to balance between multiple hats.” [FG#4]
- The male representative of a non-XBE certified construction company described his company as, “we have a construction company as well and property management. I represent the construction side” [FG#5]

Nine firms worked in the engineering and professional services industry. [#5, #16, #17, #19, #20, #24, #25, #28, FG#5] For example:

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm described the type of work her company does, “We provide inspection and design, that's what my background is and that's what I wanted our company to be focused on.” [#5]
- The non-Hispanic white male owner of a certified disabled-owned professional services company commented, “We are a survey and engineering firm located in central Indiana. We provide land survey services, civil engineering services, and construction staking services.” [#16]
- The non-Hispanic white male representative of a majority owned professional services company mentioned, “They’ve expanded over the years, when the company started it was helping hospitals prepare for disasters. Now, our product line has broadened out to include products for all types of public safety and emergency response professionals, not just healthcare.” [#17]
- The non-Hispanic white male owner of a certified VBE and Disabled-owned engineering company noted, “I'm a civil engineer and structural engineering is a subset of that. I do some structural work; I mostly troubleshoot with people. My background was largely in concrete.” [#20]
- The non-Hispanic white female owner of a WBE-certified engineering firm mentioned, “Type of business that I do is civil engineering, anywhere from planning, design, into construction observation.” [#24]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm noted the type of work her firm performs, “We specialize in civil engineering and land surveying is our background. We do land surveying for private and public jobs or projects and then we do civil engineering which we do drainage, transportation, sanitation, wastewater.” [#25]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company described the work her company does, “, it is part of HR, but it really is much, much bigger. It's more strategic in terms of what an organization should look like, what the work chart should look like, what kind of jobs we need, how to get clarity for those, what to do with your people, how to engage them, so on, and so forth. It's the strategic side of people. We are not industry specific, so that's definitely in our favor. We

can work with any industry, or any part of government. Any different government agencies, or even in the private sector we can work with anybody. It's all about an organization, and an organization that needs help in figuring out whether they are set up for success, or not. So, we create efficiency." [#28]

Eight firms worked in the goods and services industry. [#3, #6, #8, #9, #13, #14, #18, FG#6] For example:

- The Black American male owner of an MBE-certified electrical supply company described his company stating, "It's a distributor of pipe valves, fittings, plumbing, heating, and other construction supplies based in Indianapolis. With my other company we fabricate and install wood, solid surface and other solid surface items, quartz, plastic laminate. We fabricate and install on all of the products." [#3]
- The Black American male owner of an MBE- and DBE-certified construction supply company explained the type of supplies and services provided, "We're a manufacturer's agent for mechanical, plumbing, electrical, and construction supplies." [#6]
- The Hispanic American female owner of an WBE-, and MBE-certified safety supply company explained the types of products and services her company offers, "We provide installation and design of fire sprinkler systems, inspections testing and maintenance. We also provide alarm, extinguisher, and any other fire life safety services." [#8]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company noted, "We are a metal fabricator and installer here in the local Indianapolis area, we extend through the Midwest and will deliver country wide. We are a corporation that's independently owned. We do have one subsidiary that's a staffing firm, we currently don't operate that one as much anymore. We have a couple of DBAs that we also go by, one acts as a general contractor and the other is a supply firm. We offer material, steel and metal supply through that company." [#9]
- The non-Hispanic white male owner of a goods and services company commented, "We're in the security alarm business, so burglar alarms, cameras, and door access are our main components, we also do fire alarms on occasions. I would say we are 40-percent burglar alarms and 40-percent cameras and 10-percent door access. We do very little fire." [#13]
- The non-Hispanic white male representative of a majority owned goods and services company explained the type of work the company performs, "They do a lot of print media for the local postal service in the Print Media Division. In the transportation division we offer third party logistics, operations range anywhere from print media to auto parts, plastics, paper, pretty much anything that you can put on a truck. We are hauling for various companies. For the corporate office I would say we're doing probably 70 percent with the Print Media division, and the other 30 percent would be auto parts, brake pads and seats, that come from Mexico into El Paso and then up through the states." [#14]

Years in business. 31 businesses reported their date of establishment. The majority of firms (#20 out of 31) reported that they were well-established businesses; they had been in business

for more than ten years. #7 out of the 31 businesses had been in business for between five and nine years. #4 firms were newly established, having been in business for less than four years.

Four firms reported they had been in business for fewer than four years. [#1, #16, #26, #28] For example:

- The non-Hispanic white male owner of a certified disabled-owned professional services company noted, “We started the company January 1st of 2015, so we’re at four years and eight months.” [#16]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company stated that her company started in January 2018 and has been operating for just over a year. [#26]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company mentioned that her company began in 2016. [#28]

Seven firms reported they had been in business for five to ten years. [#8, #11, #15, #21, #29, #30, FG#4] For example:

- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company mentioned, “I founded the company eight years ago, we started in 2011.” [#8]
- The Native American male owner of an MBE-certified construction company commented, “I’ve been here the entire time, I started full time in 1982, 37 years. I have owned it since the beginning of 2012, so six and a half years I’ve owned it. I bought it from my uncle.” [#11]
- The Asian Pacific American male owner of a construction company noted that his company has been in business, “since 2014.” [#29]
- The Black American male owner of an MBE-certified construction company stated, “We’ve been in business since 2012, locally we have been in business since 2014. We started business in Maryland, I’m originally from Indiana, a Purdue graduate, but I ended up moving to Maryland for a few years and I started a business up there in Briarbank in 2014.” [FG#4]

Twenty firms reported they had been in business for more than ten years. [#2, #3, #4, #5, #9, #10, #12, #13, #14, #17, #18, #20, #22, #23, #24, #25, FG#1, FG#2, FG#3, FG#11] For example:

- The Black American male owner of an MBE-, and DBE-certified construction company mentioned how many years the company has been in business, “This is our 14th year, we’ll be embarking on our 15th year after April the 21st.” [#2]
- The Black American male owner of an MBE-certified electrical supply company stated, “I’ve been working in the business for 35 years. I bought my first company in November 2001 then I started my electrical company March of 2004.” [#3]

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company expressed the year he purchased the business to become the owner and the year it was originally established stating, “The company started in 1997, but has been around since 1988.” [#4]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm mentioned the number of years in business, “This will be the 11th year, at the end of this year.” [#5]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned, “We started in June of 2006.” [#12]
- The non-Hispanic white male owner of a goods and services company mentioned the company was formed in 2017. [#13]
- The non-Hispanic white male representative of a majority owned goods and services company stated, “We were founded in 1982 out of Wooddale, Illinois.” [#14]
- The non-Hispanic white male representative of a majority owned professional services company mentioned the company was formed by a doctor in 1991.” [#17]
- The non-Hispanic white male owner of a certified VBE- and Disabled-owned engineering company expressed, “I incorporated 20 years ago in the month of August.” [#20]
- The non-Hispanic white male owner of an architecture firm stated, “my firm is 20 years old now.” [#22]
- The non-Hispanic white male owner of a construction company noted, “I’m the sole owner and have been for several years. I became an LLC in 1999. I started back when I was 20 years old, and now I am 56, so I’ve been at this business quite a long time.” [#23]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm expressed, “We started in 2005 and we just celebrated 14 years.” [#25]
- The female owner of a WBE-certified construction services company noted the year she started the company, “We have been in business since 2007.” [FG#1]
- The Black American female owner of a DBE-, MBE-, and WBE-certified construction company mentioned the year she started the company, “We’ve been in business since 2005 and been MNWBE certified for all of that time, and DBE certified for nearly as long.” [FG#2]
- The male representative of a non-XBE certified construction company stated, “we’ve been in business since 1977.” [FG#5]
- The female minority owner of a trucking company noted that her business “started in 1967 back when the minority program wasn’t even in existence.” (FG#11)

Business formation and establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

The majority of business owners and founders had worked in the industry or a related industry before starting their own businesses. [#2, #3, #4, #6, #10, #11, #12, #13, #17, #19, #20, #21, #22, #23, #25, #26, #27, #28, FG#11] This experience helped founders build up industry contacts and expertise. Business people were often motivated to start their own firms by the prospects of self-sufficiency and business improvement. Here are some of the founder stories from interviews:

- The Black American male owner of an MBE-, and DBE-certified construction company explained how the company was started, “My background was not in construction or rebar. I ran manufacturing plants ever since I graduated from school. Back in 2002, following the 9/11, the company I was running, I was the operations VP at a manufacturing company that was sold to a Canadian competitor. They moved the entire operation to Canada and I was out of a job for the first time in my life in my early 50s. I happened to run into a gentleman I’d previously worked with at the gym on a Monday, and by Thursday I was on his payroll to open a rebar fabrication shop in Franklin, and that’s how I got into this industry.” [#2]
- The Black American male owner of an MBE-certified electrical supply company explained how the company was established, “I’m a chemical engineer and I ran a chemical company before I bought my first company pipe supplies, then I added electrical supplies to that company’s product line. Eventually, as my electrical business grew, I spun it off into a separate company. So, the third company I invested in was in 2002 and I bought the founder out in October of 2007. My third company is consulting and engineering design firm, full-service, civil, structural, LEP, project management, some architecture. To this day all three companies are certified as MBE.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company specified how he became the owner, “I used to haul for the gentleman, he was getting old, tired and he was ready to hand it off to a young man that was filled with energy and vision. He came here in 1988 out of Michigan and started it here that same year. Prior to that, he was up in Detroit paving. He was trying to sell it to me since 1995. I was his subcontractor, so I got to see him day in and day out for a while.” [#4]
- The Black American male owner of an MBE- and DBE-certified construction supply company explained how the company was developed, “I was interested in starting a company, and starting a supplier company required less overhead than starting a contracting company. I worked for a mechanical contractor, I started out as a pre-apprentice in sheet metal work, became an apprentice, went to journeyman, and ended up in the office as a project manager then, became an estimator. Some of the challenges as an estimator for that large mechanical contractor was finding minority suppliers. So, as a minority working for a contractor, trying to meet the goals that were presented by the city or the state, I had trouble meeting that. So, one day a little light came on, and I thought I could be that supplier. It seemed like an easy way to go into business, or a more

streamlined way to go into business. So, that's when it all started. I found a few companies that I could represent." [#6]

- The non-Hispanic white female owner of a WBE-certified construction company mentioned, "I started my career in the construction industry in 2004, I worked for the largest surety company in the State of Indiana. A big part of my book of business was road contractors in the state, and so I got in and saw a lot of large companies, small companies, I handled about 150 contractors in the State of Indiana in prequalifying them to be able to bid work for the city or the state. A mutual acquaintance of mine approached me out of the blue one day and said, 'I've got a great opportunity, someone's looking to retire, doesn't necessarily have the best continuity plan in place, and I think you would be a great fit, and the two of you would really hit it off.' We did and then we worked out a plan." [#10]
- The Native American male owner of an MBE-certified construction company explained how he became the owner, "My maternal grandfather is who the company is named after, him and his brothers started it in '36, he worked here his entire career. My uncle on my mother's side, took it over from him in the mid '70s. In '82, I graduated high school, I started working here as just one of the field guys. Then I joined the union, did that for 25 years, was really good at it, really enjoyed it, but the company was getting to the point that the gentleman that ran it for my uncle, he was getting quite senior in age. I came in and talked to my uncle and took a position as a project manager, estimator. That was about 2004, when I came and started working in the office. About a year and a half later, my uncle put me in charge of the business and I started running it and found I had a pretty good aptitude for it." [#11]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained how he started the company, "I started the company in 2006, I'm 100 percent owner of the company. I was a union laborer for roughly 14 years and I decided to go out on my own. I was given an opportunity to acquire a contract and from that moment on, we've had some good times and bad times, but overall, it's been very good for me and my family." [#12]
- The non-Hispanic white male owner of a goods and services company described how the company was started, "I had been working at another company, running the company, and there was a change in the direction of the company, so the owner and I separated and we formed our own company from there." [#13]
- When asked how the company was established the non-Hispanic white male representative of a majority owned professional services company commented, "A realization that there was a need for the products and services that we carry. There was a need in the marketplace that wasn't being filled, and the founder recognized that." [#17]
- The Black American male owner of an MBE- and DVBE-certified professional services company explained how the company was established, "After my law enforcement career and military career, which I retired both on the same day, I created my business. I was in

law enforcement for 21 years; I was in the National Guard first before I joined the law enforcement. I had the best of both worlds. Security has been my life.” [#19]

- The non-Hispanic white male owner of a certified VBE and Disabled-owned engineering company mentioned how the company was formed, “After being in the consulting business for a while, I worked for a local Cement Association until they ceased field operations. Then I worked for a state concrete organization for quite a while. By working with concrete, I got involved with foundations, which got me involved with basements, which got me involved with residential construction. Some of these builders said, ‘Oh, could you work for us?’ I kind of took off in that direction because there aren’t many engineers who want to get involved with those people and their problems.” [#20]
- The owners of a majority owned electrical construction company explained how the company was established, “My father and the owner of an electrical company at the time were really good friends, so I came in and started working with them as a summer job at the end of high school. I stayed on with them for a few years and I moved to another electric company, I worked for them ten years. They were two five-year stents, that is where I got most of my big job experience. In 2014 I started my company.” [#21]
- The non-Hispanic white male owner of an architecture firm recalled their business formation, “Basically it was the fact that I had worked for a larger firm for many years and was really just ready to do something different. Started sole practitioner, see about it, and wanted to kind of get into residential work instead of, I was doing medical work. I just needed a change” [#22]
- The non-Hispanic white male owner of a construction company noted, “I started here back in 1983, and then it was 1999 when I eventually went LLC, I was still pretty young and spoiled when I started the company. I was a union concrete finisher in my early years, and things weren’t going my way, I wasn’t working as much as I should, and I was laid off. Then, I was working out at a gas reservoir area, working for a framer, doing framework, building houses. I got to talking to one of the builders out there, and that’s when it all started, we started doing the guy’s concrete work, that’s when I started doing my own thing.” [#23]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm expressed how she started the firm, “I kind of fell into this field. I started when I was in high school, I started working for a small surveying firm. I just stuck with it so I’ve been in the field for 33 years now. I was in a partnership with another firm prior to starting my company and I always wanted my own business and decided to go out on my own. In 2005 I started the firm with three other employees so a total of four of us and we’ve grown we’ve had up to like 28 employees but now we’re at 20. I like to keep it 15 to 20 if I can, I like the smaller atmosphere.” [#25]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company recalled her business formation, “Well, I wanted to do something, I actually just wanted to do something different. I have always wanted to own my own business, and I actually owned a staffing agency long, long, long time ago in Indiana. I wanted to do my own

business and I wanted to do something that wouldn't be really labor intensive, so I decided to start my company. I started it on my own and I actually had a mentor of another nurse that had started the same type of business. I just got me a mentor of somebody that had already done it, and she helped me.” [#26]

- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company described how the company was started, “It was a small company at the time, the previous owner was able to secure two very large contracts, that's why I was brought in to assist her. I came on as a partner because she didn't have experience in the sizes of those projects. We were chosen for the projects, primarily because we were female, in both cases of these projects. It was out-of-state consultants, large national firms that got these contracts, and they had to include local minorities. They told us, ‘You will get this percentage,’ as opposed to, ‘We really feel like this is the work we want you to do, because you're qualified and you're experienced and you're good at this. We will throw that percentage out of the window.’ But we were relegated to simply helping them meet their goal. In 1992 the previous owner made the decision to branch off and become a minority enterprise, so that she could participate on larger projects with consultants.” [#27]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company noted, “I've been doing this work for a very, very long time. I've been a consultant in my career. I've also worked full time for certain companies. I just felt like there was a need for it, and it was the right time in my personal life to take that step.” [#28]
- The female minority owner of a trucking company described the formation of her business, “I'm a third generation business owners. Our business was started in 1967 back when the minority program wasn't even in existence at that time. And my dad was very successful in keeping the business open and then he died in 2005 and me and my brother worked right alongside him and learned the business.” (FG#11)

Other motivations. There were also other reasons and motivations for the establishment of interviewees’ businesses. [#1, #5, #7, #8, #9, #15, #29, FG#3] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company explained how the company was formed, “I went to high school with a guy whose dad was in the business. It seemed like they lived a good, nice lifestyle, and I thought it was cool to have equipment running around the city with my name on it so it was always a goal of mine or a dream of mine that I wanted to own my own fleet of trucks. So, I worked in corporate America for eight years, I didn't see myself really climbing the corporate ladder within that company so one day I decided to start my own company, my dad and I. It was all underneath my name but he was kind of my helper there and started with one truck and started to grow from there.” [#1]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained how the business was formed, “I started at the downfall of the 2008 crisis and made the bad decision of cashing out my 401K to start the company when it had lost all of its value, so I cashed it out at the bottom. Took what I could and put it into the company and

took the risk. The benefit to that was, at that time, whenever a crisis like that happens, of course, the government typically puts funds towards infrastructure costs and to get those kinds of businesses up and running. So, as a WBE, we were able to capture a lot of work right away. We were very fortunate, what should be the biggest downfall, actually, was a benefit to us getting started.” [#5]

- The Black American female owner of an MBE-, WBE-, and DBE-certified trucking company explained how the company was established, “I worked as an executive administrative secretary for a number of years at a local trucking company. I’ve always been a part of the trucking business. In 1979, my husband started with one truck, doing work with his dad. I started my own business in 1994, I am the owner and co-founder with my daughter. I’m now 100% owner. I could see the city was having a great need for WBE firms in the trucking industry. There may have been two certified forms on that list when we started in the trucking industry for WBE.” [#7]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company explained how she started the firm, “My background is a Certified Public Accountant, I worked for a local business management consulting firm for about 13 years before starting my company in 2011. My background was just a business background with an opportunity that came up in construction. I had a background in plumbing due to a spouse that had been in plumbing. So, fire protection, pipe, and water led itself to me.” [#8]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company mentioned how the company was established, “The company was originally formed after information came across about the city being in trouble with minority participation. It was when the new airport was being built. They were needing some minority participation so we thought well, we can probably fill a void there in some way, some capacity so, we did. We started the company to provide steel. It was something really minor and then we’ve just grown from there, we got into it and saw it was something we could do well in so we have just grown and grown and grown.” [#9]
- The Hispanic American male owner of an MBE-certified landscaping company explained the formation of the company, “I’ve always been working for somebody else, but I’ve been also working my own. I have a small business that every now and then that I’m trying to get another job, because I don’t have enough customers to keep growing, and I need to have two jobs to pay my bills. My situation to pay my bills, child support, and my new family. That’s why I started my new business and work for somebody else.” [#15]
- The Asian Pacific American male owner of a construction company explained his business formation as, “I used to work for my father-in-law until he passed away in 2012 and then I went and worked for the state of Indiana for a year. Kind of felt like I was undervalued for my knowledge, so I decided to go into business for myself. I was kind of involved with doing insurance work for my father-in-law. And I saw there was a decent margin in there, more than some of the other trades.” [#29]

- The female owner of a WBE-certified construction company explained how she started the company, “I’m kind of a fall-out from the harsh economy we had in '07-'08. My prior experience was really working in commercial real estate for several years with a construction and civil engineering degree from Purdue. I didn't know what to do with myself, so I joined NAWBO [National Association of Women Business Owners], and they were the ones that encouraged me to get my WBE and I started a corporation and became a 1099 for hire person. The city picked me up right away on a team, and I did a lot of septic tank removal projects, managed mainline sewer, and took care of septic tanks that were failing. So really the city is where they saved me, which was Ballard's administration.” [FG#3]

Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

Businesses reported working on contracts as small as several hundred dollars to contracts approaching one billion dollars. [#1, #3, #8, #10, #13, #17, #19, #21, #22, #23, #25, #26, #28, #29] However, most firms reported an upper threshold for contracts at around \$2 million or less. For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company specified the type and size of contracts his company was able to perform, “I had a couple million-dollar projects. They were more on the Indiana Department of Transportation (INDOT) level, as it relates to city projects, I haven’t had any city projects in a while. When I first started and got certified, I was able to acquire some city projects. Then those projects just stopped coming, so I started focusing on the INDOT side of the business or on INDOT contracts because that was where I was getting the most work at the time.” [#1]
- The Black American male owner of an MBE-certified electrical supply company commented about the size of contract the company performs stating, “We’ve had contracts as large as \$15 million. We have the capacity and distributors that we work with.” [#3]
- When asked the size of contracts the company performs on the Hispanic American female owner of a WBE-, and MBE-certified safety supply company explained, “We will bid on anything from as low as \$1,000 and upwards, we were just awarded a \$5 million contract. So, we're talking from \$1,000 to \$5 million.” [#8]
- When asked about the size of contracts the company performs the non-Hispanic white female owner of a WBE-certified construction company mentioned, “The average is \$50,000 per contract, but we just picked up a \$650,000 contract doing traffic control and pavement marking. We'll bid small lane closures for folks that are in the \$5,000 range, and I would say during our peak season we have 200-plus active jobs going at any point.” [#10]
- The non-Hispanic white male owner of a goods and services company explained, “The average contract for us that we're bidding on is between \$20,000.00 and \$50,000.00. Our average sale is smaller, because we do service calls. We do a lot of service work, so those are smaller ticket items, less than \$1,000.00, we're going out there and fixing somebody's alarm system.” [#13]

- The non-Hispanic white male representative of a majority owned professional services company described the types of contracts the company performs stating, “Our business ranges from very small orders in the less than \$100.00, all the way up to orders in the hundreds of thousands of dollars. Our sales have quite a range in terms of products and dollar volume. Primarily, we’ll contract with healthcare facilities in some cases to provide training and products for emergency preparedness. Sometimes, it will be for the federal government for certain products on a finite basis, to provide specialized products to them.” [#17]
- The Black American male owner of an MBE- and DVBE-certified professional services company stated his company performs on contracts up to \$500,000. [#19]
- The owners of a majority owned electrical construction company explained the size of contracts the company performs on, “With residential, we do a lot of whole house rewiring, those are usually 10-20 thousand-dollar jobs. We do a lot of service work, quick in and out things. We do a lot of stuff for some design companies, remodeling, changing in and out light fixtures. We are proficient and familiar with retrofit lighting in large buildings, we have done that. The largest contract has been \$140,000.” [#21]
- The typical size of a contract for the non-Hispanic white male owner of an architecture firm vary from under \$1,000 to “a couple 100,000.” [#22]
- The non-Hispanic white male owner of a construction company mentioned the size and location of contracts the company performs, “My biggest contract I’ve ever had was a couple million dollars on a contract. All the time, we’re working on \$250 to \$300,000 contracts, they range anywhere from \$70,000 to \$500,000 contracts are where we’re really at, for the most part. We’ll go coast to coast for contracts, I would say probably 50% of my business is in Indiana still.” [#23]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm commented, “The size amount of our contracts varies, it can go from say 10,000 up to 200,000 and sometimes maybe a little higher than that. We work throughout the entire state. We’ve been a prime with the city of Indianapolis a few times, here lately we haven’t been fortunate to get the prime jobs but we’ve been on several jobs as subs to the primes and we’ve been really fortunate in that area.” [#25]
- On average, the contract size for the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company “have been really, really big. I think the largest order that I did was like 4,000, something like that.” [#26]
- Discussing contracts in terms of company size, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company stated, “it doesn’t matter the size of the companies. We’ve worked with companies as few as, maybe, 70, 80 people, total. And as many as 120,000 across the world.” [#28]

- The Asian Pacific American male owner of a construction company described his contracts, “It can be anywhere from seven thousand dollars up to three hundred and fifty thousand dollars, just depending on the size. I think the biggest one we did was like six hundred and thirty thousand.” [#29]

Mupltiple firms reported working on contracts in Indiana. [#5, #21, #26, FG#4,] Some firms worked only in Indianapolis, while others focused on southern or central Indiana, or did business state-wide.

- When asked the location of contracts the firm performs on the non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm stated, “We have some work up in Northern Indiana, a little bit in Southern, we go up to South Bend, and then we’ve done work in Evansville, but it’s primarily Central Indiana.” [#5]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company stated that her company only works in Indianapolis. [#26]

Several firms reported working in the Indianapolis marketplace and with clients outside of Indiana. [#1, #2, #3, #4, #9, #13, #18, #21, FG#1, FG#2, FG#3] For example:

- The Black American male owner of an MBE-, and DBE-certified construction company described the type and the location of the contracts the company performs, “We just have one facility, the largest project we have in the backlog is a bridge project in Ohio. We’ve worked on projects in Chicago and St. Louis, we try to stay within a 150-mile radius, but we’ll go farther if we can be competitive.” [#2]
- The Black American male owner of an MBE-certified electrical supply company mentioned the company works on contracts in Indiana and surrounding states. He went on to say, “Sometimes what happens is a Chicago contractor will do some work down here. We develop a good relationship, and they’ll have work in New York or in Baltimore so we’ll ship products there. We also work with local contractors that have work out of state.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company described the locations the company works in stating, “Depending on the size of the job, we’ve gone as far as Macon, Georgia to put in a parking lot before. If the job gets sizeable where you can pay the per diem to your men, we’ll go. Specifically, with the industry being as busy as it is right now, we have no reason to leave Marion County and surrounding areas unless there are better margins to drive farther.” [#4]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company articulated the locations the company works, “So everything that we do right now is all fabricated here locally and then we’ll ship it out to anywhere in the United States. We do have a satellite office in the St. Louis area. We’re chasing a lot of work out there because there is the same kind of struggle with the minority participation. So, we decided to expand, become certified, and secure some work. The bulk of our work happens here and we put it on a truck and send it where it needs to go.” [#9]

- The non-Hispanic white male owner of a goods and services company stated, “We worked in all 50 states last year, but in Indiana we cover from top to bottom, and we like it that way; we like working in Indiana.” [#13]
- The owners of a majority owned electrical construction company stated they work in “Indianapolis, Carmel, Noblesville, Fishers”, but have gone “all the way to Bloomington and as far north as Kokomo”. [#21]
- The Black American female owner of a DBE-, MBE-, and WBE-certified construction company expressed the location her company performs contracts stating, “We work in central Indiana primarily, but we have done a good amount of work in Louisville, St. Louis, and a little bit in Cincinnati.” [FG#2]
- The female owner of a WBE-certified construction company mentioned the location her firm typically works in explaining, “I will go to Fort Wayne, I’ve done some work in Detroit and other parts of Michigan, I’ve been to Ohio for a couple of projects doing consulting, management services. We help manage the subs, manage contracts, manage general conditions on site, things of that nature.” [FG#3]

Employment size of businesses. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (29 of 31 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses, but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

The majority (14) of businesses had 1-10 employees. [#6, #12, #15, #19, #20, #21, #22, #23, #24, #26, #27, #28, #29, FG#3]

- The Black American male owner of an MBE- and DBE-certified construction supply company mentioned his employment size, “At one time, I had 13 employees and that was enough. Now we’re down to 10 and things are a little easier.” [#6]
- When asked about the employment size of the company the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company commented, “During the summertime, we might get up to 10 or 11, in wintertime we will scale back to six.” [#12]
- When asked about the employment size of the company the Hispanic American male owner of an MBE-certified landscaping company explained he works by himself but if he needs help it’s always his friends. “they work for somebody else, but when I have something, they come and help me, too.” [#15]
- The owners of a majority owned electrical construction company commented, “we really don’t have any employees, we have subcontractors, 1099. As far as manpower that we have, I have four full-time and one is in the office, I have another guy that fills in the gaps.” [#21]

- In regards to employment size, the non-Hispanic white male owner of an architecture firm noted, “there’s five of us. Four are licensed architects, one is a graduate architect. All professionals.” [#22]
- The non-Hispanic white female owner of a WBE-certified engineering firm commented about the employment size of the firm, “it’s just me and one other female engineer right now. It has fluctuated over the years of having one or two other people with me.” [#24]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company stated, “it’s just myself, and I just employed one other person, and an office manager just to assist with paperwork.” [#26]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company mentioned, “we have four employees; one is part-time and we have a bookkeeper that works part-time.” [#27]
- As another small firm, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company stated, “the two of us are here all the time. We have two or three more that come and go if we need them.” [#28]
- The Asian Pacific American male owner of a construction company described his company, “it’s just me, I sub out all of my work.” [#29]
- The female owner of a WBE-certified construction company described how many employees the company has, “I started hiring people as 1099s and then evolved into W2. So, currently I have nine employees and graduated into doing construction management services for large municipal projects.” [FG#3]

Twelve interviewees reported that their businesses had 11-25 employees. [#1, #2, #3, #9, #13, #16, #17, #25, #30, FG#1, FG#2, FG#4] **For example:**

- The Black American male owner of an MBE-, and DBE-certified trucking company stated that the number of employees fluctuates between 10 and 15 depending on the workload. [#1]
- The Black American male owner of an MBE-certified electrical supply company stated, “We don’t have any part-time employees, and we have 23 full-time employees.” [#3]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company explained, “We have approximately 20 full-time employees, that is inclusive of the owner. One of the owners is like a silent partner and he’s not on the staff.” [#9]
- The non-Hispanic white male owner of a certified disabled-owned professional services company commented about the employment size of the company, “When we started there was one person on January 1st of ’15. We grew to three people, then to seven, then to 16, and now we are at 24 individuals. There are three licensed professional engineers, one

licensed surveyor, and then there's many in training. They go to school and then they have to work a certain number of years. So, I think we have four land surveyors in training, and then three or four engineers in training." [#16]

- The non-Hispanic white male representative of a majority owned professional services company mentioned the employment size of the company, "We have ten full-time and we use subcontractors. We currently have about four subcontractors that we use, and sometimes we'll use temp employees, it's a small business." [#17]
- When asked how many employees the company has the Black American male owner of an MBE-certified construction company mentioned, "If you count the union folks, I'm up to 12 right now." [FG#4]

Three business had 26-50 employees. [#4, #8, #10] For example:

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company detailed the number of employees that work for the company, "There is about 25 to 30 that are year-round, and then the seasonal portion is our difference, depending on our workload. Right now, we're doing three jobs for the city, and the other day had up to 70 people on payroll." [#4]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company mentioned the growth of her employees, "Over the past two years, based on key hires that we've made, we have probably tripled our size. We went from 18 employees up to 35 over the past two years. That's really all been based on making specific key decisions in our hiring realm to grow specific areas of the business." [#8]
- The non-Hispanic white female owner of a WBE-certified construction company stated, "During our peak season in September or October, we have about 30 to 35 guys in the field. We have 16 full-time office people, and that's estimating operations, accounting, and admin." [#10]

One business had 51-100 employees. [#11] For example:

- When asked how many employees the company has the Native American male owner of an MBE-certified construction company noted, "We have right around 60 employees total." [#11]

One interviewee indicated that their firm had more than 100 employees. [#14] For example:

- The non-Hispanic white male representative of a majority owned goods and services company mentioned, "At this office we have four full-time employees, but throughout the entire company I would say upwards of 300 to 500. We have a lot of satellite offices in Atlanta, Seattle, just to name a few, there are a lot of different offices." [#14]

Growth of the firm. Business owners and managers mentioned the growth of the firm over time.

- The Black American male owner of an MBE-, and DBE-certified trucking company mentioned the growth of his company over time stating, “A lot of other minority companies didn’t want to help me get started. Once I got my first truck, it was hard for me to find work. So, I went to a white male who helped me grow a lot, he showed me some good things and some bad things. It was hard for me to grow or try to get work from those other companies, so I found somewhere that I could work my trucks and that’s where I started to grow and started to learn about the city certification and the different certifications that were out there. I started getting contracts from the city, state, and from INDOT projects. The more projects you land, your capacity tends to grow.” [#1]
- The Black American male owner of an MBE-, and DBE-certified construction company explained the growth of his company, “In our case, our growth has been motivated and driven by paying attention to customers’ demands and the market. Customers will tell you what they need, how much they need it, how soon they need it, and how they need it. If you listen, you’ll understand whether you have the resources and the capabilities to give them what they want without putting the company in jeopardy.” [#2]
- When asked about the growth of the company compared to others in the industry the Black American male owner of an MBE-certified electrical supply company stated, “I think my entire industry is growing. I may be growing a little faster, but I think my entire industry is growing. If you look at the last five years, there’s been a fair amount of growth, we came out of the downturn and it’s been consistent growth. We market the firm by word of mouth, relationship building, and we have five outside sales people.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained the growth of the company, “In the last few years, it’s been harder to grow with the four percent unemployment. We try to maintain quality, we’re not growing as fast as some businesses, but my philosophy is the day after we’re done doing this, somebody else will be doing it. If you grow too fast in these times right now, your quality of work will be affected. So, if anything, we’re at a 20 percent growth rate in the last three years.” [#4]
- The Black American male owner of an MBE- and DBE-certified construction supply company described the growth of his firm, “It was pretty constant the first seven years, and then we got as big as we wanted to be. Our best years have been around \$13 million. We had a little dip in the economy where we dropped a couple of million, but we’re between \$10 to \$13 million every year, which is what we call our sweet spot.” [#6]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company explained the growth of the company, “Our growth has been potentially faster, if I look at our competition that has been in existence through generations, they are more mature. So, I’m not sure that I could compare it because most of our competitors have been around for generations. Their growth is kind of steady whereas we’re still a younger company. Our

growth is still towards the bottom of where we probably could be. It'd be hard to compare to the competition.” [#8]

- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company commented about the growth of the firm, “We started relatively small with one estimator and a few guys in the shop to fabricate since the beginning. The beginning was more of a purchase and sell sort of operation and then we got to the place where as a minority you don’t want to be looked at as a passthrough so you want to self-perform and be able to stand up in the market as someone who’s actually performing a service and not just being utilized in that way. So, from that point we hired another estimator, some more guys in the shop to keep expanding our business and be able to compete again with some of the larger people. What we find in this particular market is there’s a lot of mom and pop type shops that will pop up. Anybody that goes to welding school that now thinks they can go out and weld something.” [#9]
- When asked about the growth of the company over time the Native American male owner of an MBE-certified construction company explained, “By buying an established company and one that had a very good reputation within the area, we were already fairly strong in what we did. I will say with the strength in the economy, we have grown in the last five years quite rapidly.” [#11]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained the growth of the company stating, “The growth took off pretty well, and then we hit the recession, like other businesses, we had to do what we had to do to make it through the recession. We scaled back, we did things that normally we wouldn’t, went out and bid, we were awarded them, we did them successfully with no complaints. Once the economy started coming back around where it was more profitable, we stuck to what we’ve known best, and that was playing in the dirt. We usually generate over \$1 million to \$1.3 million, pretty steady for the last four years. So, it’s been pretty stable.” [#12]
- When asked about the growth of the company the non-Hispanic white male owner of a goods and services company mentioned, “Extraordinary. More than I can take some days. I would say we’re growing at a faster rate than others in our industry because we were smaller to start with.” [#13]
- The non-Hispanic white male representative of a majority owned goods and services company commented about the growth of the firm, “Well they started this office in 2015 and a few other ones in Charlotte El Paso. I would say the growth is pretty good, it’s been growing exponentially every year. Compared to others in the industry I would say our growth is better, since we’ve been around since the 1980’s. A lot of brokerage companies that try to come in these days don’t really make it. A lot of companies don’t want to work with brokers, but we have an established customer base.” [#14]
- When asked about the growth of the company the Hispanic American male owner of an MBE-certified landscaping company stated, “It was like three years ago when I saw the

most growth in my company. There was a little more work, and people paid better. This time, they don't want to pay, they don't want to spend money, and they're looking for the cheaper guy to do the jobs." [#15]

- The non-Hispanic white male owner of a certified disabled-owned professional services company mentioned the growth over time, "Engineering firms get work that's associated with the trust and reputation of the company, we've been slowly building up the reputation. The clients that we're meeting with are slowly beginning to trust the stability of the company. So, we've been going after bigger and bigger projects. We've been doing hotel work, and we've been trying to get more work that's not only on the private side. I was employed in 2009 with a different company when the market went down, and the company closed, because they only did private work. So, we know being only private is not going to work, we're trying really hard to diversify our company into utilities, state agencies, and other places like that." [#16]
- The non-Hispanic white male representative of a majority owned professional services company stated, "We've had growth year over year. We're at a year-to-date growth of about seven percent. Last year, we grew seven percent from the year prior, amazingly the same number. Before that, we were in a period of no growth for several years following some changes in the market that were occurring." [#17]
- The non-Hispanic white male owner of a construction company mentioned the growth of the company, "The last seven years have been really awesome. Of course, everybody took a hit back in 2010. I got a hard head and made it through it and now there's a lot of building going on." [#23]
- The non-Hispanic white female owner of a WBE-certified engineering firm commented about the growth of the firm, "I haven't really grown, I've stayed pretty much just myself and this other lady engineer. She's very flexible in the aspect of, she can work part time or full time. It's been very hard for me to find people because everybody is busy and everybody is looking for people to work for them." [#24]
- When asked how the growth of the firm has been over time compared to others in the industry the non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm explained, "I would say we're average, it just depends on our demand and a lot of times we'll even use a firm for arrow tech so they'll help us as needed, if we need inspectors or additional employees. We'll contact them and they'll help us build those positions but our growth is pretty average, it's just the demand and we stay pretty steady." [#25]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company mentioned the growth of the company over the years, "We've had steady growth from 1992 until 2002. We went from three of us to about nine of us, and it got crazy. In one way it was good, I had taken on another partner, she was a partner for a very short time, left, and attempted to take half the work and half the employees with her. That didn't work out so well for her. But after that experience, I didn't ever want to go back to being nine people

again, that was a conscious decision. We ranged anywhere from four to five, six at the most, then the recession hit. We had an enormous backlog, because those projects took so long to complete, we didn't feel the effects of it until those projects were done, and all of a sudden there wasn't anything. We went down to about three to four people, and that's where we've been." [#27]

- The Asian Pacific American male owner of a construction company commented on the growth of the firm, "growing, definitely growing. It's mainly word of mouth. I've got a website up, but I don't really do much of advertising or anything like that. I do have a business plan in motion. Where I'm planning to hire a few more people to take on some of the duties that I have. Because I have a lot on my plate. , I'm definitely looking to bring on some more people to kind of help with the office stuff so I can actually focus on some other things." [#29]

C. Race/Ethnicity/Gender/Veteran Ownership and Certification Programs

Business owners and managers discussed their experiences with XBE and other certification programs. This section captures their comments on the following topics:

- XBE and other certification statuses (*page 24*);
- Advantages of XBE certification (*page 26*);
- Disadvantages of XBE certification (*page 29*);
- Experiences with the XBE certification process (*page 30*);
- Recommendations for improving the certification process (*page 33*); and
- Comments on other certification types (*page 35*).

XBE and other certification statuses. Business owners discussed their XBE status, and shared their opinions about why they did or did not seek certification. For example:

Seventeen firms interviewed confirmed they were certified as XBE. [#1, #2, #3, #4, #6, #8, #11, #12, #16, #19, #24, #25, #27, #28, #29, #30, FG#1] For example:

- The Black American male owner of an MBE-, and DBE-certified construction company described the company's certification, "We're certified as an MBE with the city and the state. We're also certified with the Minority Supply Development Council. We have DBE certifications with multiple states. We have a small business certification but I think it's a reciprocal thing. If you're with the state as an DB, they automatically roll you into that category." [#2]
- The Native American male owner of an MBE-certified construction company explained when he became certified stating, "I initially applied in probably 2013. I didn't quite meet all the criteria. Like I said, I originally applied with the state. The gal that came out and did the office inspect was very nice, very thorough, but just told me I didn't quite meet – I didn't

have my uncle paid off enough at the time. Once I did get far enough along in my payments, I reapplied in 2016 or late 2015. One of the two. The state came out. A lot of paperwork. It can be a little daunting, but it wasn't terrible. I didn't think it was terrible at all." [#11]

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned, "The certificates that I hold here in Indianapolis are MBE and DBE, Minority and Disadvantaged Business Owner. I've been certified over ten years now, with the city and the state of Indiana, and federal-approved for about the last probably seven to eight years." [#12]
- The non-Hispanic white male owner of a certified disabled-owned professional services company mentioned, "I'm a white male, we hold a DOBE with the city of Indianapolis, and a DBE with INDOT. We are not registered with the IDOA, because the DOBE is not recognized at this time. We've been certified about four months now, so really new to the program. It's been more rewarding than I ever thought possible." [#16]
- The Black American male owner of an MBE- and DVBE-certified professional services company mentioned his certification status, "I am MBE certified, which is minority business. I am a state-licensed security guard and a private investigating firm. I'm a federal government contractor, been a member since 2017 with VetBiz for veterans." [#19]
- The non-Hispanic white female owner of a WBE-certified engineering firm stated, "I am a WBE Certified Company with the City of Indianapolis. I have been since 2007 and I have continued to get recertified through the city every three years." [#24]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm mentioned, "Currently we're a WBE with the city of Indianapolis and an DBE with the state or INDOT. We have been certified for at least 12 years." [#25]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company commented, "We're WBE with the city and DBE with the State of Indiana. We were certified with the State of Illinois and the Chicago Transit Authority, and in the State of Ohio." [#27]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company verified that she is certified with both the city and the state for three years. [#28]
- The Asian Pacific American male owner of a construction company confirmed that he was certified with both the city and the state, "just a few months now, I just got certified this year." [#29]

Three business owner explained why their firms sought XBE certification. [#5, #20, PT#5]

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained why she decided to become a certified business, "I worked at a lot of firms before starting my own firm and one of my frustrations was, when I would put teams together, the minority-owned firms we could get good work out of, but the women-owned firms

struggled. When I would find team members it was basically just a pass-through to fulfill a WBE requirement. I kept seeing there's a huge opportunity if we actually did our own work, had a team, and had a staff that's qualified, there's just not anybody out there doing it at that time but it is changing." [#5]

- The non-Hispanic white male owner of a certified VBE and Disabled-owned engineering company explained why he went after certification, "At the time, I was getting a lot of information. I still get a lot of information from organizations which are promoting business for veterans, and specifically for service-disabled veterans. In fact, they have national conventions at one thing or another. It just seemed like a reasonable place to get some more work like I had done in the past, and would be worth a try. That's why I went about it at the time. I thought I was going to be doing more concrete and pavement sort of things. It was considered to be a good move, just getting into the business, letting people know I'm available, I'm here, and I will possibly be eligible for something." [#20]
- The female owner of an XBE certified professional services firm mentioned, "I've been certified since 2005, part of the access to city work is the certification. If you're not certified you're not going to have access. If you really want to be in business and you really want to have that access to that information and opportunity then it's going to cost you something whether it be your time or your information and that's been the challenge. So many Black American firms are not certified because we are afraid of this big brother theory." [PT#5]

Two business owners and managers explained why their firms had not pursued XBE certification. [#26, PT#2] *For example:*

- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company commented on her lack of certification saying, "I'm not because until the other lady called me, I didn't even realize that I could be certified as a woman owned or minority owned or a veteran owned business." [#26]
- The female owner of a professional services company explained why her company is not certified, "We are a new start-up and I'm not certified because I don't understand the certification process. The challenge that I see is the trend to do everything online, that's fine if you know what you're doing. If you run into questions or issues and you need clarification it is not as easy to talk to a person." [PT#2]

Advantages of XBE certification. Interviewees discussed how XBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by XBE certification. [#1, #2, #3, #4, #9, #10, #11, #16, #19, #24, #29, FG#1, FG#9] *For example:*

- The Black American male owner of an MBE-, and DBE-certified trucking company commented on how certification has been beneficial for his company, "It's helpful, the only reason I say that is because you're notified of different projects that are going on but it doesn't guarantee you anything, which I was told that it would from the beginning, it just opens the doors for you. You're notified via email, letter or fax some of that comes from the contractors because once you're certified, you get on their certified list so they send it out to

all the certified companies. Also, the city has an email blast that they send out to all their MBE truckers a notice that you'll be getting solicitation for a quote for this particular project. You don't submit it directly to the city but to the various contractors that we may have relationships with." [#1]

- The Black American male owner of an MBE-, and DBE-certified construction company explained the benefits of being certified, "Our business has benefitted tremendously from the city, I will tell anybody that. I don't think we could have been the business that we became without the help of the City of Indianapolis. We had a lot of work that the city provided for us over the years that have helped us not only grow the company, but build our reputation, provide paying jobs with benefits, and invest back in our community. I believe in being a good corporate citizen. So, we've adopted three or four not-for-profits that we put our resources in." [#2]
- When asked if certification has been beneficial for the company the Black American male owner of an MBE-certified electrical supply company stated, "Well, it does help breaking into industries where old, established relationships prevail and companies may or may not be willing to try a company like mine. Once they try me, they take me to jobs that aren't MBE requirements. So, much of the work we do have nothing to do with minority business goals." [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained his experience and benefits with being certified as an XBE with the city, "The benefits are working for the city, if you do your part correctly, your payment is guaranteed. That is definitely a good thing, because if you're a subcontractor to someone, the city has the ability to make sure you get paid. In the private sector, that's not always the case. Also, the percentage amounts that they've raised on the job definitely helps since we've been re-certified, before 2007 or 2008, I didn't get recertified because there was hardly any benefit. Since they've raised the numbers, it's looking a little more promising to be able to get work, for a while there wasn't that much." [#4]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company described the advantages of being certified, "I would say that the MWBE certifications gets your foot in the door, it is a marketing tool, you get visibility." [#9]
- The non-Hispanic white female owner of a WBE-certified construction company expressed her thoughts about the advantages of certification, "The certification for us is huge. Last year, I ran the prior three years of jobs and we tracked how much of the work that we had was to fulfill a goal and that's tough. We bid competitively, so whether or not we were awarded the job specifically to fill a goal, or whether we were awarded a job just because we do what we do, but in either way, it did apply to a goal of some sort. About 80% to 85% of our contracts that we have, had some sort of goals tied to it. The goal for us, or maintaining a certification status, is very important, and has benefited us because a lot of our revenue that we have is tied to a goal in some fashion or another." [#10]

- When asked if certification has been beneficial the Native American male owner of an MBE-certified construction company stated, “It’s been very beneficial, it’s been very helpful. When I first met the gentleman at the development center that works for them, he was very intimidating, very direct. Since then, he’s been nothing but helpful. He’s really the only person with the city I really know that I’ve met and talked to a few times. He’s asked me some questions about becoming an MBE and all that and I told him my experiences. Anytime I’ve gone to him with a question, he’s been extremely helpful.” [#11]
- The non-Hispanic white male owner of a certified disabled-owned professional services company commented about the advantages of being certified, “The advantages are I get emails of opportunities that I didn’t know existed, I didn’t know how to get on these lists. The seminar they put on two weeks ago, people were on stage and they gave out their contact information. I have followed up with every single one of them and to a T, every one of them has at least replied to my email, and I’ve met with three of the five. You don’t know how to overcome getting in contact with the right people and just knowing that there’s people out there trying to help out companies like this it makes you feel good.” [#16]
- The Black American male owner of an MBE- and DVBE-certified professional services company mentioned, “The benefits that I see is that the big conglomerates, in order for them to get government funding, they have to be able to work and have set-aside money. If they request money, they have to have set-aside money for small businesses. Small businesses built this country and there’s just no other way about it. That’s why big business became big because of the small businesses. That’s somewhat of a lost art. But now it seems like the government is starting to slowly see, ‘Hey, we need to bring them back on board and there’s just no other way about it.’” [#19]
- The non-Hispanic white female owner of a WBE-certified engineering firm mentioned the advantages of being a certified firm, “The opportunities to be teamed with people and projects that I wasn’t aware of I now have access to because of being part of teams. They almost are out there marketing for you because I don’t always have time as a smaller business to market, or to get out there to know everything, when you’re a part of these teams they kind of help you, ‘Hey, this is going on. Why don’t you come be part of our team, it’d be great? You know how to do this, you know what the scope is, let’s do it.’ It has been great in that aspect of I really formed really good relationships with teams with other engineering firms, and I’m able to continue that relationship and get work.” [#24]
- The Asian Pacific American male owner of a construction company commented on the advantages of certification, “I guess it just makes it look better for my company. I really had no reason to, but my brother-in-law is in a completely different trade and he strongly urged me to do that. And he said better off to just get it done now so you can have that, you know... long term was if I start getting into larger scale government projects or something then it’s good to have that. To maybe bid on, like, government work.” [#29]
- When asked if certification has been beneficial for the company the female owner of a WBE-certified construction services company expressed, “It’s been really good for our business. It was one of those things that I was focusing on, growing the business. When I was out

having conversations with folks they would say, 'Oh, are you WBE?', they just assumed. I had conversations with the previous owners about buying ownership in the company so that we could pursue that [certification], and it really has helped." [FG#1]

- The male representative of a trucking company noted, "the advantages is that you're listed with the city or either the state or whatever the job that's being bid for and you're listed and you're available to help the prime contractor reach his goals. That's the advantage in the public sector work versus the private sector. The private sector there's no advantage for them to use you so therefore that's why the program I think was established, to give us an opportunity where there wouldn't be one." (FG#9)

Disadvantages of XBE certification. Interviewees discussed the downsides to XBE certification [#3, #8, #28]. For example:

- The Black American male owner of an MBE-certified electrical supply company commented about the disadvantage of certification, "There's some really screwy things in the contracts, like a dollar from my company counts as 60 percent because I'm a distributor, but a dollar from a construction company counts as 100 percent. Like, the construction company is adding more value." [#3]
- When asked if there were any disadvantages to being XBE certified the Hispanic American female owner of a WBE-, and MBE-certified safety supply company mentioned, "There was a greater disadvantage. The disadvantage was we were only being looked at for the XBE portion whereas our competitors were in that spot where the assumption is that they can handle it. On the XBE side, I had a project manager specifically mention to me, 'We can't find XBEs that would be able to bond this size of a project.' Which was false, I can bond up to a \$12 million project, we bond other projects all the time. The assumption was we couldn't handle it because we are an XBE. We actually bid it to another contractor and didn't have a problem. I think that was actually more of a disadvantage to an extent for us having had the XBE status on the criminal justice center. Not all projects, but on that one, I do believe they only considered us for that small portion and that was it." [#8]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company mentioned a lack of concrete advantages, "so far I've seen almost nothing to a point that, I think a lot of times we just forget to even say that we're certified through the city, or the state, because it makes no difference. It's not special. In hindsight, if I were to do it all over again, I would've given a lot more focus to actual getting business, and work, than to spend all of my time collecting all the paperwork for this. Because, I was seriously under the impression that once we did this, there would be some benefits to it, in the sense that we would know what to do. There would be help in figuring out what to do, where to go. Nothing. Absolutely nothing. , I am considering whether to renew, or not, because I have no benefit from this what so ever. . All of the work that we have had so far, 100% of it had nothing to do with certification. They didn't care. I believe that everybody knows whom they want to work with, and I think that they go to these ... Like the city, or the state, or Purdue, or whatever, they'll work really hard to get companies there, because it looks good on paper that they're paying attention to diversity, and women owned business, and all of

those. You know, inclusion. But, once they're there, they're there for no real purpose. My experience has been such that it's not that they have a need and they're going because of that reason." [#28]

Experiences with the XBE certification process. Businesses owners shared their experiences with the XBE certification process. [#1, #2, #3, #4, #5, #6, #9, #11, #12, #16, #25, #27, #28, #29] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company explained his experience being certified stating that he was originally denied certification, "So, the reason why they say I got denied is because I lived in St. Louis, I didn't have my CDL license at the time, and I was also parking my trucks on another trucking firm's lot, the majority of my work was coming through that company. So, they wanted me to show a little bit more independence. So, I made some changes, I quit my job, moved back to Indianapolis, got my CDL license, and started to branch out to other trucking companies to get work and to show the city that I wasn't 100 percent relying on that company. The process is extensive, it's a 15-page application with all your paperwork. I didn't think the process was too hard at all." [#1]
- The Black American male owner of an MBE-, and DBE-certified construction company described his experience with the certification process, "Initially it was horrible. I didn't get into this business to be an MBE or a DBE. I was naïve enough to think I could just hit the ground running. It doesn't work that way. So, someone said to me, 'Well, you know, you need to get your business certified.' So, I figured out how to get certified and there was a big difference from being certified with the state versus the city. I was certified by the state and the process went fairly smooth. Months had passed with the city and I never heard about my application. So, I called, and nobody could find it, nobody remembers me bringing it in. So, I do it all over again, I hand-carry it down there again, and the same thing happens again. Finally, one day they say, 'You're certified with the state? Well, we'll just go ahead and grandfather you in.' That's how I got certified with the city. The only difference I observed was the accountability with the people at the state and the lack of accountability with those that work for the city. I think the process in the last four administrations have worked just fine for recertification, it was just that initial time." [#2]
- The Black American male owner of an MBE-certified electrical supply company explained his experience being certified, "It's easy. You're just answering questions about work that you've done, and providing the documentation for the stuff you had to do to set up your business. So, yeah, it's an easy process. The city needs to do more to qualify companies because the city has a bunch of pass throughs that aren't legit." [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company shared his experience with the XBE certification process, "I think it was pretty easy. For a while there, the previous administration did a streamlined, one-page renewal, but now you have to do the whole thing about 15 or more pages. I know CEG is a little bit easier the water company, citizen group. The state, it's a little tougher, so I don't think the

city's is too bad. I don't think there was anything that I couldn't really wrap my mind around as far as what they were asking." [#4]

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm commented about her experience becoming certified with the XBE program, "Initially, it was a different administration, and at that time, it was the same document as the state. Filling it out was pretty easy considering I'm the sole owner. There weren't any questions. My state certification went through, I was very fortunate it went through in eight days, and I was approved. One application sat at the City for over a month, I had to keep calling and pushing them, eventually they got it approved. They were very supportive; it was just at that time they didn't have the support staff to do it." [#5]
- The Black American male owner of an MBE- and DBE-certified construction supply company explained his experience with the certification and recertification process, "In the beginning, it was hard, it seemed like I had to prove I was black. A lot of it is proving that you are really the owner, and you aren't fronting for somebody, so I understand that. Recertification I'd say was the same. They've talked about some reciprocity. It makes it a little simpler if you're already certified with the state or the city. Now that I'm in and I'm only recertifying, it's a lot simpler." [#6]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company explained her experience becoming certified, "Certification is very interesting. For me I use the analogy it's like you have to give your firstborn and a drop of blood. For the person who has never done it before I imagine it's a very cumbersome process. It is very detailed. I do all of the certifications for our company now, I'm pretty familiar with them, and once you've done one you can pretty much do the rest of them. I could see why a person that wants a certification would turn away from it. The renewal process isn't as bad. Some certifications require a no change once a year, those are simple and easy to do. The renewal requires almost the bulk of what it does to initially apply and that can be very cumbersome." [#9]
- When asked about the certification process the Native American male owner of an MBE-certified construction company stated, "With the city, I didn't think it was bad at all. I had already been through my state certification. At the time, it was the same form, it's a lot of paperwork and there's a lot of things they want. You turn it in, they come back and they ask for a bunch more stuff. If you've got a business, you have those documents or can get them quickly. The gentleman with the city came out and inspected things. He's a little tough, he can be a little intimidating, but it turns out he's a really good guy. Probably the worst thing I found with the city was they've updated their website, so finding the documents you needed were a nightmare, none of the links worked correctly. That was the one thing that took me a while to dig through it." [#11]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company commented about his experience becoming certified, "The first one was the minority participation, we did that with the city of Indianapolis, I believe in 2006. They came out, interviewed me, they had me fill in all my paperwork; you have to have birth

certificates of you, your parents, et cetera. So, I filled all that in, had it all sent in, then they came out onsite and did an onsite visit. After the onsite visit and everything, I was issued my minority certification. It was a fairly easy process.” [#12]

- The non-Hispanic white male owner of a certified disabled-owned professional services company mentioned his experience with the certification process, “The city’s certification experience was wonderful. I didn’t think I could get a DOBE, I just thought this’ll be like other things that I haven’t had success getting, and it’ll be a hardship. Everyone there was wildly helpful. I can’t say enough about how nice those people were. They even encouraged me to go after the INDOT DBE, which I had thought about, but I didn’t think I could get. The process itself, couldn’t have been easier for someone to figure out.” [#16]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm mentioned her experience with the certification process stating, “I thought it was a pretty simple process. I felt like that was good at the time, that they really checked it out and I was prepared for that. Several years ago, I didn’t see much of a difference with INDOT certification. INDOT came to the office, walked through the office, and made sure that we were a legit company, but it was a good process.” [#25]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company mentioned her experience with the certification process, “it’s a lot of redundant information. It was all right; I was able to pull information from what we already had and copy it. I did most of it then I hired my former project office manager to help me finish it, because she is a Speedy Gonzales when it comes to that stuff. The process was okay.” [#27]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company commented on the certification process, “city was easy, because they wanted us to do the deal. I had already done it with the state, which was a royal pain. It’s the exact same thing they need, but just collecting everything. Once we’d done it, I just asked the state to give me a copy of my file, and I just took the copy and forwarded it, essentially.” [#28]
- The Asian Pacific American male owner of a construction company described the process as “pretty easy. It was pretty straight forward”. [#29]

Three businesses owner described their experience with the XBE certification process in negative terms. [#8, FG#3, FG#10] Their comments included:

- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company commented about her experience becoming certified, “With the city there is less communication. You have no clue where you stand in the process. I can’t tell you. It’s kind of scary. You go there and you drop off all your documents. You’re dropping off your tax returns. Everything personal, you drop it off at the front office and you never hear from anybody ever again. So, you have to call. Sometimes they don’t even know where your application is. Suddenly you just realize your name is back up on the certification list. There’s no communication at all. From the city, I received a letter the first time. But on the recertification, I never did. It was probably like a year and then there was transition in the

office that took place. The only reason I knew I'd been recertified was because I saw it on the list that I had been recertified. It is scary though because you sent everything. You have to drop it off. You can have a tax return that's a lot of pages. You drop it all off, hard copy, at the office. You don't get a little receipt that says you dropped off the documents. There's nothing. If you're going through this process and you don't know where you stand and there's been a change, if they tell you we did not receive your documents, you have no proof to show them I dropped off all the documents. There's nothing. There's no communication. I don't know if it's an intern at the front of the office. I don't know who answers it but you hand over the package. Here you go. That's it." [#8]

- The female owner of a WBE-certified construction company discussed how she established her business and became certified, "I think initially it's the whole thing just getting articles of incorporation can be daunting at first, the paperwork, with the certification I thought it was a lot. Not so much filling the application out, just all of the attachments. And then continuing to stay strong with the negotiation going back and forth with the state and the city. Then there's an interview process that you have to go through. So it's not so much that it was hard, it's just it's new, and you don't know a lot of people that have been through it, so sometimes you're going in with no expectation. And so I think especially with the interview, I wasn't quite sure why this guy from the city or the state had come to my little office, 10 by 10, I was just one little office space, it was gross." [FG#3]
- The Black American male representative of a MBE-certified trucking company noted that some requirements in the process may hurt small businesses in the future, "I know that they did it for a reason, when they start making you list how many trucks you got on the DB certification. That's something my father hated because when you say you got five trucks, you might have five or six companies that will help you, but those contractors hold you to that. And sometimes they can help you because you're trying to wean out the ones saying they got five and then they got 30 front companies whatever. I think if you legit and you can prove paperwork, paper trail. When you start saying you only got three, the contractor looks at that and that puts a black mark on you because they saying, "Well how's this guy going to come up with the insurance."" (FG#10)

Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process. [#1, #4, #5, #6, #9, #11, #12, #24, #25, #26, #27, FG#3] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company provided recommendation on how to improve the certification process, "They just need to make sure that the folks that are being certified are who they say they are, that they know the business. There are ladies that are getting certified as trucking companies and they know nothing about it but they have a brother or a father or a husband or someone of that nature who is the head running the company that's just kind of a front to get work for both entities. We see this happening a lot." [#1]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company provided recommendations on how the city can improve the certification process,

“If they had that one-page recertification for a company that would ask, ‘Is there any ownership change, is there any of this, is there any of that?’, that probably wouldn't hurt. In their initial certification process, I think they need to pay great attention to anybody that they're certifying as an XBE that is housed at the same address as a non-XBE. They should have their alerts up because that is a front company simply put, those people are playing the game. A lot of times, it looks like it is someone renting from big brother. It's not, that is all big brother, and I guarantee you, there are several examples going on right now that's like that.” [#4]

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm had one recommendation for improving the certification process, “If they're [the City] going to want it earlier, then they need to put that into the recertification notices that you need to turn it in by this date if your certification is ending. That information is not on their website so, we had no way of knowing that they've changed the requirements.” [#5]
- The Black American male owner of an MBE- and DBE-certified construction supply company provided recommendations on how the recertification process can be improved, “With the government, it seems like the certification process is too lengthy, too slow, too cumbersome, and too repetitive. For example, if I get certified this year, they want three years of back taxes. The next year they want three years of back taxes, and the year after that, but you've got them! This is really sensitive data to me. What are they doing after I get certified? Are you shredding this stuff? If I certify every year, why do you need three years of back taxes again? They should change it to anybody that's already certified, should only need one year of taxes.” [#6]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company provided recommendations for the XBE certification process, “There needs to be more site visits, more follow up as far as ownership is concerned, and there needs to be more validation there. Who really is the owner of the company? Who really is in daily operations? You do fill that out on the certifications but there's no verification I could put anybody on there. They need to do more I think as far as coming and actually putting the boots on the ground to see if that's really what's happening.” [#9]
- When asked if there were any recommendations for the city the Native American male owner of an MBE-certified construction company mentioned, “I would say just make the documents easier to find, better instructions. I know they're doing a lot more now. I get a lot of emails for disparity work where they're doing workshops and things of that nature for all that to help people. From what I see, they're making a real good effort.” [#11]
- When asked if there are any recommendations for the city the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company stated, “I think the best thing is to do some more onsite interviews, to keep up with their contractors who they have that are out there representing them.” [#12]
- The non-Hispanic white female owner of a WBE-certified engineering firm provided recommendations for the certification recertification process, “It's not always easy to

remember every year when you have to do either a no change sheet or recertify. That would be one nice thing, if they could send you an email saying, 'Hey, anything changed?' or 'It's your certification anniversary.' Something just because we get busy and time flies." [#24]

- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm provided recommendations for the certification process, "If somebody's going after an XBE and say it's an engineering field, I think if it's a woman and they have an engineering degree it's fine, but they should also have their PE [Professional Engineers License]. They should have their license or surveyor license. There are things like that which should be put in place and verified for XBE certification. I wish they would be a little bit more diligent in that process, when they're looking at it." [#25]
- In regards to programs offered for veterans, the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company noted, "I was contacted by someone here at the veteran's hospital to ask me if I would be interested in doing that program for veterans. But you again had to be in business for two years, and I haven't been in business for two years yet. It's always you have to be in business for two years, so it's kind of hard because starting a business and then you have to put that capital up front." [#26]
- When asked for recommendations to improve the certification process the non-Hispanic white female owner of a DBE- and WBE-certified landscaping company stated, "Shorten the decision-making, and make it easier for people to get the information to them. I had to deliver a hard copy of my application, which was 170 pages, that's a lot. It would be really nice if there would be some way that they could provide affidavits for all that information. One of the things that I saw as a problem that has been changed is how many people I knew in the industry that were pursuing certification that had no business as a WBE, and I think the city and the state have done a good job of making sure that's not the case, that's been better." [#27]
- The female owner of a WBE-certified construction company suggested, "reciprocal service would be good. The state's questionnaire and the city's questionnaire is very similar. It would be good if you just had to fill out one form, instead of both. The other thing too is the city of Indianapolis had no idea what I was doing. The service I was providing, they could not get their head around it. There's no box for what I do, nothing. They either wanted me to build something, or to design something. They didn't realize there was a manager in the middle that had to make sure everyone did it. So it was really, the city couldn't, and the state, I just don't even think my NAICS codes match what I do. I mean the codes just aren't really, have never been overhauled." [FG#3]

Comments on other certification types. Interviewees shared several comments about other certification programs. [#9, #10, #12, #16, #25, #28, AV#9] For example:

- When asked about the difference with state certification versus city certification the Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company stated, "I don't know of any differences, I never understood why we needed one

for the city and one for the state. We have them and we maintain them but when we have to provide them, they normally always want the state. I've never had anybody to ask me for the city. I would assume that would be if we're going after some city work in particular." [#9]

- The non-Hispanic white female owner of a WBE-certified construction company provided comments about the certification process, "This year will be my first time with the city going through the full renewal process. With the state you jump through a lot more hoops, for INDOT in particular. We jump through a lot more hoops on an annual basis. INDOT's criteria is very different than the city's requirements. INDOT has some guidelines in place that are different than what the Fed requires when it comes to a DBE, which is even more restrictive. It's interesting to me, how they evaluate you on an annual basis, it's just always been interesting to me how INDOT has these certain guidelines that they say you 'must' do these things, and if you look at the federal guidelines they say you 'can.'" [#10]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company shared his experience obtaining the DBE certification, "It was similar to the MBE process, I had to have all my paperwork in order, they came out. The biggest thing on that one was to make sure you have your accounting person, whoever's doing your accounting, to have all their Ts crossed and all their I's dotted, because that is a big, big one, because it's basically off the revenue that your company does. If you qualify for it, it's a great thing, but, you know, you might not qualify for it just because you didn't have all your paperwork in a row, so it's a little bit harder." [#12]
- The non-Hispanic white male owner of a certified disabled-owned professional services company explained how the Disabled-Owned Business Enterprise (DOBE) certification is not recognized in every agency, "IDOA doesn't recognize DBE or DOBE, so I don't qualify. The certifications for IDOA are veteran, women, and minority. We went to a bid opening, I described my situation to the representative and she also told me, they go by IDOA. It's been interesting to figure out where we fit. I think IndyGo is the most forward with it, the representative was excited to meet a DOBE, because some of their projects have Indianapolis criteria, and the Indianapolis criteria is a DOBE, and she had never met a DOBE firm. It's finding out how to meet these people at DPW, and other places that would recognize the DOBE and the DBE. It's been a wonderful experience." [#16]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm explained, "When I initially received my certification, I was pretty proud of it because I'm a woman-owned business. I am the woman that is in the field so I do the work, I'm a professional land surveyor, and I have an engineering background. Now as it's gone on, I find it a little disheartening when I see firms that get an XBE and it's really not that woman. There's some that don't even have degrees but they get their XBE and they have other people that they've hired or with them to do say engineering or surveying. I find that frustrating because to me that's a loophole or a way that they've gotten in. When I first started the process that I went through, they were pretty adamant about what is your background, why are you doing it? Just seems like it's changed, so that's a little frustrating." [#25]

- With other certification processes, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company noted, “We have done so many, those diversity and inclusion websites. Their own websites, these companies have for procurement. Go and register with this, register with that. We are registered so many places that my email gets full every night, because they’ll send us an email about something. But, that something doesn’t ever come up. Nothing comes of it. Not only that, but it’s not even relevant to what we do. We are DBE certified. They have more benefits than, I think, all the rest of them. The DBE, that government agency is a federal government agency. They’re paying for somebody to provide help to disadvantaged businesses, and I think that’s phenomenal. We also get, sometimes we get emails directly related to our business, and what not. They’ll be like, “Here, there’s this thing. You can bid for it. Please let us know how we can help, and what have you.”” [#28]
- The owner of a WBE-certified professional services firm stated, “I attempted to re-certify as WBE and because of all the paperwork issues, I lost my WBE standing with the city but I still have it with the state. I just can’t understand why I need to certify with the city and the state.” [AV#9]

D. Experiences in the Private Sector and Public Sector

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work. Section D presents their comments on the following topics:

- Mixture of public and private sector work (*page 37*);
- Experiences getting work in the public and private sectors (*page 41*);
- Differences between public and private sector work (*page 43*); and
- Profitability (*page 45*).

Mixture of public and private sector work. Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

Eight business owners or managers explained that their firms only engaged in private sector work. [#15, #19, #20, #21, #22, #28, #30, FG#5] For example:

- The Hispanic American male owner of an MBE-certified landscaping company explained his experience obtaining work in the private sector, “I drive around. If I see a dead tree or a yard in need of work I stop, if they’re not there, I leave my business card. Sometimes they call me, and sometimes they do not call me. Also, when I don’t have a job, I go to Home Depot, Lowe’s and I start putting business cards in the carts, and sometimes I get a job and sometimes I don’t.” [#15]
- When asked about the proportion of work the company performs in the non-Hispanic white male owner of a certified VBE and Disabled-owned engineering company commented, “Well, at least 90 percent of our work comes from the private sector.” [#20]

- The owners of a majority owned electrical construction company commented, “We do about 90 percent of residential work, 9 percent in commercial work, and 1 in industrial work.” [#21]
- The non-Hispanic white male owner of an architecture firm noted, “I’d say right now, yeah, it’s all private. We’ve done public projects in regards to family houses and stuff like that.” [#22]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company described her business, “for all intents and purposes, we are a private sector completely.” [#28]
- The male representative of a non-XBE certified construction company commented, “we don’t usually chase public work. We have enough private work. We just don’t do that.” [FG#5]

Four business owners or managers explained that their firms only engaged in public sector work. [#10, #24, #27, FG#3] For example:

- The non-Hispanic white female owner of a WBE-certified construction company noted, “Almost all of our work is public, I would say it’s 90-95 percent public versus private. We will get calls from developers, contractors, where they might need an entrance at a subdivision, or they’re tying in a public road into the entrance of the subdivision, so they need us to do a lane restriction, closure, merge, or something to tie it all in. But those requests compared to us actively bidding INDOT work or city work is pretty small.” [#10]
- The non-Hispanic white female owner of a WBE-certified engineering firm stated, “I haven’t done any work in the private sector, most of mine has been in the public field. Either with Citizens Energy Group, the City of Indianapolis and now the airport.” [#24]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company noted, “We work mostly on corporate projects. We’ve done quite a bit of work with a local health center, some development work, and University work. It’s sort of public-private. Some private development; not much mostly municipal and government work.” [#27]
- The female owner of a WBE-certified construction company commented, “my team does pretty much all public work.” [FG#3]

For some firms the largest proportion of their work was in the private sector. [#3, #4, #13, #16, #17, #23, FG#1] For example:

- The Black American male owner of an MBE-certified electrical supply company explained that his company works in both the private and public sector, with approximately 70 percent of his work in the private sector and 30 percent in the public sector. [#3]
- When asked about the portion of work that comes from the private sector versus the public sector the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company noted, “Last year, I would say 70 percent private, 30 percent public.”

This year, there may be a shift in the wind because we found that we've been more profitable in doing some of the public work, because the private sector has been very, very tight on markups and margins. In the public sector, we bid three jobs with the city. One is not profitable, the second one was so-so, and the third one seems to be profitable, so right now we're probably going to bid more public once we find our sweet spot." [#4]

- When asked which sector the company works in the non-Hispanic white male owner of a goods and services company stated, "We do very little public, it's less than 10-percent in the public sector, we would like it to be different." He also mentioned that the mix of work varies year to year, "For example, two years ago we got a public contract in Michigan, and it occupied eight months of our time for two of our guys, but we don't have any public contracts this year." [#13]
- The non-Hispanic white male owner of a certified disabled-owned professional services company detailed which sector his company performs work, "The private side has been where we've always been. I got really lucky that I have a disease where my bones break more and more. It was really bad when I was a kid. You have a good phase, and then it diminishes. During my good phase, I created relationships with people that you create when you know things aren't always going to be great, and you want to keep them a client for life. That's what I tell them, when you're a client of mine, you're a client for life, because I'm going to take care of you. The private side is where I graduated from college. I had an opportunity to go to a small firm, which they knew about me and my bones, and they accepted that and helped me with the things that I couldn't do. That's really what I knew the best so, private work has been what we do mostly, and we're trying to get a better balance of public versus private right now." [#16]
- The non-Hispanic white male representative of a majority owned professional services company described, "I would say about 20 percent of the business is public and 80 percent is private. There are some city hospitals, there are U.S. Army hospitals, we sell to that would be considered public." [#17]
- The non-Hispanic white male owner of a construction company noted, "It's 75 percent private and 25 percent public. When things were bad back around 2010 or so, we were mainly doing public work. We were doing fire stations, the government thrown a lot of money toward fire station stuff and different municipalities, they were giving money out. For about a year we did a lot of that stuff." [#23]
- The Black American female owner of a DBE-, MBE-, and WBE-certified construction company mentioned the sector her company works in stating, "We've never had a city contract in all of that time of being certified by the city. We have done work for the state, but most of our work is in the private sector." [FG#1]

For other firms, the largest proportion of their work was in the public sector. They described multiple reasons for engaging in more public sector work. [#1, #5, #9, #11, #12, #25, FG#3] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company explained that majority of the company's work comes from the public sector, "I focus on the public sector. I work in both but about 95 percent are government-funded, city, state and INDOT projects. Dealing with city contracts or federally funded projects I know that I'm going to get paid and in a timely manner. You deal with some of these private projects. They can be 60, 90, or 120 days before you get paid." [#1]
- When asked what portion of work comes from the public sector versus the private sector the non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained, "It's almost all public, there's very little private, about 90 percent public, and 10 percent private. I would like to diversify and get more private work, but due to the nature of use being an XBE we are pulled primarily to the public side. The mix of work doesn't really change, there are different projects that we have now in the city that are unusual projects, they're not truly public/private partnerships." [#5]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company explained the company's experience with the mix of work in the public and private sector, "We do a good mix of both public and private work. We do seem to have better opportunities with public work only because of the prerequisite for minority participation. That seems to be when we have the best chance at a leg up. Private work we're able to secure ok but, if they don't have to use us, they won't." [#9]
- When asked which sector the company performs work in the Native American male owner of an MBE-certified construction company stated, "I would say in the last ten years, we've done a lot more private work. Used to, we did a lot of school, a lot of institutional work when my uncle owned the company and we did not do a lot of private. In probably the last ten years, we've done a lot more private. There's just a lot more opportunities out there now. The recession and coming out of the recession looking for opportunities to keep the guys here busy, is when we decided to do more private work. I would say currently we probably do 70 percent public and institutional work and probably 30 percent private." [#11]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company noted, "Probably 30 percent is geared towards private, and 70 percent toward public work. We do a lot of work for municipality companies and the gas company. I'm calling those public, because they serve the public. Those companies are what I call triple-A companies: they pay their bills, they do expect a lot out of you, but if you're willing to put in the effort, they're willing to pay the bill. I will give them a triple-A rating for most any of them out there. In the private sector, you will come across what I call some knuckleheads, once in a while, guys who don't want to pay you, so you do have to watch out for the person who says they're going to pay you and never shows up." [#12]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm explained, "It's probably 60 percent public and 40 percent private. The economy definitely has a big factor on the sector we work in, but it usually stays about the same. We tried to go more for the public side when we can, but I handle a lot of the private side with my sister,

she's an engineer. So, we would kind of team up together on the private side and then I have another partner and he has a background in other areas like the transportation and wastewater, so he handles a lot of the public side, but we team up together as we go out and market." [#25]

- The female owner of a WBE-certified construction company stated, "I would say the majority of my projects are in the public sector because there's a diverse need. I would say my projects where I work sometimes with developers, a lot of multi-family developers right now need a skill set that segues into concrete and steel, because they're doing a lot of podium type work. So, a lot of it is network based also, because I have 13 years of working in the private industry, so people will call and ask if you have bandwidth to come and help. Where there's a lot of money it's busy, as things slow down, I'm sure that part of the business will slow down." [FG#3]

Other firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy. [#2, #6] For example:

- The Black American male owner of an MBE-, and DBE-certified construction company commented about the variety of work his company performs in both the public and private sector, "From a quoting standpoint and the pursuit of business, we don't limit ourselves. You can't be successful in this business and just be an MBE company. Part of what that does is it limits you. I'd be naïve if I tell you that we don't benefit from it and we don't pursue opportunities in it, but we don't limit it to that. Because to grow our business, you've got to have more work than that. We try to build relationships with small repeat customers. We call it flow business." [#2]
- The Black American male owner of an MBE- and DBE-certified construction supply company commented about his experience working in the private and public sector, "It's been favorable in both sectors. We bid competitively every day, and not every day it has an MBE requirement, we do a lot of work that has no requirements, or goals. So, it's been successful, it's all about being low. First, you must have the lowest price on bid day, if you've got the lowest price, they'll use you so, it's competitive. When the city has a big job, you've got to be low, plain and simple. You can be the best, and you can have a better product, but if you're not low, you're not getting the job. It's all dollars and cents for both private and public sectors." [#6]

Experiences getting work in the public and private sectors. Business owners and managers commented on what it's like to seek work with public and private sector clients in the Indianapolis area.

Some business owners expressed that it is easier to get work in the private sector. [#28]. For example:

- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company noted the difference in getting work between the private and public sector and elaborated on why her business is primarily private sector, "in the government

contract, we haven't been able to do anything. Because, I think getting a start, they all look for 20 years of experience within the government sector. They always ask for, in our files and everything, you have to give past performance. How are we going to build past performance if we don't have any way to get in? So, I think that's been a very big barrier for us, in getting in. There's just a lot of paperwork, which is fine. But, being a small company, you start to weigh your options and go, "Okay, I can do this for five hours, or I could go and make money for those five hours. Which way do I want to go?" So, I think it's been more survival than anything else, if we just choose to go in this direction, because it's easier to get in, easier to do the work." [#28]

Several business owners elaborated on the challenges associated with pursuing public sector work. [#12, #16, #28] Their comments included:

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company described his experience obtaining contracts in the public sector, "Now, those ones you have to put in your time, that's the bottom line. Don't think you're going to go in there and say, 'Hey, here I am. Use me.' They're going to say, 'No, we want to see a track record, we want to know what you do, see how your guys act, see how you interact with other people.' It keeps you on your toes. I've been trying for five years or six years, to get in, and then they just had a large contract that they're going to do, changing all the poles. They called me when their contractor that they use on an everyday basis had a failure or breakdown with his truck or equipment. I've been able to just jump in there, and I tell the guys, 'Hey, we're going to get one shot at this. Do your best, get out there, do it safe, and show them that we do good work.' After about five years of trying, they finally said, 'Hey, we're going to give you a shot. We've seen your track record. I'll be glad to give you guys an opportunity. I want to see minority companies grow, but I'm telling you now, we don't play, we expect professionalism.' We've been working for them for over seven years, now." [#12]
- The non-Hispanic white male owner of a certified disabled-owned professional services company articulated, "It's been a learning experience. I think we have advantages over some firms that probably don't do professional services, because we have to have the insurances all ready. We already have to have all these forms ready to show workers' compensation, liability insurance. A trucking company, or something like that they're not used to having to come up with all this stuff, it would have been harder for them. I think we had an advantage on the paperwork side, but I didn't know how to get from A to B on the public side. I know you don't walk in and get jobs; they have to recognize your face or a face within your company. They have to trust that you're going to be there, and that's what we're trying to do right now, every day." [#16]
- In regard to pursuing public sector work, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company commented, " , we can't even get to that point, because nobody is really telling us how to do the RFPs. You got to figure all that stuff out in the government sector. We do proposals for private." [#28]

Other business owners and managers described public sector work as easier, and saw more opportunities in this sector. [#9, #11, #13] For example:

- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company described her experience pursuing work, “Whenever we work for the school systems and any of the universities, we have really good luck there. We’ve built enough experience in the market and enough networking that whenever there’s some state projects or something that come out, we’re thought of first, most of the time. That’s helpful for us, also having the goal that’s set in the contract. That’s really helpful for us because that will determine the amount of work we get on that job. Most of the state of Indiana or in particular the city of Indianapolis is run by several, maybe six or seven General Contractors [GC], period, point blank. What they do is determine with one another who is going to do what. For us it’s not an opportunity that you see come out from the state, we have to go to that GC to get the work. Usually, they’ve already decided who they’re going to use on the project. So, having the participation gets us in the door. But if that participation is not there nine times out of ten, they’re going to go to somebody else.” [#9]
- The Native American male owner of an MBE-certified construction company described his experience obtaining work in the public sector, “For us, it’s been fairly easy. Being a specialty subcontractor, we generally get invited by the larger contractors to bid on and participate in projects, so it hasn’t been really bad.” [#11]
- The non-Hispanic white male owner of a goods and services company explained how the company obtains work in each sector, “The private sector’s much easier, they come to us. The public sector we have to seek out in the bidding process, a lot of times it’s different.” [#13]

Several business owners or managers noted that it is not easier to get work in one sector as compared to the other. [#3] For example:

- The Black American male owner of an MBE-certified electrical supply company explained his experience attempting to get work in both sectors, “It’s in phases. So, in the beginning, to break in with a contractor or a customer, it’s easier when you’re going in on the public side as a minority-owned, woman-owned, veteran-owned or disadvantaged business. The contractors get to know you, the customers get to know you, and if you do a good job, they’ll use you anywhere.” [#3]

Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Many business owners and managers highlighted key differences between public and private sector work. [#3, #4, #16, #17, #20, #21, #22, #25, #27] Their comments included:

- The Black American male owner of an MBE-certified electrical supply company commented about the differences between working in the private sector versus the public sector, “I would just simply say that in the public sector, if it’s city work, my dollar only counts as \$.60. In private work you don’t need to be certified, they don’t care about certification some private work does, because they have some city money in the project, but they don’t care whether I’m minority or not.” [#3]

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company described the differences between public and private sector, “Private sector, unless it’s engineered by an engineer and unless it has a supervisor looking over it, it can be a little bit more of a reckless situation for the contractor. The defined role is what portion of the job is his is dictated by the city through their inspectors. There are more defined roles in a government job than there is the private sector. The private sector, sometimes they expect you to do everything for X dollars and change orders and it can become quite troublesome to get paid on those jobs.” [#4]
- The non-Hispanic white male owner of a certified disabled-owned professional services company noted, “It’s kind of an interesting situation, because when your resume supports private, if you can get in front of the right person, you have a resume that demonstrates you’re capable. Finding the opportunities in the private side is really difficult, they almost always have a relationship with someone, because they’re already doing work. So, what we’ve tried to do here is to hire people who have the same character that would promote that, we’ve been really fortunate to get some people here that have relationships and we have enough capability to fulfill the work that private companies have.” [#16]
- The non-Hispanic white male representative of a majority owned professional services company provided comments about the company obtaining work in both sectors, “It’s much easier to get work in the private sector, you can market to them easier. You typically know who your points of contact are. Public is a maze of decision-making complexity and multiple sign-offs, so it’s a much harder sell. But, if you know how to do it, it’s your core competency, then selling to public entities can be very rewarding. Public usually has lower profit margins, there’s quite a lengthy bid process, and as good stewards of tax dollars typically government, state, local, and federal are always going for the best bang for their buck. So, lower margins, longer sale cycle because the decision-making process is just much longer in public than in private. I would say those are two of the big differences.” [#17]
- When asked about the differences working in sectors the non-Hispanic white male owner of a certified VBE and Disabled-owned engineering company commented, “There’s more regulation in things you do in the public sector, and they have published standards of procedures that you adhere to. If you’re going to submit something to them, they have formats they want it submitted in and so forth.” [#20]
- The owners of a majority owned electrical construction company described the key difference between public and private sectors as, “[in] The public sector you can get paid immediately, which helps with daily cash flow” [#21]
- Discussing the differences between public and private sector work, the non-Hispanic white male owner of an architecture firm stated, “private as regards to we manage our projects where we have just two or three meetings with a client and with the contractor. Then a lot of this work that we respond to is handled by phone calls, communicate, emails, stuff like that. When we do public projects, I find and expect that there’s a number of people that are brought in, there’s sometimes a representative by the city to help manage a project that isn’t necessary. Then they’re all ... so the city itself, during construction, they bring in their

inspectors that basically demand excessive amounts of meetings and also scrutinize. Most of the time the meetings are worthless.” [#22]

- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm explained the differences from private versus public sector, “There’s definitely a difference in the process, in the private side it’s just when we’re doing plans it’s a totally different process. It’s hard to explain but private is its own beast and then public there’s definitely a difference and then that’s kind of why we split up and have a team for both sides.” [#25]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company mentioned work in the private sector has diminished, “Unfortunately, some landscape architects have done a very poor job managing projects, as a result, the state now says, ‘If you’re a landscape architect, you may not be prime on anything short of maybe a landscape project, where you do nothing but a planting plan, and not the full spectrum of landscape architecture.’ I have spent 42 years doing this, I can do anything and everything outside the building lines of a project. I can do grading and drainage, as a certified landscape architect, I’m allowed to do that on self-enclosed encapsulated sites. So, as a result of the state saying, ‘No, we want LAs only as subs,’ The City is taking the same position.” [#27]

Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Some business owners perceived public sector work as more profitable. [#1, #5, #23, #25, #29] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company specified why he felt the public sector was more profitable stating, “That’s where I get a lot of my work from because they tend to keep me busy. Also, the rates when you compare private to the government-funded projects. The rates tend to be better, a little higher when you’re dealing with government jobs.” [#1]
- When asked if profitability differs in the public sector versus the private sector the non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm expressed, “Absolutely. Profitability is capped when you’re dealing with the municipal and the State, which is good, but at the same time, they can eat away at your profitability. I’ve got a few projects that have just been dragging on for so many years. We know we’re not going to make money on it, so we’re just trying to make sure we don’t lose actual money to complete the project.” [#5]
- The non-Hispanic white male owner of a construction company noted, “Well if I worked for the right people during these public jobs, I know they would be a lot more profitable, if I didn’t have to go through a general contractor that would work great. Say if I work directly with the city of Indianapolis, there’s a middleman, there’s somebody who’s got their hands in the pot. Even when I was doing a snowplow, they paid very well. I was very happy with what they paid. The money is definitely there in the public sector if you go at it the right

way. The public sector is definitely a little harder than the private sector. The private sector is everybody, so you have more of a wider range of people to work for at that point.” [#23]

- When asked if profitability differed between the sectors the non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm mentioned, “It does. On the private side it’s a little bit more cutthroat you really have to form those relationships. I think the public side’s probably a little bit more profitable than the private side.” [#25]
- The Asian Pacific American male owner of a construction company commented on the profitability of public work, “I feel like there is more money in public work than private.” [#29]

Other business owners and managers perceived private sector work as more profitable. [#26] For example:

- Native American female owner of a WBE-, MBE- and VBE-certified goods and services company stated she avoids the public sector facilities because, “. It’s making those products affordable to a big company, and if you’re paying \$30, \$40, \$50, that’s not really affordable to a public facility. You’re mandated to sell the product at whatever they tell you that you have to sell for, but with one public entity you have to be able to offer their employees a 20% discount. Now if I can’t discount it because that’s what my supplier is mandating, then it’s hard to get that contract because I can’t do a discount, and that’s what they mandate as a vendor for their employees.” [#26]

Three business owner did not think profitability differed between sectors. [#3, #4, #13] For example:

- When asked if the profitability differed from one sector to the other the Black American male owner of an MBE-certified electrical supply company stated, “No. It doesn’t differ at all for me.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company shared his thoughts on profitability between the sectors, “The only difference is in the private sector, if you want to do something a little bit different and the end result is the same, and you could do it with less time, material, or whatever it may be you could probably be more profitable. On the public side, you have to do exactly what’s dictated. That’s a tough one, the fact that they’re both profitable, for me, it’s usually finding the shortest distance between two points on certain jobs. Internally, we grade our jobs *A, B, C*. We try not to do a *D* because the *D* would be the way more complicated one. In this construction environment, you’re given nine months of decent weather to get your job done. As you put a timeline to your bid, we also have an internal gauge that we bid accordingly with markup, because a \$100,000.00 job that’s going to take one week versus a \$100,000.00 job that’s going to take one month, the same type of material used over a month will not be \$100,000.00 based on time factor. The last few years have been good, almost as good as they’ve been since the ‘90s.” [#4]

- The non-Hispanic white male owner of a goods and services company mentioned, “I would say there's not much difference. The public jobs typically have been bigger jobs for us, but the profitability has been on par with the private sector.” [#13]

E. Doing Business as a Prime Contractor or as a Subcontractor

Part E summarizes business owners’ and managers’ comments related to the:

- Mix of prime contract and subcontract work (*page 47*);
- Prime contractors’ decisions to subcontract work (*page 50*);
- Prime contractors’ preferences for working with certain subcontractors over others (*page 50*);
- Subcontractors’ experiences with and methods for obtaining work from prime contractors (*page 51*); and
- Subcontractors preferences to work with certain prime contractors (*page 53*).

Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

A number of firms (n=11) reported that they primarily work as subcontractors but on occasion have served as prime contractors. [#1, #4, #11, #12, #19, #20, #21, #23, #24, #25, #30] **Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise.**

- The Black American male owner of an MBE-, and DBE-certified trucking company explained that his company works as a subcontractor on all projects, “I’m a subcontractor to the prime that performs the work. I just have trucks so I’m always going to be a subcontractor. Now they may give me the job where I’m the prime truck owner and I’m responsible for supplying all the trucks for the job but for the most part, that would be my only responsibility just supplying the trucks but I’m still considered a sub.” [#1]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained the role his company plays on projects and contracts, “We’re usually always the sub. We’ve been the prime on the last few jobs, but I always say I would rather be the best man than the groom, so we try to always be the sub to help assist the prime in their goals. When you’re XBE to the prime, he gets the credits for your efforts, when you become a prime, unless you’re a prime for IU or CEG or any of those companies, they will then use your whole numbers as a participation towards their goal as a company, not so much per job. The YMCA, CEG and those companies, if they all have X amount of dollars that they spend with us, it goes against their yearly capital budget for meeting certain goals that they try to do. That being said, you don’t become what they call race-neutral at the INDOT

level. When you become a prime, you become race-neutral, so you're no longer an XBE.”
[#4]

- The Native American male owner of an MBE-certified construction company noted, “I would say probably 80 percent of our work is subcontracting. We do a little bit of prime work and then a fair amount of negotiated work with owners. For us prime contracts are very good opportunities, I really like them. In some of the lines of work we do there's a lot of competition, a lot of it is smaller guys trying to make their way. The prime work, there's a lot of forms to fill out. There's a lot of Ts to cross and making sure you get all your paperwork in. There's nothing worse than missing one required paper in a prime bid. That kind of stings when you found out you had a good number, but you left something out. We're getting a lot better at it.” [#11]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company stated, “Ninety percent of the time, I am a subcontractor, I am rarely the prime. I can't complain, it's just a matter of documents, details, sticking to the details, making sure that everything is done, like they asked, when they asked, and how they asked it.” [#12]
- When asked about the distribution of prime to subcontracting work, the owners of a majority owned electrical construction company stated that, “most of it's a prime, probably 75 and 25.” [#21]
- The non-Hispanic white male owner of a construction company noted, “I mainly do subcontracting. I will sometimes take on a whole job and be the primary bidder on the jobs, then I'll sub some stuff out, but mainly that's an extra hassle for me. I don't like to do prime contracting work so much. I'd work for the general, or somebody, or even a municipality. It's just a lot more hassle for me, my wife and I do run the business. She runs the paper end of it, and I run the work end of it. It's just easier for me to do that.” [#23]
- The non-Hispanic white female owner of a WBE-certified engineering firm noted, “Being smaller it's been very good in the aspect that I really lean on the primes to give me guidance. I always tell them, I want them to see me as an extension of their staff or their team, and I'm capable of helping them and I want to be there. It's really important to have a good team. It's been good, but I've also been very fortunate to work with very good people. The only thing is I'm trying to branch out a little bit to become a prime and trying to get more consultants.” [#24]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm mentioned, “With the city of Indianapolis it's been a couple years since we had a prime job. We're on a lot of teams so we're a little heavier on the sub side.” [#25]

**One firm reported that they usually or always work as a prime contractor or prime consultant.
[#28] For example:**

- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company commented on her business' role saying, “prime, yeah. But would I be

open to being a subcontractor? Oh, absolutely. Work is work. It doesn't matter where it's going, or how it's being done. We just want to do the best that we can, and the best that we will, and deliver.” [#28]

Some firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project. [#5, #16, #27] For example:

- When asked how often the firm performs as a prime contractor versus a subcontractor the non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm noted, “Last year half of our work was performed as prime and the rest of the year as a sub.” [#5]
- The non-Hispanic white male owner of a certified disabled-owned professional services company stated, “We work as a prime for about 50 percent of our work. Even on the private side, we still find that we don’t have what it takes. So, we subcontract work to bigger companies. Although one of our biggest clients is another engineering firm here locally, they don’t have a survey, so we provide surveying to that company in a reliable manner that they like. When it comes to subbing on the public side, it’s a little bit different. We actually have met with two different INDOT districts, and they were very clear that we can’t be a prime until they recognize our name. What they’ve said is go team up with other companies, show them that you have a DBE, and that should help you out in trying to team up. I met with another engineering firm that does a lot of INDOT work with a person who I’ve known, who was actually a boss of mine previously. I met with him in his office, and it went pretty well. It’s kind of interesting, we have to be a sub before we can be a prime. We’ve never been a prime on the public side.” [#16]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company mentioned, “We’ve been a prime and a subcontractor. We like being the prime and having that direct access to the client. Oftentimes we’re under the realm of an architect, but to be able to have a direct audience with the client and not have to be subjugated to the architect was great. As a matter of fact, she’s still our client on projects. She calls us in whenever she can.” [#27]

Several firms explained that they do not carry out project-based work as subcontractors or prime contractors. [#2, #3] For example:

- The Black American male owner of an MBE-, and DBE-certified construction company explained the type of work the company provides, “We’re neither prime nor subcontractor. We’re a material supplier. We operate off of purchase orders, not contracts, it’s a different world. We’re not required to be bonded, that’s one of the big differences. But we’re not a subcontractor and we’re not a prime. We are a material supplier.” [#2]
- When asked if the company performs work as a prime contractor or a subcontractor the Black American male owner of an MBE-certified electrical supply company commented, “I’m a supplier, so if you take a construction project, so let’s look at one of the city’s projects. The city’s going to build the courts so, on the courts, Wilhelm is the construction manager and then the electrical contractor is Electric Plus. So, Electric Plus is the prime and I’m going

to sell electrical supplies to Electric Plus so, I'm selling to the prime. So, you could call me a sub if you want." [#3]

Prime contractors' decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with XBE-certified subcontractors.

Three firms that serve as prime contractors explained why they do or do not hire subcontractors. [#5, #21, #29] For example:

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained why her firm hires subcontractors, "We have to fulfill the XBE requirements just like everybody else. We don't count when we prime, I wish that weren't true. I think they're [the city is] missing a big opportunity. I think that if a woman-owned or minority-owned firm primes a job, I don't feel as though, if I'm a WBE, I should have to bring in a WBE onto all of my projects. I would rather see where I could offset that percentage and give a minority or veteran-owned firm a higher percentage, and me count as the WBE. I'm not saying eliminate the minority or veteran in the jobs. I just think whatever the prime is certified as should count towards the goal." [#5]
- The owners of a majority owned electrical construction company discussed why they often chose not to hire subcontractors, "We have tried subbing out work and we have not been extremely pleased with the quality of work that we get for what we are paying. So I would say that our choice would be to not do that if possible. Most of the work that we have attempted to sub out in the past has had to be... We've paid for them and then we'd have to go back and repair things." They also noted the price differential between their costs and the pay received by the subcontractors, "He's making \$15 an hour, but you're paying \$35 for him." [#21]
- The Asian Pacific American male owner of a construction company commented on his subcontracting practice. "I sub out all of my work. They're roofers. Roofers or siding contractors, depends on what the project is. I'm usually the general contractor. It's mainly the same people [I subcontract]" [#29]

Prime contractors' preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors. [#22, #29] For example:

- The non-Hispanic white male owner of an architecture firm mentioned, "Well, the subs we do use mechanical, electrical, plumbing engineers, structural engineers. The only time we sub work out is for a trade that we aren't providing." [#22]

- The Asian Pacific American male owner of a construction company explained his process for hiring subcontractors, “It’s a process. First of all I check their background and make sure they’re even qualified to do the work. Once that process is done, I’ll narrow it down to two or three people. And then obviously I call their references and make sure they’re qualified. And once I have someone that I’m comfortable working and then I just stick with the same person. Almost 100 percent of my subcontractors are licensed and they are minorities. And I am trying to convince them to go through the process to become a minority owned business. But none of them are. I’ve found that they provide a higher quality... product, you know, as far as installation goes. They’re much more efficient and timely in completing the project. Non-minority subs usually I found that they try to... Whatever the contract amount is, they try to work it out in favor of getting paid by the hour and try to complete it that way. Whereas the minority subs that I’ve used, they don’t try to work by the hour, they try to get it done quickly and efficiently without spending as much... you know, spending that crazy amount of time on the job site, that it doesn’t necessarily need. I mean, there’s a contract amount so if I’m... If they’re doing 100 squares of roofing and they’re charging me 50 bucks a pop, that’s five thousand dollars. Non-minority subcontractor might try to make that equivalent to making maybe 25 dollars an hour where and take as much time as they can to...have that payroll going for themselves. Whereas the non-minority will try to just quickly get the project done.” [#29]

Subcontractors’ experiences with and methods for obtaining work from prime

contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

Two subcontractors mentioned the helpful role Indianapolis’ programs play in finding work. [#9, #12] For example:

- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company commented about her experience getting work from general contractors, “The majority of it is a challenge. We find we have the most luck when we go directly to the city when we’re having an issue. I definitely believe there’s a hierarchy underneath the work that we have to constantly battle against. But when the city officials are there represented with the GCs [general contractors], when they’re putting out these pre-bids, and when the city is actually following up with what they’re hoping happens, we have the best luck. There are some city officials that are really, really good with that and they follow along with their GCs and make sure that they’re utilizing the minorities. Then there’s some that the task goes to the wayside, and then your kind of left just hoping that you can get it.” [#9]
- When asked how the company obtains work from prime contractors the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned, “A lot of it is through local meet-and-greets with minority councils, they have job walkthroughs with companies and I attend those regularly. We’re in a service industry, so a lot of the contractors that use us will refer us to other contractors. A lot of our work is obtained through meet-and-greets, being out there, and being seen.” [#12]

Some subcontractors reported that they are often contacted directly by primes because of their specialization, their XBE certification, or because of they are known in the industry. [#1, #11, #13, #21] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company stated that the company learns about work from emails sent from primes based on the certified companies list. He also learns about work from cold calling and knocking on doors asking for work. “I present my certifications to them, let them know who I am. Just because I send a quote, they may not really put a name with the face or anything like that so I try to do onsite visits to introduce myself to those guys.” [#1]
- The Native American male owner of an MBE-certified construction company explained how his company gets work as a subcontractor, “We get a lot of bid invitations. Say a contractor or an entity has a large job, I get a lot of invites to the meetings to network and talk. We get a ton of invitations to bid. There's so much work around here you can't keep track of it all.” [#11]
- The non-Hispanic white male owner of a goods and services company mentioned how gets work as a subcontractor, “Many times construction companies, larger construction companies get public sector jobs, but they need specialty folks to fill in behind them to do the alarm work and the camera work and the door work. Consequently, they hire a firm like ours to do that for them. So that makes it a lot easier on us, because the bidding process we're precluded from because of the construction component. Works a lot of that way with federal government type jobs especially.” [#13]
- When asked about how they find work or projects as subcontractors, the owners of a majority owned electrical construction company said, “a lot of them honestly are from out of town and they will go through and read our reviews and see that we have high esteem ratings, and high rankings, and they'll call us.” [#21]

Several interviewees said that they get much of their work through prior relationships with or past work performed for primes. [#2, #4, #5] They emphasized the important role building positive professional relationships plays in securing work. For example:

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained how he gets work from primes, “We have an 85 percent rate of returning business, so much of our work is reputation and word of mouth. We're also on a couple of email lists and there are several sites we go to see lists of projects going on.” [#4]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained how she obtains work as a subcontractor, “We call and we're always in touch with everybody. I was with four of the firms Monday, having lunch. We all get together often; I spend a large percentage of my time sitting on different committees for nonprofits. We work with a lot of firms in those committees. We try to help each other out because of our relationships in the community, people bring us in on jobs.” [#5]

Subcontractors' preferences to work with certain prime contractors. Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

Many business owners and managers indicated that they prefer to work with prime contractors who are good business partners. [#1, #4, #5, #11] Examples of their comments included:

- The Black American male owner of an MBE-, and DBE-certified trucking company shared his preference for working with certain prime contractors, "I have new primes that I'm working with and I have my set ones that I go to, but I'm always looking for more because if they don't get the work, then I don't have work. So, I'm always looking for new customers and always trying to get through those doors and build new relationships with new contractors and primes." [#1]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned that there are prime contractors he prefers to work with because they are great to work with, they bond their jobs, you know exactly what you are getting into and they pay on time. [#4]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm mentioned, "I've got a firm that we did work with three years ago and during one administration, they were a sub to us. We were in the same building as DPW and so they used us a lot to help them because they didn't have a good relationship with the city. They piggybacked off of us. When the administration changed, they thought they had this great relationship with the new administration. We had helped them win this big job and we had a quarter of a million dollars' worth of work. They never gave us a single part of the project after they won it. Never. I will never work with them again; I just don't trust them. They ended up shooting themselves in the foot on something else with the City so I don't think they get any work now, what goes around comes around." [5]
- The Native American male owner of an MBE-certified construction company mentioned that there are some prime contractors he prefers to work with because, "There's people that don't pay, the people that direct you to work on a time and material basis and then come back and say, 'We're not paying you for any of that. Thanks for doing the work and taking care of us, but we're not going to pay you now.' This happened on a private contract but the same contractor does a lot of public work as well." [#11]

Subcontractors also offered their perspectives on hiring second-tier subs. [#13] For example:

- When asked how the company hires subcontractors the non-Hispanic white male owner of a goods and services company commented, "We vet them so that we know that they're capable technical-wise. Then we work with a platform of subcontractors that have a five-star rating. We vet them very thoroughly, we work with them on two or three small jobs, before we give them anything." [#13]

F. Doing Business with the City and Other Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

- General experiences working with public agencies in the Indianapolis area (*page 54*);
- Barriers and challenges to working with public agencies in the Indianapolis area (*page 56*); and
- The City of Indianapolis' bidding and contracting processes (*page 56*).

General experiences working with public agencies in the Indianapolis area.

Interviewees spoke about their experiences with public agencies in the Indianapolis area.

Eleven business owners had experience working with or attempting to get work with public agencies in the Indianapolis area and in other places. [#4, #5, #13, #20, #22, #25, #27, #28, FG#7, FG#9, FG#15]. Their comments included:

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company described his experiences working with public agencies in the Indianapolis area, "Working with the Department of Public Works was very frustrating. In the previous year we had one crew working for one month for around \$200,000. This year they asked for three crews to work the entire season. When I asked them how much money was available, they said don't worry about that. I told them the first week I could have one crew available, the second week I could have a second crew available, the third week I could have the third crew working. They called me after one week at 10:00 to say 'you have used up all of the money, stop working'. I have an email to back up all of this. I am still waiting on someone to answer the email I sent." [#4]
- The non-Hispanic white male owner of a goods and services company explained his experience getting work from the City and other public agencies, "With the City of Indianapolis I work as a sub. I've been a sub on the federal government contracts as well. On the state one we tried that one ourselves, but I was so new to it, and I'm still too new to it, I don't know how to do it. I don't know how to make it work. So, lack of knowledge kept me from really getting into the process on that one, but I tried. City of Indianapolis was the – the one project that we'd done was the garage where they repair the police cars one of those locations." [#13]
- The non-Hispanic white male owner of a certified VBE- and Disabled-owned certified engineering company commented about his experience attempting and working with public agencies, "I was unsuccessful in getting any work with Carmel as my own business, but when I was with another company, I did get work from Carmel. It was in between some of the other things I was doing, I had a friend who was an engineer for the city of Indianapolis. I did a survey on the condition of the paving bricks down on Market Street." [#20]

- The non-Hispanic white male owner of an architecture firm described their experience working with a public agency, “I swear for every one person of us there was four of their people attending every meeting. The meetings would go on for three hours and like, oh, my God, this is ... just make a decision and let me get back to what I need to do.” [#22]
- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company mentioned her experience working with public agencies in Indianapolis, “It's been fine. My problem isn't working with the agency as much as it is the lack of budget that's typically assigned to our part of the project, and it saddens me. That isn't an issue of whether I'm a minority or not; it's a budgetary consideration. We're doing a park project right now for an engineering firm, and I have a \$2,000.00 fee, and it's really hard to make those things. Then we did a nice landscape design, very simple, according to the city standards, and they just cut it down. So that's no good because we estimated what we thought it would be based on reasonable landscaping, and that's not efficient, so how do you deal with that?” [#27]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company described the difficulties in breaking into public sector work, “on city, state level, I think one or two companies ... This is my experience and I know this for a fact. That there are one or two companies that work with the city, and they like working with the city. They do all of the ... They are the primary vendor. They get a lot of the business, and they can subcontract, but they will only do it with the ones that they've already worked with, because, hey they have a proven history, and what not. So, there's definitely not a clear, "Okay, we're going to give everybody a chance.”” [#28]
- The Black American female owner of a no-longer operating trucking company commented on contracting with public agencies, “It's just been a roller coaster. It's like, you have to heed to what everybody wants in this industry or they will bring you down.” (FG#7)
- The male representative of a trucking company commented on a public project, “, I did do a job at the airport and I'm going to just guess at the number without being a... I'd say it was \$412,000 was going to be minority trucking. Halfway through the project I ran my year to date with the customer, whatever, start to date. And let's say it was 200,000, and I told him I said, "Hey, are we still going to hit this number?" And by reiterating to them, "Hey, my numbers were low according to where we look like we are on this project," all of a sudden they call me up the next day and they double the quantities of trucks and they quit using other persons. So sometimes you do have to monitor that work a little bit. Do not expect the destiny to be filled by the prime contractors. Or don't expect them to take care of that but I will say that if the city, let's just say I didn't get to that 400. Does the city have anything in their capacity they could go back to?” (FG#9)
- The male representative of a trucking company noted, “what I can't understand is how one trucking company get all the work in the city with all except maybe one prime contractor. And the city let them get away with it.” (FG#15)

Barriers and challenges to working with public agencies in the Indianapolis area.

Interviewees spoke about the challenges they face when working with public agencies in the Indianapolis area.

A few business owners highlighted the complexity and difficulty of the public sector bidding process, and the length and large size of projects as challenges, especially for small disadvantaged firms. [#5, #21, AV#1, AV#3, AV#5, AV#8] For example:

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm described her experiences working with the Indiana Department of Transportation, “They make it difficult for a small firm to grow and get certifications with their prequalification’s. You have to have so many projects under a design within so many years. You have to prime it but you can’t prime it without having those prequals, so it’s kind of like you’re stuck. They just keep you at the same size and that’s the struggle. The whole point, to me, of the XBE program is to grow to the point where you don’t really need it. I mean, I’ll always be a woman, so I’ll always be a WBE, but I don’t want to rely on that. That’s not my intent.” [#5]
- Noting the difference in scale between their capacity and the size of projects offered by public agencies, the owners of a majority owned electrical construction company stated, “most everything that they’re doing is once again too big for my work. We’re too little.” [#21]
- A non-Hispanic white male owner of a construction company mentioned that his company does not work with the government or public agencies because the amount of paperwork needed to be approved for a job is over whelming. [AV#1]
- The non-Hispanic white female owner of an electrical supply company stated, “The City needs to require ideal certifications. I have applied three times and have been denied three times. I can’t bid on jobs without this certification.” [AV#3]
- The non-Hispanic white male owner of a construction company noted, “The process to work with the City or other public agencies is very difficult and time consuming. When you want to do work with the city, they don’t have a clear understanding of scope of work.” [AV#5]
- The Hispanic American male owner of a construction company mentioned he has a hard time finding out about work with the City, “I never got any answers on how to go about getting business with the city. I have received a lot of different answers about how to get contracts but not where to find the work.” [AV#8]

The City of Indianapolis’ bidding and contracting processes. Interviewees shared a number of comments about the City’s contracting and bidding processes.

One business owner discussed difficulties in learning about the City’s and agency contract opportunities. [#26]. For example:

- Discussing the bidding process, the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company said, “I went on the website before so that I could see the state contract, and this was way back when I first started. I went on the website, but I didn't see anything on there for my product. Like all of the contracts that you could bid on for the state, but I didn't see anything in my field when I went on there.” [#26]

Many business owners shared recommendations as to how the City of Indianapolis or other public agencies could improve their contract notification or bid process. [#4, #13, #20]. For example:

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company provided recommendation on the city's bidding process stating, “The city should require all jobs to be bonded, it adds a layer of credibility and you can track exactly what the organizations are actually paying to the prime and subs. The city should track down the front companies.” [#4]
- The non-Hispanic white male owner of a goods and services company expressed challenges he has faced with the bidding process, “I'm uninformed about the process. If I understood the process I'd be involved, I think others would be too. I guess if I got notification as part of my registration with the State of Indiana somehow that says, ‘Hey, if you ever want to bid on City of Indianapolis jobs or if you want to bid on state jobs, here's how you do that.” [#13]
- The non-Hispanic white male owner of a certified VBE and Disabled-owned engineering company provided recommendations, “I think that if they [the City] were maintaining a list of people who were qualified for minority or veterans, they could just email out when there was an opportunity for some sort of professional thing. If you're not interested or not eligible, then there's no harm in getting that. It certainly isn't any expense to them, as long as they have a list. Then that wouldn't necessarily imply that you were favored to get something. It's just, we're looking. Can you do it? Would you be interested in doing it?” [#20]

G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of the City of Indianapolis' marketplace. It focuses on the following three topics:

- Current marketplace conditions (*page 57*); and
- Keys to business success (*page 61*).

Current marketplace conditions. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the City of Indianapolis' marketplace that they have observed over time.

Eighteen interviewees described the current marketplace as increasingly competitive. [#1, #3, #4, #6, #13, #14, #19, #20, #21, #22, #23, #25, #26, #28, #29, FG#9, FG#11, FG#15] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company explained marketplace conditions within his industry, “I think it’s growing but it’s only growing for a few companies, that really have the truck power, the capacity and the relationships. Due to their relationships with the contractors but Indianapolis is saturated with a lot of dump trucks. But there’s only a few trucking companies that are truly growing their capacity year after year and some of us are either reducing the size of the trucks that we have or getting out of the business completely. I went from one truck up to 11 trucks back down to 3 and now I’m back up to 11 trucks.” [#1]
- When asked about current marketplace conditions the Black American male owner of an MBE-certified electrical supply company expressed, “There are excellent opportunities in both public and private sector. They’ve grown in public just in the last couple years.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned the current marketplace conditions, “There is so much work out there it’s a lot of competition but a lot of the companies will be gone because they try to do jobs they can’t do. Sometimes I show up to a pre-bid meeting and I am the only one there.” [#4]
- The Black American male owner of an MBE- and DBE-certified construction supply company mentioned the marketplace conditions, “This city has been pretty good. It was shielded from the recession, in ’08 and ’09, when everything took a dive, we had an airport being built, we had a JW Marriott being built, and we had a football stadium being built because of the Super Bowl. That work pulled my company right through that recession. Fortunately, when the economy was dipping in ’08 and ’09, Indianapolis went right over that dip. Indianapolis was kicking butt in the recession. Well, then when the recession ended and the rest of the country started going back up, Indianapolis was going the wrong way, I can’t say we saw the lows that a lot of the country saw as far as construction goes Indianapolis has been steady.” [#6]
- The non-Hispanic white male owner of a goods and services company mentioned his experience with the Indiana marketplace, “Well, both marketplaces are strong right now, so I’d say that they compare favorably as far as what people are trying to do based on the economy. Private sector work is just easier to get. The marketplace, is stronger than it was say two years ago even, when we started. Part of it is that our competency level is now more recognized because of the work that we’ve done in the marketplace, but part of it is the marketplace itself.” [#13]
- The non-Hispanic white male representative of a majority owned goods and services company commented about the current marketplace conditions, “Rates have gone down, there is not a lot of truckers, and a lot of the truckers these days are older. There’s not a lot of young people getting into trucking, a lot of people are just going to college and getting different types of jobs. Customers want the rates low and drivers want the rates high, so it’s kind of tough to find that intermediate to actually make money.” [#14]
- The Black American male owner of an MBE- and DVBE-certified professional services company described the current marketplace, “They differ in my opinion it’s because politics

are involved. If you're not part of the clique, you won't get nothing and I've seen that. For example, the deputy mayor has friends that contract and they get the money from the government. Then they funnel down to their people then they get kickbacks. That happens on national level, and it happens in small level too, that's what it does here predominantly. It's growing flat for the very fact that you're going up against a machine, they have things done their way." [#19]

- The owners of a majority owned electrical construction company commented, "We are kind of stagnant in our growth, but the overall market is great, we turn down more work than we would like to. That is for sure, because we don't have enough people." [#21]
- The non-Hispanic white male owner of an architecture firm said, "Last couple of years have been really good, economy has been strong. People keep on wanting to do work." [#22]
- The non-Hispanic white male owner of a construction company stated, "Other contractors that I've talked to have said, 'It's a contractor's market in the area now.' They have as much business as they want, they're turning business down." [#23]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm mentioned, "For what we do and the services we provide, the marketplace right now with the economy there's a high demand and it's been really, really positive this past year so that's a plus. I think that it just seems really good right now overall because of the way things are going and the projects that are going on." [#25]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company commented on the marketplace conditions stating, "I think that for my particular business, that the market is saturated. I mean, honestly if I had it to do all over again I probably wouldn't start this type of company because the market is just saturated here in Indianapolis." [#26]
- Commenting on the general condition of the market, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company noted, "it's been very good in that regard. Indianapolis is a very good, very well connected small town. I still think it is fairly small in terms of people being connected." [#28]
- The Asian Pacific American male owner of a construction company described the marketplace as, "roofing's really saturated. There's a lot of competition. There's a lot of companies that open up and fold up. This year the homeowners or the clients don't really know and they don't really do the research and they'll hire someone who's going to fold up in a few weeks or in a few months. And it's not really in my control or in my hands." [#29]
- The male representative of a trucking company noted the increased competition due to larger more well funded firms in the marketplace, "Prior to the powerhouses coming to town and sending the questionable XBEs, whatever the companies, front and prior to that everybody had to grow within their cycle of earning the money and showing it on your books to get support to buy more trucks. So everybody was like, we're all in the same boat.

We're headed about the same kind of speed. Well all of a sudden when the new large company shows up and is funded by this brand new company that has no record to show that their performance could even support those payments, that's where it disrupted the market so to speak. Let's say I was running five trucks and Mr. So-and-So on the phone saying he's running five, we get a good year we may be up to seven or eight. And within the friendly environment of being competitive, that's what you have. But whenever somebody shows up with literally 40 to 50 trucks, that disrupts the market in such a way that finances, we couldn't pull together every minority trucking company and have that kind of a financial sheet to get that loan." (FG#9)

- The female minority owner of a trucking company commented on the current marketplace, "as far as African-American people, we probably had a workforce of probably 150 trucks between all of us that were in business at that time. I would say right now probably not even half that, not even a quarter that. They have successfully deleted and got rid of a lot of the independent contractors." (FG#11)
- The male representative of a trucking company stated, "There was some opportunities until the few powerhouses they talked about flood the market with over 150 or 200 trucks on two companies versus what it would take everybody on this phone and their friends to get to that number." (FG#15)

Four interviewees observed that marketplace conditions are generally improving, especially for small and disadvantaged businesses. [#11, #12, #15, FG#3] For example:

- The Native American male owner of an MBE-certified construction company commented about the marketplace conditions, "In the early '80s, there was an increase of work, an increase in manpower here. Over the years, it's ebbed and flowed just like the economy of Indianapolis and surrounding areas. During the last recession, we did fine because we do restoration work. We'll re-caulk old buildings, tuck point, and we do concrete repairs. During the last recession that started in '08, we just kind of switched back to doing more restoration work because there wasn't a lot of new work. I don't think our revenues dropped at all during the last recession, we were quite fortunate here." [#11]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned, "Well the marketplace for years seven through ten was very unstable, and I've noticed the last three to five years is really starting to come back in a strong manner and being stable. So, I think the economy's in an upswing." [#12]
- The Hispanic American male owner of an MBE-certified landscaping company commented about the marketplace conditions, "It's been great. Every year, it gets better. Sometimes it's low, like in wintertime, very low. I've got to save money to survive. I don't have big equipment to do ice and snow removal. I have snow machines, and that's how I make money for my bills in wintertime. But, besides that, everything is okay. It's not that much, but I survive." [#15]

- The female owner of a WBE-certified construction company noted, “I would say the majority of my projects are because there’s a diverse need. So a lot of it’s network based too, because I have 13 years working in the private industry, so people will just be calling and ask if you have the bandwidth to come and help. Cause things are just, where there’s a lot of money it’s busy. As things slow down I’m sure that part of the business will slow down.” [FG#3]

Business owners and managers offered mixed sentiments about whether there was greater business opportunity in the public or the private sector. [#16, #17, WT#2] Most business owners felt the private sector held more promise than the public sector. Their comments included:

- The non-Hispanic white male owner of a certified disabled-owned professional services company provided his thoughts about the current marketplace, “The market on the private side you have to be constantly evolving. Having a client for 15 straight years isn’t going to be the future, and that’s what we had become comfortable with. On the public side, it feels like everyone has hundreds of millions of projects. It was the airport, IndyGo, IU Health, Browning Investments, and Ambrose. Every one of them had hundreds of millions of dollars in projects, it just seemed logical to try to work on some of those contracts. Then the fed lowered the rate by a quarter point, so that helps, but we used to do 10 Taco Bells every year since 2005. We’ve built hundreds of Taco Bells last year was the first time they built six, and this year they’ve built zero. The private side gets saturated with certain things like a Taco Bell, and people change their mind about how healthy a Taco Bell is, and they don’t want it anymore.” [#16]
- The non-Hispanic white male representative of a majority owned professional services company noted, “The public sector marketplace in Indiana has always been very conservative. Indiana has never been a big spender at a state level. That can be good and bad I mean, we have one of the most conservative fiscal states in the region, and that’s kept our noses clean, financially but our roads are a mess so, it’s always a trade-off.” [#17]
- The female owner of a WBE-certified professional services firm expressed her concern about the Indianapolis marketplace, “This is the second disparity meeting that I have been to since becoming a WBE member with the State of Indiana. I am a new WBE-certified business and this makes me wonder if I made the right decision. One would think that minority companies would make it through with city and state help. I’ve heard if a minority company wins the bid as a subcontractor then the company is ‘bullied’ into work outside the scope of what the bid was. The city should have a non-bias group to oversee work and issues with payments, bidding, and contracts that minority owners can go to for assistance. Minority businesses are frustrated with the way things are now.” [WT#2]

Keys to business success. Business owners and managers also discussed what it takes to be competitive in the Indianapolis marketplace, in their respective industries, and in general. [#3, #4, #5, #13, #14, #17, #18, #29, FG#3, FG#5] For example:

- The Black American male owner of an MBE-certified electrical supply company commented about what it takes to be competitive in his industry, “You have to have very good

relationships with major manufacturers to get the right costs and you have to be an authorized distributor to get the cost that you need.” [#3]

- When asked what are the keys to business success the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company noted, “You have to know what your areas of expertise are and stay in them, try not to expand too much too fast.” [#4]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained what has helped her company be successful, “There are some firms that just get away with just doing the bare minimum, and that’s fine. If you want to grow a company, you’ve got to be more strategic and actually produce quality work and not just rely on, oh, I’m a woman-owner, XBE firm, and actually deliver. That’s what we get called about a lot. A firm may call us just because they’re like, ‘Hey, we’re slammed but we know you guys can knock this out so we’ll put you on this; can you get this done for us?’” [#5]
- When asked what it takes to be competitive in the goods and services industry the non-Hispanic white male owner of a goods and services company stated, “Competency. Your techs have to be competent. I mean I can go sell it all day long, but if we can’t go out and do it and do it quickly the next guy is going to follow in right behind me.” [#13]
- The non-Hispanic white male representative of a majority owned professional services company described the keys to business success, “You have to know your products and services, you have to be able to provide top-quality in what you do, you need to know your customer base and be able to build relationships with them, and deliver on promises that you make, and price yourself reasonably. I think those are core competencies of any successful business. Our particular business, we just really need to know the life and the work of public safety responders, healthcare responders to disasters.” [#17]
- The Hispanic American male co-owner of a goods and services company explained the key to business success, “Do the right advertisement.” [#18]
- Advice for business success from the Asian Pacific American male owner of a construction company, “Warrantees are big, price is important. Having a good track record, not doing the wrong things and taking advantage of clients. Being honest.” [#29]
- The female owner of a WBE-certified construction company described how she found success, “. I would say it’s a lot of self motivation. Setting goals, making it happen, calling on resources, knowing who to hire and what to spend your money on. So it’s just a lot of personal determination I think is probably the hardest thing. To just keep going. When there’s no reward.” [FG#3]
- The male representative of a non-XBE certified construction company suggested, “read before you sign the contract. Ask for it.” [FG#5]

H. Barriers or Discrimination Based on Race/Ethnicity/Gender/Disability or Veteran status

Business owners and managers discussed a variety of barriers to business development and any experiences with discrimination. Section H presents their comments and highlight the most frequently mentioned barriers and challenges first:

- Obtaining financing (*page 63*);
- Bonding (*page 65*);
- Insurance requirements and obtaining insurance (*page 66*);
- Equipment (*page 67*);
- Personnel and labor (*page 68*);
- Working with unions, being a union or non-union employer (*page 69*);
- Obtaining inventory or other materials and supplies (*page 72*);
- Prequalification requirements (*page 72*);
- Experience and expertise (*page 73*);
- Licenses and permits (*page 73*);
- Learning about work or marketing (*page 73*);
- Any unnecessarily restrictive contract specifications (*page 74*);
- Bid processes and criteria (*page 75*);
- Bid shopping or bid manipulation (*page 75*);
- Treatment by prime or customers during performance of the work (*page 77*);
- Approval of the work by the prime or customer (*page 77*);
- Delayed payment, lack of payment, or other payment issues (*page 78*); and
- Other comments about marketplace barriers and discrimination (*page 82*).

Obtaining financing. Interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics [#23].

Many firms described how securing capital had been a challenge for their businesses. [#1, #4, #9, #11, #6, #21, #22, FG#3, FG#4] Examples of their comments are included below.

- The Black American male owner of an MBE-, and DBE-certified trucking company expressed, “Being an MBE-certified company it’s just harder to get financing, not that it’s hard but they may want you to put a lot of money down where other companies may not have to. It also may have to do with their track record, credit history, things of that nature that I’m not privy to.” [#1]
- When asked if obtaining financing has been a barrier for the company the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned, “Financing is a definite barrier for me and others, I would never work with a bank if I didn’t have to. I don’t believe this is a discrimination thing. Once we have spent over a million dollars, we will be able to drop our current rate from 2 percent to 1 percent. Other large companies only pay a .5 percent rate, small companies have a difficult time getting loans because of that rate.” [#4]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company noted, “Lack of capital is probably the biggest issue in an industry, where women owned businesses are very much underrepresented. So, you have those two strikes against you.” [#9]
- The Native American male owner of an MBE-certified construction company mentioned how obtaining financing was a barrier when starting the company, “After I bought the company, it was very difficult. After the purchase of the company we did six months of me using my personal credit card for everything. The company could not get a credit card from anybody, I shouldn’t say anybody. PNC was historically the company’s bank and PNC would not even give me a credit card. I actually went to Chase where I personally bank, I applied online and had a credit card in three days after four months of trying to get one at PNC.” [#11]
- The non-Hispanic white male owner of a certified disabled-owned professional services company commented about his barriers with obtaining financing, “A hurdle we experienced that pushed me over the edge to pursue the DOBE certification was we’d been in business for four years, we went to go get a line of credit, and I disclosed that I was disabled. We’d made profit every year, we’ve had no cash flow problems, this was just a safety blanket, and we were denied. I explained the situation to my landlord, who’s a pretty good businessman, and he said, ‘Something’s not right there.’ I gave him the same Dropbox of files, he sent them to five different banks and did not disclose that I’m disabled, all five approved us. That was the moment where I realized that people do treat you differently, and that was really hard. When we initially filed for the company, we asked for a loan so I could hire somebody who I knew wanted to work here, the initial reaction from the bank was, yeah, engineering firms are very easy to get financing, they’re kind of like doctors and dentists, you know they pay their bills and they’re pretty low-risk. They ran a score, we scored really high, and then we got denied the loan starting out. I wasn’t able to hire right off the bat, we had to accrue revenue before we could hire somebody.” [#16]

- The owners of a majority owned electrical construction company mentioned when they first started the company there was a barrier obtaining financing, “We have found that the hardest thing to do is to get any kind of actual funding to help us grow. A lot of places say they can help you with an SBA loan, but nobody wants to base it solely on a business, they want to base it off your personal stuff. We sunk everything into this; our savings and our inheritance.” [#21]
- As a suggestion, the non-Hispanic white male owner of an architecture firm stated, “thing is with the city, if you want to help people, is the fact that maybe work on more in regards to small business loans and things like that.” [#22]
- A major challenge faced by the female owner of a WBE-certified construction company was financing, “I mean there was no money, right? So I had \$20,000 that I had started the business on, and really had no paycheck for nine months. And every day just had to get up and force myself cause I have two kids at home.” [FG#3]
- When asked what barriers the company faced when first starting the Black American male owner of an MBE-certified construction company stated, “So the biggest bumps were funding, I started with 300 bucks. I didn't know what to expect, I gave 300 bucks to a guy that had legal background, next thing I know I was registered for a business. I didn't have a clue what that really meant because I was still working my old job parallel to this, because I still had to survive and take care of my family. I started attending the SBAs, and all the SCORE events that I could think of, and just learning about business.” [FG#4]

Bonding. Public agencies in Indianapolis typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds. Securing bonding was difficult for some businesses and other interviewees discussed their perspectives on bonding. [#20, #22, #23, AV#6]

- The non-Hispanic white male owner of an architecture firm noted, “a lot of it has to do with the fact that the city and the government basically requires a lot of proof, a lot of insurance that everybody has to end up paying for somehow. To protect a bid. There's a number of projects that are self-performance bonds or TIF bonds, that are being issues. So instead of the city taking the responsibility for that risk, the contractor take on the risk. I understand. As public money, we don't want to take risk. You want to make sure that the fact that when you engage in a contract, that contractor can be completed.” [#22]
- The non-Hispanic white male owner of a construction company mentioned that bonding requirements are too high and bonding is the only barrier his company has experienced with the City. [AV#6]

Insurance requirements and obtaining insurance. Business owners and managers discussed their perspectives on insurance. [#4, #16, #22, #24, #29, FG#11] Examples of their comments include:

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned that insurance requirements and obtaining insurance is a huge cost for small businesses and can be a barrier. [#4]
- The non-Hispanic white male owner of a certified disabled-owned professional services company expressed his experience with obtaining insurance for the company, “We hit our first major hurdle trying to hire people and it came down to we couldn’t get health insurance, because health insurance requires everyone at the company to apply, and I’m disabled. We were repeatedly denied, we couldn’t get health insurance, dental insurance, vision, and we couldn’t get disability obviously. We had very hard times getting life insurance. We couldn’t get almost any insurance program. That made it very hard, and engineering firms are professional services, so you’re only as good as the employees that you have, and the team you’re on. It took four years of work to get any insurance of any kind.” [#16]
- In regard to insurance, the non-Hispanic white male owner of an architecture firm stated, “a lot of the liabilities and things like that that are being requested are much, much higher than a small firm can do. So I think the city has realized, are you going to completely require small firms to take on that liability? Or are they willing to purchase the liability insurance themselves to carry with the project? Because one way or the other, you’re gonna pass on that cost.” [#22]
- The non-Hispanic white female owner of a WBE-certified engineering firm commented about insurance presenting a barrier for her small company, “It has been a challenge. It’s hard to get these higher limits as a subcontractor. When you inspect a small company it’s up to 5 million now of coverage. It’s hard, because you don’t have a lot of assets and then, it’s a huge risk for them. The primes allowed me to just have a million, they waived it for me, and they had to do it for each project. They had to look at it individually because some projects you do need more coverage.” [#24]
- The Asian Pacific American male owner of a construction company found obtaining insurance to be “a pretty easy process”, however, “the only thing that I’ve found is some of the insurance companies, they’ll use a different software so it varies from company to company. So it’s kind of hard to get the exact pricing of what something is going to cost. Cause everyone uses different software.” [#29]
- The female minority owner of a trucking company recalled changes in insurance requirements that put an undue burden on many companies, “We had a lot of people that were African-Americans that didn’t have a fleet of trucks, but they owned their own truck and were owner-operators. And when they wanted to level the playing field as what [the president of the Teamsters] said in his letter they sent to us, basically what they did was made it to where independent contractors could not afford to pay the hundred and what is

it? Twenty-five dollars? I don't know what it is now, a week for the health insurance."
(FG#11)

Equipment. Business owners and managers discussed their experiences and challenges obtaining the necessary equipment for their firms. [#1, #2, #3, #15, #21, FG#7, FG#14, FG#19]
Examples of their comments include:

- The Black American male owner of an MBE-, and DBE-certified trucking company stated the biggest barrier for his company is capacity stating, "I don't have enough trucks and it all depends on the project, there are small jobs and medium-sized jobs, and I only have 11 trucks. That's a lot but some of the guys, some of the minority firms, there's only a few of them, they have 30 to 40 trucks but they continue to get all the work. Then they're going to continue to grow where I'm not. So just my trucking capacity is one of the reasons why I haven't grown. I'm trying to get more trucks but it takes time, money, and contracts. Can't go out there and get trucks but you don't know if you'll be able to work them or not." [#1]
- When asked if obtaining equipment has been a challenge due to discrimination based on race or gender the Black American male owner of an MBE-, and DBE-certified construction company stated, "It's a huge challenge this is a niche business, it's a commodity business and it's tough to control your margins. You sell a job today and then the price of steel goes up, by the time you ship it you're at a negative margin. Those are barriers that have nothing to do with race or gender. It's just the nature of the business." [#2]
- When asked if equipment is a barrier for small businesses the Black American male owner of an MBE-certified electrical supply company noted, "There are barriers, but they're not caused by discrimination. I'll give you an example of a local manufacturer hasn't authorized anyone but us in the last 15 years and they're not going to, it doesn't matter whether your white male with an MBA from Harvard and \$50 million, anyone, they're not going to authorize you. So, that's a barrier for distributors, you can't get those brands in your store." [#3]
- The Hispanic American male owner of an MBE-certified landscaping company explained how obtaining equipment has been a barrier for his company, "I never try to grow because I don't have the money. I don't have the equipment to do the job. I just go slow. Right now, I have this truck, a 1985 I've had that truck for almost five years. Every time it broke down, I try to fix it because I don't have the money to buy a brand new." [#15]
- In regards to equipment, the owners of a majority owned electrical construction company stated, "some of the equipment that we use is extremely expensive. We do a lot of rental renting equipment. We're kind of limited in what we can do with them." [#21]
- The Black American female owner of a no-longer operating trucking company commented on the difficulty procuring trucks for her business, "when it comes to even purchasing trucks, whatever, you can only get trucks a lot of times if you get an okay by someone else. And that's another thing the majority-minority companies are dealing with, is that they limit your availability to get a certain amount of trucks because if you get a certain amount

of trucks, then you will not have to be paying so much on the non-minority. [Dealers] limit you very badly as far as having trucks you can attain. It's predatory lending" (FG#7)

- Once a local dealer became WBE-certified, the female representative of a trucking company recalled, "for the first time he [the truck distributor] never returned my calls. He didn't do any of that, because he didn't have a reason to because he was putting into operation his own company. So he says, "The heck with that. I'm not selling you no trucks because I have my own company." And this is a person that for years and years and years, everybody in the state of Indiana, and the surrounding states had purchased trucks from this person. Now, with all his millions, he puts his daughter and his secretary in business and then hurt the people that don't have that kind of money that made his money. ... All they're going to do is they're going to keep the minority for that little bit of money and as soon as they fulfill their goals they're going to kick them [the WBE branch of the company] off and they're going to be making just as much money as if they were the minority. Because they have the money to hang in there. They can hang in there for a long time." (FG#14)
- The male representative of a government agency commented on equipment procurement, "Some of the other issues I see is since we only have a few dealerships, some of the dealerships sell trucks to the XBE for a different rate and when they sell to a non-XBE they sell at a different rate. So right there there's at a disadvantage when an XBE goes in, purchases a truck. They have to pay a different rate because some of those dealers also are 90% or 30% owners in other hauling and trucking businesses. So they control how you say the mid-Indiana region where a lot of these XBE truckers that you're talking to now are in the central Indiana region. So if they have to purchase a truck, they're not going to drive across the Indiana border to purchase a truck. They're going to look locally." (FG#19)

Personnel and labor. Business owners and managers discussed how personnel and labor can be a barrier to business development [#1, #2, #5, #6, #11, #16, #21, #23]. For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company explained how personnel and labor has been a barrier for his company, "It's definitely tough in the industry that we deal with. You have to have a CDL license Class B. There are not a lot of good truck drivers out there, the ones that are good, they pretty much already have employment with someone else. My trucks are manual so a lot of folks don't know how to drive sticks, so the market is going towards automatic trucks and I may need to start looking at buying those trucks, which cost more money. That may hinder me from increasing my capacity, too. Finding good drivers that know what to do, because the type of work we do, we're a union outfit so I pay my guys good money so I expect them to know what they're doing to go out there. I don't really have time to train you so I look for someone that has at least two to three years of experience. I'm willing to train but there's no paid training in our organization. So new personnel have definitely been a hindrance, just trying to get good quality drivers." [#1]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm mentioned, "I think there is a barrier a bit when it comes to personnel and labor but that's on me. When you're a woman-owner, sometimes finding staff, because it is male dominated.

Sometimes you can have a harder time convincing, but it also is being a smaller firm, too. It's hard to discern if it's between being a smaller firm versus being a woman-owned firm.” [#5]

- The Black American male owner of an MBE- and DBE-certified construction supply company mentioned finding specific personnel has been a barrier for his company, “I wish I could find more black people, we can find people but all my sales guys are white, my son just became a sales guy, so there’s two of us now. Nobody of color is really into this business and I really wish I could have a completely minority staff, but been tough.” [#6]
- The Native American male owner of an MBE-certified construction company mentioned how finding qualified personnel has been barrier for his company, “A lot of the younger guys just don’t know what it means to work and it’s a little bit of a shock when you expect things from them. Us being a union contractor, that could make it kind of tough for the city to help out. We rely on the union; the union relies on us. I’m sure the city could help in some way, I’m not sure what they would do. Manpower is always the thing for everybody in the construction industry.” [#11]
- The non-Hispanic white male owner of a certified disabled-owned professional services company mentioned that personnel and labor have been a barrier for his company, “We’ve tried really hard to be an employer that hires females because females in engineering is really hard to find. We’ve tried hiring minorities, and it’s been really hard to find minorities that will even apply. So, we’ve been going to career fairs and really trying hard to reach out to different people. I’m happy to say today that engineering is eight people, and it’s four women. That didn’t just happen, it’s been difficult. In fact, we would be three women and a minority, but that person elected to go back to Hawaii where they were from rather than take our job, so I can’t blame him. We’ve tried really hard to hire the right people with the right character.” [#16]
- The owners of a majority owned electrical construction company noted that “getting the manpower wouldn’t be an issue, but obviously we have to have the work to pay them. It is sort of that Robin thing you need the money to pay them, but you can’t get the money if you can’t get the bigger jobs.” [#21]

Working with unions, being a union or non-union employer. Business owners and managers described their challenges with unions, being a union or non-union employer [#1, #4, #13, #21, FG#3, FG#9, FG#10, FG#11]. Their comments are as follows:

- The Black American male owner of an MBE-, and DBE-certified trucking company expressed his experience working as a union employer, “There’s definitely some discrimination going on within the union as it relates to African-American companies versus white companies. It’s not a level playing field for minority companies versus non-minority companies. One example is I had a big project up north, it was a big union job and I didn’t have enough trucks to supply myself so I had to hire outside help. Well, anybody that hired on subs has to take out benefit money for their drivers, but there’s another firm kind of northeast Indiana that had to do the same thing, but the union wasn’t on them as it

relates to paying benefits for their subs. There's definitely some discrimination going on within the union as it relates to, they say, non-minority companies, African-American companies versus white companies." [#1]

- When asked if working with unions has been a barrier for the company the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company noted, "We are a non-union shop, so if the prime is a union company we can't bid on that project." [#4]
- The non-Hispanic white male owner of a goods and services company commented, "Working with unions is a challenge for us because we're non-union. So sometimes we show up on a job site and there's a union and that's an occasional problem. Not a big problem, just the, 'Hey, you're not union' kind of problem." [#13]
- The owners of a majority owned electrical construction company noted no challenges being nonunion, "but I have seen over the years, working with other contractors that with the city projects, most of them do end up in union hands." [#21]
- The female owner of a WBE-certified construction company discussed working with unionized subcontractors, "being able to say hey, they didn't show up for the third time, they're not coming back. They're a local union employee, he's using them for a certain job, he's got an agreement with the union. He's got a labor pool to draw from." [FG#3]
- The male representative of a trucking company mentioned changes in rules working with unions, "I believe, I'm going to say it would have been about 2005 or so. The union, all of their prime contractors, they made them sign a statement saying that all of their subcontractors have to be signatory to the union. So therefore, if there was a union trucking company that could've benefited from helping another minority company out that isn't a union company but is a minority, their hands are tied. They couldn't use them unless they treated them as another union company. So therefore, the cost of doing business went up and it was hard to operate. My biggest thing is the union has where all of their subs and helpers have to be signatory to the union. I think that's where we're having our biggest trouble is because they're starting to push that now. The only thing that could change is the prime contractor being non-union law. Almost all of primes are signatory to the union. The union itself I believe is somewhat corrupted in their way of doing business. They kind of angle who they want to be the powerhouse. And I think you've heard from everybody that they dictate how the game's played and you either play ball or you don't." (FG#9)
- The Black American male representative of a trucking company commented on working with unions, "We're kind of like at a double disadvantage to me, because in order to get some of this big work, you've got to be union, and I think that would be a disadvantage. And then you're at a double disadvantage, because the union is dictating how you proceed on doing any type of business. Because, you've got to pay more money to be union, and as far about the income and overhead that you've got to have to complete those tasks to be in that type of business, it's putting a hurt on you. Because they come in and just take and freeze up the contract unless it's them. They want to dictate what they do with your money, and I just

think they've got too much power when it comes to us trying to survive, try to get through the system. I can say, some years ago, we had about three large companies that was in the city. And they were like, pretty much we were getting some big projects and you had the three of them big truckers were like doing these jobs and we were doing them with no help. It's like, all of them had like 50 trucks a piece to 100 and we was doing all of that work. And it seemed like they sicced the union on you, because they had changed some of the rules. Because we used to be able to use independent contractors to help us finish some of our work, to do our work, and it seemed like the union came in and changed the rules and said no longer can you use independent contractors. So they started making us treat independent contractors like they were our employees. And then, when they started slapping that money on you, you get this job done. Then they went back on a bunch of people, and said well you owe all this money, but you're not supposed to pay a independent contractor like an employee. So, when they changed those rules, it's like the union set out to make us where we had to start calling majority workers to start help us do the work, because they were sitting there watching us do all the work by ourselves" (FG#10)

- The female minority owner of a trucking company commented on her experience with unions, "I think it was in, I don't know if it was 2005, the \$200 million contract that was done on the west side of Indianapolis, and I was successful to get the concrete portion of it and also I stockpiled for the stockpile material to the concrete batch plant. And at that time, this is what the union did. The president at that time targeted me in particular, because I had a big portion of that work. One of the biggest contracts that was held by a minority in the state. And what they did, is they changed the rules to where I was stockpiling the stockpile plant which is supposed to be exempt from union wages and union pay and benefits. I had a lot of independent contractors that were working stockpiling on that project, and what they did was they came in and performed an audit on me and came back and said that the work that I was doing on the stockpile was no longer exempt and I had already paid all my independent contractors for the work, and they came back and made me go back and pay double. I had to go back to pay hourly and they come up with this bogus... It was about \$100,000 that they said I owed Teamsters. They came in with this bogus audit and they came back and said that I owed hundreds of thousands of dollars to Teamsters for work that was regularly exempt. Some of the majority truckers sat on the pension board and on the board with the union, they had did a lot of exempt work and were aware that the rules were being changed midstream during this contract period. And basically, it put me in a situation where I had to close my doors, because they took the money, they went to the prime contractor who pays us and said hey, she owes too much money. And then they started deducting money and sending me directly to the Teamsters Union. And of course when you get that kind of money and you're not able to pay your people, you're not able to pay your insurance, your truck payments, and all of that. And so I just decided at that point, I was tired of fighting the fight so I just decided to close it down and shut my business down" (FG#11)

Obtaining inventory or other materials and supplies. Business owners and managers expressed challenges with obtaining inventory or other materials and supplies. [#26] For example:

- The challenge facing the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company is primarily, “putting the capital up front, because they want you to, which is smart, buy at least like, I think it's at least \$5,000 worth of product before they'll do a contract with you. I basically would buy \$5,000 worth of product without a contract, and hoping to get a contract, and then if I don't get a contract then I've got \$5,000 worth of product.” [#26]

Prequalification requirements. Public agencies, sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on government contracts. Multiple business owners and managers discussed the challenges associated with prequalification [#3, #5, #11, #28]. Their comments included:

- The Black American male owner of an MBE-certified electrical supply company expressed his concern with prequalification requirements creating barriers for small disadvantaged businesses, “They [prequalification requirements] are [barriers] with the state, and the city has to follow the state’s rules. It doesn’t affect my company, but it does affect contractors. So, for example a contractor has to get audited every two years, and submit that application to be qualified to do contracts larger than \$300,000 and that’s a big barrier for XBEs if you’re doing state and city work because that audit’s going to cost you a fortune. Generally, it’s \$15,000 to \$20,000 or more, and that’s ridiculous that you have to have that.” [#3]
- When asked if prequalification requirements has been a barrier for the company the non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained, “It's just a problem of when you can't get into complex roadway unless we have two people that have worked on five projects within three years for INDOT on major roadway. That's a lot for a small firm. We have it, we just need to file it. From an INDOT perspective, they make it to where we can't grow. The City requirements, they're good, they're not limiting, you can get them.” [#5]
- The Native American male owner of an MBE-certified construction company mentioned how prequalification requirements have been a barrier for the company, “I've got a young man that probably spends a fourth of his week filling out prequalification’s for everybody, he hates it. It's a lot of paperwork, that's why he takes care of it. After it started consuming too much of my time, a lot of it is since I am a sole proprietor. There is some personal information they want your financials and that kind of stuff. He absolutely hates them, he wished everybody would use the same format.” [#11]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company noted the difficulty in meeting prequalification requirements, “Prequalification? Well, it says, “Show three of your past projects that you've worked with a government agency, or what have you.” Well, we would love to, if you gave us an opportunity to build that” [#28]

Experience and expertise. Interviewees noted that experience and expertise can present a barrier for small disadvantaged businesses. [#29] For Example:

- In terms of finding experienced subcontractors, the Asian Pacific American male owner of a construction company stated, “you’ll run into people who say they can do this and that and they’re basically just trying to pull a quick one on you. That’s why you got to do a lot of research before you figure out who you’re going to hire to do your work.” [#29]

Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. The study team discussed whether licenses, permits and certifications presented barriers to doing business. [#26, #29]

- For the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company, obtaining her retail merchant certificate was a “pretty easy” process, “It was just a matter of filling out an application.” [#26]
- The Asian Pacific American male owner of a construction company found the licensing and permit process, “pretty straight forward and easy as long as you have your insurance and bonding.” [#29]

Learning about work or marketing. Business owners and managers discussed how learning about work is a challenge [#13, #23, #26, #28, WT#1, PT#4]. For example:

- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company discussed her marketing strategy saying, “not really door to door but from facility to facility. Mainly just that way, not really any marketing beyond that just because of the nature of the field that I’m in. That’s a barrier because marketing, you have to have the money to market.” [#26]
- As discussed by the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company, learning about work and marketing is primarily, “networking. Also, staying connected with everybody across Indianapolis. It’s not a very big place, so we do our best that we can. Being a smaller shop, it’s not always easy. Most of our work, I would say 99% of the work that we’ve so far done, has been word of mouth, so we get referred.” [#28]
- The female owner of a WBE-certified professional services firm expressed her barrier with learning about work, “It does not seem like there are very many opportunities for professional services consulting. I get a lot of construction related bids but few to none in the professional services area. I am certified with the state and the city. I would like to see more partnerships with groups such as NAWBO to seek those of us that are certified for professional services consulting.” [WT#1]
- The male owner of a construction services company explained the challenge for his company is learning about City work, “Our problem is that we have such a niche job that we perform, we have trouble reaching the prime contractors. It’s a tough spot to find anything

where we can actually be used with the city. We really don't know where to look to get more government." [PT#4]

Any unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Multiple interviewees commented on personal experiences with barriers related to bidding on public sector contracts [#5, #29, FG#3]. Their comments included:

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm commented about barriers due to unnecessary restrictive contract specifications, "There have been situations where we have been told that we need to fulfill the DBE requirement because we're low on that side versus the WBE, so why don't you be a sub to the DBE. But they're trying to fulfill the goals so sometimes, the goals can kick you a little bit. We just negotiated it to where we'd have a higher fee." [#5]
- Describing restrictive contract specifications, the Asian Pacific American male owner of a construction company mentioned, "they'll try to say well we're not going to cover this or we're not going to cover that. And then as soon as you do a tear-off and if it's existing they owe for it, so... We just take pictures of everything and then send it into them with a final invoice." [#29]
- The female owner of a WBE-certified construction company described contract difficulties she has encountered, "your attachment in the body of your contracts, the prime agreement is always stated in there. You never get it, do you, but you're always subject to that prime contract with your contract. So if I'm contracted with the general, their prime contract with the owner is always called into play in my contract. And I think that's pretty typical across the board. I do [request to see the contract] and half of it's blacked out. It's all blacked out and it's all usually a horrible copy, and it usually takes months to get it. It just, it's never fun. The insurance language. The indemnity language. All that language that's in the parent contract is totally different than what's in your subcontract. Because it's never in line, you don't change your standard shelf agreements with each parent. So they're doing work for the city, for the state, for a private developer, for a private client, but that standard agreement that they have stays the same. But those owner agreements change, depending on, so none of them get aligned." [FG#3]

Bid processes and criteria. Interviewees shared comments about the bidding process for agency work; business owners or managers highlighted its challenges [#1, #11, FG#3, PT#12, PT#13, WT#3]. For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company mentioned his experience with the bidding process, "Well, you receive notifications from the primes, you send in the quote. You really don't know if you got it or if you were awarded the job, not until the prime contractor sends you a contract. With INDOT there's a website that you go on. When they bid the first thing you see is who the lowest bidder was of the prime contractors that bid on the job. A week later that same website will be updated with information who they use as their affirmative action subs or as their DBE contractors. Now

with the city I've tried to find this information out, I don't think they have a website or they don't do that. That would be something that would be good for the city to make that available for the public that you can go online, see what contractor was the lowest bidder, and then like a week later you know who their subs are, who they use for their minority requirements on that particular project." [#1]

- The Native American male owner of an MBE-certified construction company commented on the bidding process presenting a barrier for his company stating, "The bidding procedures for when you're a prime, it's a nightmare to get through. I'm looking at one now that's actually up in Lafayette. They keep putting out addendums with new bid forms and new directives on what has to be included in the bid. After a while, it's just like, 'Guys.' If we were set up as a true GC [General Contractor], you have someone that takes care of all that. If you're the estimator, it's your baby to filter through all that. I've been doing it a long time, but it can be daunting." [#11]
- The female owner of a WBE-certified construction company, commenting on exclusivity in bid criteria, noted, "I've had to say no to a few people and a few opportunities, and it kind of ticks you off when they won, you went with the wrong team, when really to be quite honest with you, we're not decision makers. We're not. So why would it matter whether I was on your team? The whole exclusiveness needs to go away." [FG#3]
- The Black American male owner of a professional services firm expressed barriers prime contractors are causing when it comes to the bidding process, "When we're bidding on projects as a subcontractor, I'm running into prime contractors asking us to sign an exclusivity agreement saying we're not going to align with other prime contractors. When I first started in the program, I was told we could bid on project with whoever we wanted. This exclusivity agreement would limit our chances, but if we want to work with that particular contractor, we have to sign it." [PT#12]
- The female owner of an electrical company expressed barriers she has faced due to the bidding criteria, "Some of the things that the City puts in RFPs are designed to minimize the playing field. I think the City and State have good intentions with these programs, but they don't understand the level that an architect engineering firm is going to put an RFP on the street and put limitations in there that right away knock out 50 percent of the playing field." [PT#13]
- The owner of a VBE- and DOBE-certified engineering firm mentioned his experience with the bid process, "I have personally been asked to sign a \$600 contract so that the prime could get credit for meeting their 3% VBE participation. This equated to four hours of staff time but didn't count for any of the principal level time in setting up and negotiating the contract. This didn't provide the city any value or the VBE firm any value." [WT#3]

Bid shopping or bid manipulation. Bid shopping refers to the practice of sharing a contractor's bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process, or a bid, to exclude fair and open competition and/or to unjustly profit.

Business owners and managers described their experiences with bid shopping and bid manipulation in the Indianapolis marketplace [#3, #4, #9, #11, #29, FG#11, PT#9]. For example:

- When asked if bid shopping or bid manipulation is a barrier for small disadvantaged businesses the Black American male owner of an MBE-certified electrical supply company expressed, “Yes, that can be a barrier when they shop your price, but that works for and against you. If I give a quote and I’m not the low bid, they’ll [contractors] come to me and say, ‘Hey, if you can meet this price, I’ll give you the contract.’ So, it works for and against you.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company explained his experience with bid shopping and how it can be a barrier for small businesses, “It happens a lot when a prime wins a bid promising to pay X amount to XBE subs, then when we bid on the project we are told to sharpen our pencils and bring the cost down if we want the job. They may agree to pay \$28K to subs, but only pay \$16K.” [#4]
- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company explained her experience with bid manipulation, “We work really hard to put together the best bid proposal that we can. We may be the better company to fabricate what you need and we feel that way but you’re going to go with that guy because his number is \$1,000.00 less than mine. So, that certainly is a factor that is a barrier many times when general contractors go with the lower bid. Bid shopping and bid manipulation, I truly believe it happens and when it does it works against us.” [#9]
- The Native American male owner of an MBE-certified construction company commented about his experiences with bid shopping, “I just think it makes it tough for everybody. We’ll get calls where, ‘Hey, you’re not low. Somebody is X amount of dollars less than you.’ We’re very fortunate here we won’t cut our price because we do multiple things, we can package things and give them a better number. Our price is our price, but if they’re doing that, asking me to cut my price, taking it away from somebody else isn’t fair. Also, you know it’s happening to you on the other side. Everybody’s got their friends, people they’ve worked with, they trust more. On this job, we had an issue where your pump died so we’re going to try somebody else this time. That’s always been an issue, hard to prove, but you know if they’re calling me and asking me, they’re doing it to me too at some point.” [#11]
- The Asian Pacific American male owner of a construction company described bid shopping and manipulation, “I run into that all the time. Most, and they’re smart for doing that, most smart people would get several bids and shop around. And then ultimately whoever they decide they want to go with, they’re going to try to negotiate with them.” In terms of bid manipulation, “Like, so, for example, let’s say someone needs to get something done. And then they will say okay well we need to get this roof repaired or whatever. Blah, blah, blah. And then they’ll get a price from someone... And then they’ll call someone like me, they’ll call me and get a price, like a really cheap price. And then just underplay what needs to be done and then they’ll call another larger company or whoever. And then they’ll say well this guy’s giving me this price so you should be able to do it for me for cheaper than that since

you're a smaller company. And when you actually start reading through the estimate, that's when, like, that's happened to me several times." [#29]

- The female minority owner of a trucking company commented on bid manipulation, "there was a statement that was sent out to several trucking companies stating that they need to level the playing field, from the Teamster's president. As far as price fixing. They were trying to level the playing field as far as these contracts." (FG#11)
- The Black American male owner of a professional services company explained how bid manipulation affected his company, "We've partnered with some of the larger companies and we've submitted them bids, we had one company win the bid. Then after they won the bid, they sent us out an email saying, 'Hey, we know you guys quoted this amount, but can you quote this amount?' We didn't really have any recourse the only thing I could do was threaten them. I did end up getting a decent amount out of it but I still didn't get the amount that I was supposed to get. It would have been nice to have an advocate to let them know what was going on and get the support needed at the time." [PT#9]

Treatment by prime or customers during performance of the work. Business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#3, #29].

- The Black American male owner of an MBE-certified electrical supply company shared his observation of another trucking company being mistreated by a prime during performance of work, "When the guy operating the bulldozer would load his truck, he would pick up the gravel or the big rocks and he'd release the crane 20 feet above the truck, he caused so much damage. So, when he'd drop it, the brand-new truck was getting dented up. Instead of just lowering the boom and opening it over the truck. They had brand new equipment but when he finished that job, it didn't look brand new. If he would have sent an old truck, they probably would have dropped it low but they said, 'Who does he think he is with these shiny new trucks? I'll show him a thing or two.' That happens often, and that's not the only example there are many, many others." [#3]
- The Asian Pacific American male owner of a construction company commented on the treatment by customers, "Yeah. I did a, I was working on a hotel and it was just a complete outlier, it was completely out there. The manager of the hotel was definitely... I think racist is a hard word, but that one was racist and I was awarded the job. Basically [they] found any and every reason to get me out of there and my people out of there." [#29]

Approval of the work by the prime or customer. Business owners and managers described their experiences getting approvals of the work by the prime contractor or the customer [#1, #29, PT#10].

- The Black American male owner of an MBE-, and DBE-certified trucking company described a situation where the prime contractor did not approve of a situation, "I had one issue with a prime when I first started. I was naïve going into it and he opened up some doors for me and introduced me to some contractors. Once we went our separate ways, other contractors stopped using me. A few years after that, they [a previous contractor] called me

back and wanted to know if I wanted to come work for them again, I asked them what happened. I was working for you before and getting a lot of city projects, they said, 'Hey, Such-and-Such tried to put you out of business and we just sat back and watched.' That was their response so I felt like they should've had my back and said, 'He's done a great job for us. We're going to continue to use him.' Instead they brought in another minority company and that prime started using them, instantly." [#1]

- The Asian Pacific American male owner of a construction company commented on approval of work by saying, "We live in the Midwest, so, you know, there's...and my parents are from India, so obviously you're always going to run into some people that just, you know, don't like something that's different." [#29]
- The Black American male owner of an MBE-certified professional services firm expressed his experience with a prime contractor not approving work that had already been completed, "We did a bunch of work all over the state for different sites to do a system refresh. When we would get on site some of the agencies would ask us to do other things, they needed to continue their job so we did the work and documented it. Once we did all the work and submitted the invoice for the work the prime came back and said, 'We didn't approve that work.' So, they ended up not paying it and it was probably about \$15,000 they didn't pay us, but I am positive that they invoiced the state for that work." [PT#10]

Delayed payment, lack of payment, or other payment issues. Business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#3, #4, #5, #13, #15, #18, #21, #22, #24, #25, #27, #28, FG#3, FG#6, FG#7, AV#4, PT#1, PT#8, PT#11].

- When asked if payments are an issue for small businesses the Black American male owner of an MBE-certified electrical supply company commented, "Yes, XBEs are not paid as timely as non-XBEs, and that's a fact. I'm outspoken on the subject, so I tend to get my money. There are primes that I won't work with, if they don't pay me, I won't work with them." [#3]
- When asked about payment issues being a barrier for small businesses the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company stated, "This is a consistent problem. I would love to be paid within 14 days, 30 days at the most. Some companies will only pay once a month, and when you are a small company this is very difficult." [#4]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained how delayed payments can be a barrier for small businesses, "We've got one that is from June 5th of '18 still outstanding. They've been catching up because I complained enough. I've seen lately, that the PMs [project managers] at the City have stepped up their game in the last month and it really seems like they're getting their stuff out. But now, they're having problems over at finance. They're just short-staffed and that's taking forever. It took us 45 days to get a PO [purchase order], we did some work in November on a job

before we had an amendment because it was the end of construction season, it had to be done but they couldn't process the invoice until that PO hit the system.” [#5]

- The Hispanic American male owner of an MBE-certified landscaping company explained his experience with non-payment, “Sometimes, I have a problem with people who don’t want to pay, that’s the only thing. They see that we are immigrants, and sometimes they want to take advantage. We don’t speak perfect English, and sometimes they think we’re illegal. You know, I’m a resident, I have my legal papers, but there are a lot of people who, take advantage of that.” [#15]
- The owners of a majority owned electrical construction company expressed their experience with delayed payment or no payment at all, “We were a sub to the general contractor on the industrial side of our work that didn’t pay us. We ended up with sixty something thousand dollars that they held out for six almost eight months. We negotiated back like fifty something thousand dollars, so we could close it, get some money and pay some of our stuff. In that eight months we racked up everyone we owed and the monthly interest rate. It turned us upside down and we are still in recovery mode from it.” [#21]
- Commenting on payments, the non-Hispanic white male owner of an architecture firm said, “Timely payment’s always a problem with the city because, oh, my God, all depends on in regards to how the funding’s coming. The review process. I mean the payment process can be months.” [#22]
- The non-Hispanic white female owner of a WBE-certified engineering firm commented about non-payment by primes, “Payment has been an issue lately. It’s not the prime’s fault because it’s how the contracts are set up until they get paid, I don’t get paid. The contractors actually pay the prime, then I get paid from the prime. Even though the contract is - so even though the prime contracted with the city, and the contractor has the contract with the city. The payment comes from the contractor right to the prime. Sometimes the contractor has not been paid so, when they do get paid it takes three or four months to pay the sub.” [#24]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm described her experience getting paid by the City, “If we’re a prime it’s good. If we’re a sub it’s horrible, and what happens is we’ll provide an invoice to the prime. The prime’s project manager what we find is they hold our invoices. Let me give you an example, if we’re a prime and if somebody sends us an invoice, then we submit it, even if we do not have an invoice to submit. In the perfect world we submit an invoice, they submit it to the city, then when they submit it to the city, say they get paid in 30 days, then the way the city has with the primes is they get 30 days to pay us. Well, INDOT says you have to pay your subs in ten days. I wish the city would do that at least, say, ‘Hey, when you’re paid, your subs should be paid within ten days.’ There are times if they miss their submission and if they hold our invoice, now we’re 90 days out, and if they hold it even more, now we’re 120 days. That’s very frustrating, we have tried over and over again and we’re the squeaky wheel now, but this is something they have to change.” [#25]

- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company articulated that delayed payments is a barrier for small businesses, “We invoice monthly, say you invoice the work that you did in July, that invoice goes to a prime, who says, ‘Oh, we don't invoice till the middle of the month.’ Then the client takes a month, the prime gets paid they take three to four weeks, and all of a sudden, you're staring down the throat of four months, and you haven't seen a dime. That has been a huge impact; you have to rely on a credit line, I don't have that amount of cash. When you multiply that by four or five projects, that's a real problem and I'm paying interest, you can't collect interest. I've been pretty stringent with certain firms about making sure I figure out how to get that into the fee. Right now, I've got three projects with the city and I'm having to chase money.” [#27]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company commented on her experience with delayed payment, “For work that we finished in January, I'm still getting payments. Maybe I will, maybe I won't. They still owed us \$132,000 dollars. Slowly, they're paying us slowly. What I found out, about three weeks ago, when I met with one of the partners, is that they might be going under completely. So, that means, half of it is still left, and we may never see that money. That's my interest with the government, because at least we'll get paid. Even if it's late, we will get paid. That's why I wanted to do that, because getting money, I mean, that's just tough.” [#28]
- The female owner of a WBE-certified construction company commented, “It's the ones with the most amount of money that won't pay. It's hilarious. They're just sitting on a ton of money, it's their processes that don't get it out fast enough. When you sign a contract, you're partnered in a partnership with teams of people doing a large job, you're bringing on resources to facilitate this, but the parent contracts aren't coming quick enough, but you're fulfilling your side. Therefore the contracts aren't signed, the books aren't set up, and you've got somebody on task for four or five months but not getting paid for them. And it can be, I experienced this on a job early last year, it can get really tight. I think what's important to realize is that and this goes back to your point, is that there's only a few business owners. There's a lot of people that work on W2. And they don't really understand that you have to wait to get paid. I didn't take pay last year for like six months because I lived off my savings and left everything going into the company, and then paid later myself. I mean seriously, I am nothing on a lot of these multimillion dollar projects. Nothing in the sense I've got one staff member, I'm the smallest contractor in the team, and you guys are making me get paid last? It's ridiculous. Absolutely ridiculous.” [FG#3]
- The Black American male owner of an MBE-certified electrical supply company stated, “the biggest challenge that I see, is getting paid on time. So for me, that's always been the number one issue. And I'm pretty aggressive about collecting my money. I encourage all minority women, all small businesses to be that way. They'll say stuff like “well you need to turn in your insurance certificate”, or you need to turn this or that in, I'm like “well, if I needed to turn that in, if you didn't have it, why did you bill the customer? For my work? You got paid. So if you got paid, you need to pay me.” Or don't bill the customer for the work. But that's a major, major problem. You will notice that when small and minority businesses, women-owned businesses as well, when they go under, that their balance sheet is solid. They're not underwater. But the problem is, they're not getting paid. They have all

these receivables but they're not getting paid. And if you hold the cash long enough, you can force a company out of business, like you said you were talking about payroll's coming so you've got to meet it. And if they're not paying you, you can't meet it. Unless you've got a credit line and you can run that up and run that out. So a lot of companies will come to me and want to talk about how to be successful and I tell them, you've got to get the work, absolutely, that's important. But for me the most important thing is converting receivables to cash. Because that's how, you can't pay a salary or a mortgage or a light electric bill or water, or supplies with receivables. You need cash. Getting work I found to be less of a challenge. So I've spent a fair amount of time collecting receivables. And I try to do it early because if you do it too late, some of these companies can go under while they're owing you money." [FG#6]

- The Black American female owner of a no-longer operating trucking company described how incomplete payments affected her business, "For various reasons we closed our door. A lot is because of not getting paid, loss of jobs, loss of contracts. We had \$180,000 of our money that a prime contractor took and they spent some of the money as they chose. So that put us in a situation where we were not able to pay our brokers, our truck payments, insurance, whatever the case might be. They put us in a situation where we were unable to do so. They still owe us money, \$7500 that for some reason no one seems to have a reason why it cannot be enforced. I've called several people, I've done several things. At the end of the day, the work was performed and we did not receive our money. But what I don't get is the state made sure the prime paid us our money. This is two-and-a-half years with the prime, with the city, and we don't have our money. We do not have our money. They tried to embarrass us, tried to make it seem like... If you don't pay us \$180,000, and you took \$180,000 and used it. It went two party check, they just chose to pay who they wanted to pay. We have people that did stuff and told me that they would due more money than they were supposed to get, there was no audit done showing that these people was really owed or nothing else. They just basically paid whoever they wanted to pay. And see, by doing that, then it didn't allow us to keep operating, because of the fact that they took our money and paid who they thought needed to be paid first." (FG#7)
- The non-Hispanic white male owner of a construction company mentioned, "It's difficult to work with the City because of slow pay and the pay schedule. I'm a small company and I can't afford to go months without payment." [AV#4]
- The owner of a small business expressed her experience with delayed payments, "Under the Pence administration he really supported small businesses and truly listened to those who were running the minority women's division. He was very supportive of making sure that small businesses receive their payment within a five to seven-day time span, which was unheard of under the Ballard administration." [PT#1]
- The Black American female owner of a construction company explained her experience with non-payment from a prime contractor, "There's a larger firm that owes me for part of the work that we provided that was only supposed to be three months, and it's now the next year and he still has not paid me. We deal with that quite a bit and then when you

complain you get blackballed. I've been blackballed by one firm and wherever that firm is working I would not get any work and they're a mega firm." [PT#8]

- The female owner of a construction company shared her experience with delayed payments, "During a reporting period for invoicing sometimes big companies will not invoice for two months or maybe a quarter. For a smaller firm cash flow is everything and going that long without payment can really harm a smaller business." [PT#11]

Other comments about marketplace barriers and discrimination. Some interviewees described other challenges in the marketplace, and offered additional insights. [#2, #26, AV#2, AV#7, AV#10, PT#2, PT#6, PT#7]

- The Black American male owner of an MBE-, and DBE-certified construction company explained the challenges the company faced in the industry, "The construction industry is a relationship industry. If you haven't worked in it and if you don't have a network of people in it, it's difficult to crack. So, that's a challenge I don't think it's race it appears that way because most of the people are white, but I think if I was white and came out of the insurance industry, I'd have the same problem." [#2]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company in discussing discrimination commented, "I don't think that anyone would overtly say, "I have a problem with doing business with a woman," or, "I have a problem with doing business with an African American." I don't think anybody would overtly say that. They may have a problem with it, but I don't think they would say it. They just wouldn't do business with you, and then how do you make the determination from that that it was because you were a female or you were African American or that you were a veteran? I deal with business professionals that are over medical facilities. It's just, I don't know any specifics, but there's just a way that some people act toward women. It's like the subtle things that they do that make you feel like that they're not going to do business with you, because you're a female or that you're African American." [#26]
- A Black American female owner of a construction company explained that the City denied her bid due to the lack of financial capacity then awarded the project to the same general contractor that always wins projects. The Black American female owner has not had the opportunity to work on a project with the City. [AV#2]
- A representative of a non-Hispanic white male owned construction company expressed, "In the past the complications were that the City had no minority status, the time frame it took the city to resolve an issue cost a lot of money, and occasionally they still have a hard time obtaining the DBE percentage goals." [AV#7]
- When asked if personnel and labor has been a barrier the non-Hispanic white male owner of a professional services company mentioned, "I have difficulties finding competent women and/or minorities in this field of work for sub-contract work." [AV#10]

- The female owner of a professional services company mentioned, “The major challenges in a start-up is filtering out the chaffs from the grain and finding people that are empathetic to us being new.” [PT#2]
- The female owner of a goods and services company explained the barriers her company has experienced, “I’m in the service industry and contracts are typically three to five years. I have found out just in the past couple of years that there’s a five-year contract and they just do an auto renewal with the same company and then there’s no opportunity out there. The other problem that I have is the larger opportunities happen every two years, and the same company has been renewed for seven years in a row.” [PT#6]
- The male owner of a construction engineering firm explained his barriers with the current marketplace, “Our challenge is trying to grow out of the subcontractor role into a prime role. We get a lot of subcontractor work as a sub to a majority engineering firm. We recently did a couple of contracts as a prime but it took three years to get those and we don’t want it to be another three years before we get the opportunity again. We would prefer to be a prime, it’s just been a challenge getting in front of the right people.” [PT#7]

I. Additional information Regarding Whether Any Race/Ethnicity/Gender/Disability or Veteran-Owned Discrimination Affects Business Opportunities.

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority-, woman-, disability-, or veteran-owned firms.:

- Price discrimination (*page 84*);
- Denial of the opportunity to bid (*page 84*);
- Stereotypical attitudes (*page 84*);
- Double Standards (*page 85*);
- Discrimination in payments (*page 86*);
- Unfavorable work environment for minorities or women (*page 86*);
- The ‘Good Ole’ Boy Network’ or other closed networks (*page 87*);
- Resistance to use of MBE/WBE/DBE/VBE/DOBEs by government, prime or subcontractors (*page 89*);
- MBE/WBE/DBE/VBE/DOBEs fronts or fraud (*page 90*);
- False reporting of MBE/WBE/DBE/VBE/DOBEs participation (*page 92*); and
- Any other related forms of discrimination against minorities or women (*page 93*).

Price discrimination. Business owners and managers discussed how price discrimination effects small disadvantaged businesses with obtaining financing, bonding, materials and supplies. [#18, FG#19]

- The male representative of a government agency commented on payment differences, “Some of the other things that I have seen is the XBE gets paid a lower rate, compared to a non-XBE. They get paid a much higher rate.”(FG#19)

Denial of the opportunity to bid. Business owners and managers expressed their experiences with any denials of the opportunity to bid on projects. [#3, #13]

- When asked if the company has ever been denied the opportunity to bid or submit a price quote the Black American male owner of an MBE-certified electrical supply company stated, “It’s odd, I do a lot of work with a larger local company but we were recently denied an opportunity to submit a price quote. I don’t think that was their intent, but that’s what happened, we were simply over looked. That’s the only time I was denied in my 40 years in business.” [#3]
- When asked if the company has ever been denied the opportunity to bid on a project the non-Hispanic white male owner of a goods and services company stated, “Yes, I was in a personal disagreement with the person that would be taking the bid. It has only happened once.” [#13]

Stereotypical attitudes. Interviewees reported stereotypes that negatively affected small disadvantaged businesses. [#3, #5, #8, #18, #21]

- When asked if the company has experienced any stereotypical attitudes the Black American male owner of an MBE-certified electrical supply company noted, “I’ve seen it, I’ve experienced it, and I’ve seen it happen to others. You hear it, directly, so what happens is we work with the company, we do a good job, and then they say, ‘Oh, you’re not like other minority companies. Man, you guys are competitive. You really do a good job.’ There are XBEs that are problematic, and there are non-XBEs that are problematic and that is how you get stereotyped. Any time a minority would go out of business, then they [contractors] would crack down on all minority firms in terms of credit lines with the company.” [#3]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm explained her experience with stereotypical attitudes, “There’s a firm in this building that one of the partners in it really has the old school mentality. He asked me ten times in a meeting what my husband did for the company and I told him ten times my husband is not an engineer and has nothing to do with my business. He could not wrap his mind around it. I was like, we’ll never be working together. So, you still run into that.” [#5]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company expressed how some prime contractors have stereotypical attitudes when they find out you’re XBE certified, “The assumption is always that you’re just going after that small percentage but you’ve got the workforce to handle the full thing. In some cases, we’re larger than our competitors but we’re not perceived that way. We’re not perceived as having the

manpower or the expertise so contractors will say, 'Here's the percentage we want to give you.' They're not taking you seriously at that table to give you the whole bill. There are contractors that'll let you work with them. Especially once they start working with you, they understand you've got the same capability as others. It's just still that education factor." [#8]

- In discussing stereotypical attitudes within the industry, the owners of a majority owned electrical construction firm recalled that, "I had a gentleman tell me that the next time I call him I better not have a screaming child in the background. And that maybe I should go back to business school and learn how real men work. Those were exact words... Yeah. They definitely treat me differently when calling... if I have to call an electrical supply house to obtain anything, there's definitely a difference in the way that I'm treated or talked to versus him." [#21]

Double Standards. Interviewees discussed whether there were double standards for small disadvantaged firms. [#1, #5, #12, #21, #29, FG#14]

- The Black American male owner of an MBE-, and DBE-certified trucking company mentioned how some primes treat his workers differently during projects stating, "Our guys may stop and grab a bite to eat and another firm may do the same thing and the prime won't complain or gripe about it to them only my guys. I understand they're paying us a good dollar amount; they want us to keep rolling, but it seems as though the minority firms have to work ten times as hard as the next company just so there's no complaints or no backlash because we're always on trial. If you mess up then you're afraid you won't get another job the next time one comes around that's available." [#1]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm commented about her experience with double standards, "I have seen where there have been preferences and more latitude given to firms because they are an XBE. Like if it were any other firm, they would've been cut off, but because you get a little bit more flexibility which can be a disservice to other XBEs because you don't want to be viewed as not providing quality services. It just needs to be even for everybody." [#5]
- When asked if the company has experienced double standards the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company stated, "In the work we do I've just seen companies that don't have the same higher standards as I do. So, for instance, when I'd go by and see them their guys were not wearing hardhats, or had on sleeveless T-shirts, I'd say, 'Look, see that? We're never going to have that.'" [#12]
- The owners of a majority owned electrical construction company noted the double standards between larger and smaller firms, "He wanted us to put those \$3,000 boxes in as opposed to the ones that we had put in, but we had to put in the lower ones because they didn't want to pay the price for the more expensive ones. We went to another job site where they were having us bid something and they had a contractor putting in the same boxes that they just told us we had to get rid of." [#21]

- The Asian Pacific American male owner of a construction company noted doubled standards in pricing, “they wanted to work down on a certain price and I told them you’re not going to get the type of product that you want unless your budget goes up 50 to 60 percent. And they were okay with that so I proceeded. Then they found any and every reason. They were like well why is this like this and it was clearly stated on the contract how it was going to be done.” [#29]
- In terms of meeting contract requirements, the female representative of a trucking company noted, “If they make the minority companies like ourself pay \$2400 a month, per individual employee [for health insurance], and they don’t enforce it with a majority company, they’re only paying 50% of their people, we’re paying 100% of our people. We’re disadvantaged right there. That’s how they getting us out of business. That’s why we gone.” (FG#14)

Discrimination in payments. Slow payment or non-payment by the customer or prime contractor were often mentioned by interviewees as barriers to success in both public and private sector work. [#3] Examples of such comments include the following:

- The Black American male owner of an MBE-certified electrical supply company provided comments about discrimination in payments, “You see it all the time. They’re [contractors] trying to slow pay anyone that they can get away with it, and you can get away with it more easily with small XBEs than with non-XBEs.” [#3]

Unfavorable work environment for minorities or women. Business owners and managers commented about their experiences working in unfavorable environments. [#13, #16, #26, #29]

- The non-Hispanic white male owner of a goods and services company commented about the work environment for women in his industry, “For women in our industry it’s a challenge for them. It’s a male-dominated industry, it’s traditionally a male industry. Women typically haven’t held positions of authority in this type of thing or do they have a lot of experience in the field. So, a lot of folks don’t feel as comfortable working with women. People don’t talk about it, but it’s there. I have a very strong woman on my team and she’s in a position of a lot of authority, she and I both feel that on occasion it creates challenges for her. We have hired women-owned businesses around the country. We’ve experienced no difference in the level of service or the quality of performance; it’s been at least the same, if not better, because most of it just depends on that person out doing the work.” [#13]
- When asked if the company has experienced any unfavorable work environments the non-Hispanic white male owner of a certified disabled-owned professional services company stated, “I’m always going to have barriers from going places to meet people and having to have somebody there with me to help me understand the conversation. I got really lucky that there’s people here that are super nice and caring and help me out with that. I have one guy that works here that we went to college together, we went to the first company together, that company closed, we separated and came back. He’s very good at stepping in

front of people who are about to run into me, or bump into me too hard, or step on my feet. Stepping on my feet breaks my toes every time due to my condition.” [#16]

- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company discussed her prior experiences in the workplace stating, “for me, I have two nursing degrees, and I always aspire to climbing the corporate ladder for the companies that I work for, and then when I see other people that don't have as much experience as I have, and don't have as much this, don't have as much education, and I'm training those people. For me, if I'm training those people, then obviously I am a suitable candidate for that position, but then I'm not allowed to do that position, which is the whole reason why, one of the biggest reasons why I decided to start businesses of my own. Hopefully at some point work out of a W2 job into my own business, because as an African American woman, to be perfectly honest I do feel like the tables are slighted against African American women in the workplace.” [#26]
- The Asian Pacific American male owner of a construction company described one work environment, “it was definitely a hostile work environment. The maintenance man that was at that the hotel that worked for the general manager would walk around the work area with a gun and try to scare my people. Intimidate them, you know.” [#29]

The ‘Good Ol’ Boy Network’ or other closed networks. There were a number of comments about the existence of a ‘good ol’ boy’ network or other closed networks. [#1, #3, #8, #9, #11, #13, #18, #21, #26, AV#9]

- The Black American male owner of an MBE-, and DBE-certified trucking company mentioned how he felt some of the prime contractors are in a good ol’ boy network expressing, “Well I deal with the prime more than anything, I just think that it’s kind of a good ol’ boy network and they tend to use their own. When you look at the contracts that are being let out, you see who gets them and you see who their subs are, there not a lot of folks that look like me that are getting the work. I would definitely say that it’s more prevalent in the city work. I’d say not a lot of the trucking companies here in Indianapolis really go outside the area.” [#1]
- When asked if there are any closed networks or ‘good ol’ boy networks’ the Black American male owner of an MBE-certified electrical supply company stated, “Oh yeah, it’s alive and well. They want to deal with who they’ve been dealing with. You can’t get in sometimes without the MBE certification, not because you’re black, not because you’re a woman, not because you’re a Hispanic, but because they don’t know you. It’s a big issue that there’s an old boy network.” [#3]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company expressed, “The good ol’ boy network definitely exists. That’s definitely there, from simple things like not being invited to certain events or meetings. I’d be on jobs and they’re [the contractors are] all talking about they’re all going to go here but I won’t get invited to some stuff or I’ll hear of certain things that went on. My PMs [project managers] might get invited

or my estimators on the team but I will not get invited to those meet-ups. It's a whole bunch of guys on the other end, organizing it." [#8]

- The Black American female representative of an MBE-, WBE-, and DBE-certified construction supply company noted, "The construction industry in general is the 'good ol' boys' network so, there are a lot of barriers to try to break through. Although we started the business because we saw opportunity in the Indianapolis airport construction, Lucas Oil stadium where the city was really behind. We're going to insist on participation. We're going to monitor and get that compliance. It looked like a good time to get into this business. I think that if we had been white, male owned we probably would be much larger and be much more profitable than we happen to be after all of these years in business." [#9]
- When asked if the company has experienced the good ol' network or closed networks the Native American male owner of an MBE-certified construction company commented, "The good old boy network, I would say it's out there. Everybody likes who they know. There's a private company, large nationwide contractors. For whatever reason, just never had much luck with them. You have to put your resources where you have success." [#11]
- The non-Hispanic white male owner of a goods and services company mentioned his experience with the good ol' boy networks, "The good ol' boy network is one of the biggies for us. I am honestly fortunately enough to be the beneficiary of being sometimes part of that good ol' boy network, I try not to let it dominate how I operate, but I'm part of it." [#13]
- The Hispanic American male co-owner of a goods and services company explained his experience with the good ol' boy network, "There's a group, they know each other, and so they don't let you be even close. There used to be a local restaurant that I tried to get into, and it was these people that knew each other, so they didn't give me the chance to do any work." [#18]
- The owners of a majority owned electrical construction firm noted, "There's a lot of those networks that we're not in. Pretty much, every large general contractor, any of those big guys... they have their own networks that they work with. They might be required to put out a public bid- But they already have who they're going to use." [#21]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company, commenting on closed networks, "Being a woman, of course you run into the good old boy network, and that's what I ran into pretty much my entire career once I started doing upper level management. Being told that basically in meetings, not in an overt way but that you are not smart enough to do business. You're smart enough to take care of a patient or be a caregiver, but you're not smart enough to do business." [#26]
- The owner of an WBE-certified professional services firm noted, "It seems like there is a clique and if you're a part of the clique you can get work if not, you don't. I haven't pursued any projects with the city since early 2000's." [AV#9]

Resistance to use of MBE/WBE/DBE/VBE/DOBEs by government, prime or subcontractors. Interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm. [#1, #4, #26, #28, PT#1]

- The Black American male owner of an MBE-, and DBE-certified trucking company shared his thoughts on primes using XBE-certified firms, “I don’t think there’s any resistance but I don’t think they like it because it’s dictated that they have to use us [minority firms]. If those goals weren’t in place, they wouldn’t use us.” [#1]
- When asked if the company has experienced or seen resistance to the use of an XBE certified firm by the government, prime or subcontractor the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company noted, “Yes, people hate change, but the city is doing a good job. The required percentages are really good.” [#4]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company shared her experience, “I have companies that won't do business with me. They have their employees sent to my facility, and they want to look at my program, but then they go back and they do a book report, and then I don't hear anything. That just happened to me, where the regional vice president, who is a gentleman who I've been trying to pursue for probably a year, and still not able to get anywhere with this gentleman. Even though his people that work for him have come to my facility, but there's still a barrier there for whatever reason. They came in to check out the program, I talked to the gentleman that came in and I talked to the young lady that came in, and they were like, "We love your program. We're going to go back, and we're going to talk to our regional vice president because we really want to do business with you." Then a couple weeks after that, they came back and said that, the gentleman said that it is not something that he can make a decision on, even though I know different because I can sell for the exact company. It was not something that he could make a decision on, that he'd get back to us., I just think it's probably because I'm a woman just for the fact that being in the field, you get a feel of the personalities of people, and then you hear through coworkers how people are.” [#26]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company shared her experience, “I think it's always an issue. If somebody is doing the same thing, and is a male counterpart, is more likely to get in and have the ... Or get the meetings, and have those conversations. I have a very hard time. I actually had a client tell me to my face. He said, "You look really good, you wear high heels. This looks good, so it's hard to take it seriously, or in terms of work, we don't know ..." I wrote it down because I never wanted to forget that. But, that's recent. That was in January of this year. Actually, like three, four weeks ago when I had lunch with them. A different person, but I had lunch with somebody who said the exact same thing. That, "Hey, there's going to be a lot of this and that, because you're intelligent ..." That's not what I'm looking for. I'm looking for more respect. I've worked very, very hard to be where I am. But, just because I wear high heels doesn't discredit me from that.” [#28]
- The owner of a small business mentioned her experience with resistance, “When it comes to city contracts general contractors really don’t want to work with small businesses or

certain minorities or women because they think we are not capable of handling the work.”
[PT#1]

MBE/WBE/DBE/VBE/DOBEs fronts or fraud. Business owners and managers shared their experience with MBE/WBE/DBE/VBE/DOBEs fronts or frauds. Other business owners and managers were aware of XBE fronts or frauds but did not provide comments. [#1, #3, #4, #5, #6, #12, #13, FG#7, FG#10, FG#14, FG#17] For Example

- The Black American male owner of an MBE-, and DBE-certified trucking company shared his thoughts on fronts and frauds affecting small disadvantaged businesses, “It’s really taken away opportunities for minority companies, these fronts and frauds, pretty much they [non-minority owned businesses] are coming in and they are doing 100 percent of the jobs. They get to stay on the job from start to finish, so that takes away from us being able to be on a project. The city should increase the minority goal requirements.” [#1]
- When asked if the company has any experience with fronts or fraud amongst XBE certified firms the Black American male owner of an MBE-certified electrical supply company commented, “There’s plenty of XBE fronts and frauds. I’ll give you an example; they’re [the city] certifying companies as distributors that are not authorized stocking distributors of any manufacturer. They’re just fronting for my competitors, non-XBE distributors. They’re buying from them and re-selling. The city or whomever is listing them as XBE and they’re not, they’re a front, it’s a fraud. The other cases were contractors the city counts me as 60 percent. So, if they’re spending a dollar with me, it’s like \$0.60. So, they’re treating me like a second-class citizen. ‘Oh, your dollar is only \$0.60.’ Just because he’s a contractor, he counts 100 percent.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company expressed his concern with XBE certified firms being fronts or frauds, “This is a big problem, we have been dealing with one non-minority trucking company without any trucks. They ask to use our trucks and give us magnetic stickers to put over our logo, I haven’t put them on, I am keeping track of all of this for evidence. Some of these majority owned companies will set up a front minority owned company but they do all the work and get the money. Pretty soon this will get federal attention, and then the punishment will be so bad that companies will be scared to try this again for years.” [#4]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm shared her thoughts on XBE fronts or frauds, “I see it all the time you see it less now. I think the system has caught up with how to catch that. There’s a firm in town that’s still in business and we have to deal with. They approached me ten years ago because I was managing our inspection department stuff. They said, ‘Well, why don’t you let us manage your inspection department?’ I said, ‘Well, you’re your own firm, so how would that work?’ They said, ‘You’d win the work, but we’re also a WBE, so we could just manage it.’ I’m like, so you just want me to win the work for you and pass it off to you? Eventually, you don’t even need me to win the work because you’ll use that on your resume first of all. That’s the definition of a pass-through, tell me how that’s not a pass-through. Oh, it’s really not and we think the City will approve it.’ I said, ‘You get the City to say okay and we can talk.’” [#5]

- When asked if the company has any experience with fronts or fraud amongst XBE certified firms the Black American male owner of an MBE- and DBE-certified construction supply company commented, “I think they fill those forms out and they put our names on them and they say they’re buying from us, and then they don’t do it. We’ve caught that a few times. I think the city’s caught that a few times, but they’ve been caught twice. How many times have you done it? That’s why other certified minorities including myself would appreciate more policing. I understand that’s expensive, but I do think there’s some people that are saying they’re using us and not.” [#6]
- The Black American female owner of a no-longer operating trucking company noted, “there is a lot of storefronts running around here and at the end of the day, we’re not going to succeed if that happens. They are ran by usually a white Caucasian man, and they use minority businesses for the front. And basically in the city of Indianapolis, that’s all it is anymore. And that’s the problem. Unfortunately, we were the Martha Stewarts of dump trucking, and when we brought it to everyone’s attention then we were slammed. They made an example out of us. And the drivers knew before we knew, the brokers knew before we knew. We were in the dark. We knew something was happening, but everybody knew because we were losing our brokers, we were losing our drivers, because they knew that the company that we worked for had all this money that they were using another company. So what people do, the grass is greener on the other side for a minute. So basically everything is a cover. They’re worrying. Because I mean so what they got over on you? So what they fooled you into giving them this minority work? So what? When you find out they are not legit, get rid of them.” (FG#7)
- The Black American female owner of a no-longer operating trucking company described a “bait-and-switch” experience with XBE-fronts, “We had a bad accident. One of the drivers, we were working for Company A supposedly, but it was Company B. My driver almost got killed. And then the next day, Company A sends us an agreement for Company B wanting us to fill it out because it was her job, not his job. And I refused to fill it out because it was after the fact. After the fact. We were working for Company B but we had no agreement.” (FG#7)
- The Black American male representative of a trucking company commented on companies posing as minority owned businesses, “these front companies, these bigger majority companies are coming in and then you’re also against them. You know, another minority company that’s fronting. You up against the money that they have backing them and you can’t compete. And it’s putting everybody in a bad situation.” (FG#10)
- The female representative of a trucking company discussed her experience with a XBE-front, “[as an] example, one company where the owner of the company actually owned the dealership at one point. And also owned a trucking company. That owner of that company was not willing to lend money for financing to minority truckers so they could control the market but yet they’re trying to get certified as a minority WBE company. He has put his secretary or personal assistant and his daughter into a minority business status.” She continued to explain her experience working with the company, “when I worked on a job, it was dispatched through Company A. He called the order in. We gave him trucks. But when the invoice... No, after we completed the job, Company B sent me a hauling agreement and

told me to bill Company B. I had never met this woman before. Never had an agreement on doing any type of hauling. Company A's the one that called the order in. That's who I had on my books that I was working for. And then I get a hauling agreement telling me to sign an agreement with Company B." (FG#14)

- The male representative of a trucking company noted, "I think some of the frustration comes from there is a system in place in which they could have advantages. But what is going on is the majority companies are skirting around the system and they're not utilizing the companies that they should be utilizing. And they are creating false companies, following the minorities, getting certified as minorities or but they're actually owned by a majority and they're being controlled by a majority. So what the system is that is in place, it's not working because of the fact that the majority companies have found ways around it." (FG#17)

False reporting of MBE/WBE/DBE/VBE/DOBE participation. Business owners and managers shared their experiences with the "Good Faith" programs; which give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals. [#1, #8, #28, FG#3, FG#10, FG#16, FG#17]

- The Black American male owner of an MBE-, and DBE-certified trucking company provided his experience with prime contractors falsifying the 'Good Faith' effort stating, "That goes on a lot and sometimes contractors ask me for my certification. I give it to them and sometimes I don't know if I really should because they may put it into their bid packet and then I never hear from them again. I had no indication that I was awarded the job or that they were awarded the job and they used me as a prime on that. Right now, there is a project I am listed on but I've never worked on the job, maybe the project got postponed or something but I never heard anything about it." [#1]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company expressed her concern with the false reporting of XBE participation stating, "These 'good faith efforts' are lacking, they'll [prime's will] give you a call and the bid is due the next day. Things like that I don't believe that's really a good faith effort. It's like you called me the day before and I've got to put all this stuff together. So, the good faith effort does lack. I really do think that needs improvement but I don't know how to improve it. Contractors working on city projects were notorious for it because they tend to be your smaller contractors. I don't know if they didn't get the list or how they go about it. This would happen five out of ten times, now you probably see it happen maybe two out of ten times on a bid." [#8]
- In discussing a subcontracting opportunity from an out of state company, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company recalled, "Nobody local contacted us. Somebody from far away contacted us, and said, "We want to put your name on it." I think they did the RFP, but I haven't heard anything about it. They asked me if I want to be included, I said, "Yes." They said, "Okay," and, never heard anything after that. I imagine they were sending it to all of them around here, and whomever ... Like, whatever got them in the fastest, probably got in." [#28]

- The female owner of a WBE-certified construction company commented on the disparity in efforts and outcome in good faith measures, “Well maybe they ought to get rid of the good faith effort, and just make an effort.” [FG#3]
- The Black American male representative of an MBE-certified trucking company commented on how some changes in good faith measures have negatively impacted opportunities for minorities, “Who changed the thing where it used to be every three trucks you... I mean you had to have three trucks and you could use one majority. They done changed it to one to one. Every one truck you can use a majority. It used to be three-to-one.” (FG#10)
- The female representative of an XBE-certified trucking company recalled, “we have had some situations where the prime time contractor has been so strategic where they place us down on work that we did not bid and was preparing to do the work without us knowing that the work was preparing... The preconstruction stage, we knew nothing about any phases of the work.” She continued, “or you have your place on a project with a certain scope of work. You could be a quarter of a million dollars, something you didn't bid. And then they tell you that this is a hall rate. We put you on the bid and we expect for you to perform this. So then there has to be additional coordination with the agency to say, “We want to be able to uphold what we say we can do based on our work, based on our capacity or whatever.” And not have to go to the agency to say we can't perform at a certain level for something we didn't bid.” (FG#16)
- The male representative of a trucking company commented on false reporting, “in regard to many of them, their names would be put on a bid document when the bid is turned in, but they never get the call for the work. And then there's not a check on the backend to make sure they use the company that they said that they were going to use and they use them for the percentage and the dollars they said they were going to use them for.” (FG#17)

Any other related forms of discrimination against minorities or women. Interviewees discussed various factors that affect entrance and advancement in the industry. [#1]

- The Black American male owner of an MBE-, and DBE-certified trucking company expressed how some city, state and INDOT contracts discriminate against minority companies when it comes to budget cuts or work getting cut stating, “They say they need to cut some trucks off because they may be too heavy on trucks and they need to let a couple trucks go. The minority trucks tend to be the first ones cut off and other guys get to stay. That makes it really hard to grow.” [#1]

J. Insights Regarding Business Assistance Programs or Other Neutral Measures

Business owners and managers were asked about their views of potential race- and gender-neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

- Awareness of programs in general (*page 95*);

- Technical assistance and support services (*page 96*);
- On-the-job training programs (*page 96*);
- Mentor/protégé relationships (*page 96*);
- Joint venture relationships (*page 97*);
- Financing assistance (*page 98*);
- Bonding assistance (*page 99*);
- Assistance in using emerging technology (*page 99*);
- Other small business start-up assistance (*page 100*);
- Information on public agency contracting procedures and bidding opportunities (*page 101*);
- Online registration with a public agency as a potential bidder (*page 102*);
- Hard copy of electronic directory of potential subcontractors (*page 102*);
- Pre-bid conferences where subs and primes meet (*page 103*);
- Distribution list of plan holders or other lists of possible prime bidders to potential subcontractors (*page 103*);
- Other agency outreach (*page 104*);
- Streamlining/simplification of bidding procedures (*page 105*);
- Breaking up large contracts into smaller pieces (*page 105*);
- Price or evaluation preferences for small businesses (*page 107*);
- Small business set-asides (*page 107*);
- Mandatory subcontracting minimums (*page 107*);
- Small business subcontracting goals (*page 108*); and
- Formal complaint/grievance procedures (*page 108*).

Awareness of programs in general. Business owners and managers discussed their awareness of programs designed to assist small businesses. Many were not aware of programs available to them, where others had experience utilizing various forms of assistance. [#1, #5, #19, #26, #29, PT#3]

- The Black American male owner of an MBE-, and DBE-certified trucking company mentioned his awareness of programs offered by INDOT stating, “INDOT has a supportive services team, I just don’t know how much they would be able to help me because they can’t make the banks lend me money. They help you out with like capability statements and things of that nature, and they may give you the tools to show you how to do business or speak with the contractor. But they can’t make the contractors give you work or list me as their sub on the job.” [#1]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm shared her experience about programs offered by the city or other agencies, “I used to go frequently, but since I’ve been in the business long enough, I haven’t really. I’ll go if I have some free time but I think it’s great for firms that are getting started or new to the industry to attend those. I always tell people to go to those. They have outreach, certification classes, they have all these things that they do for free. They have diversity network things. Even our professional organizations host a diversity exhibit. It’s funny, it’s for diversity firms to go and exhibit, and all the primes go to it too because they know all the big guys are going to be there. The City is going to be there, CEG is going to be there; they’re very supportive of it.” [#5]
- The Black American male owner of an MBE- and DVBE-certified professional services company mentioned, “As a member of the SBA, Small Business Administration, they do offer classes and courses. It’s up to the business owner to go out and get that or seek it out. That’s just the way it is. You have to do that in order to grow.” [#19]
- In discussing her experience with the Small Business Administration, the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company recalled, “I made an appointment with them. Then the lady had to cancel the appointment, and then she never got back with me.” [#26]
- The Asian Pacific American male owner of a construction company commented on his awareness of programs for small businesses, “I don’t know of any. That is something I need to look into, but I haven’t yet. The only thing that they kind of helped me was when the guy from the city came to meet me at the office. He gave me some local organizations to get in touch with, to possible find some work on them.” [#29]
- The female owner of a professional services company expressed her awareness of the programs offered by neighborhood associations and the SBA, she also noted the lack of staffing and resources available to those associations which makes it harder for them to provide support to start-up businesses. [PT#3]

Technical assistance and support services. Some business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses. For example: [#3, #5, #12, #13, #14, #15, #16, #19]

- The Black American male owner of an MBE-certified electrical supply company provided thoughts on technical assistance and support services, “I think that’s helpful for all business, particularly startups. There are plenty of places around the state to get that technical help, the small business development center is certainly one, and it’s free. They’ll help you write a business plan and do other things; I think it’s worthwhile.” [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company felt that technical assistance and support services would be beneficial for small disadvantaged businesses, “If you can get technical support, IT, or somehow have something, a class that shows how to get linked into the city, fantastic, that would be a great opportunity.” [#12]
- When asked if technical assistance and support services would be helpful for small disadvantaged businesses the Hispanic American male owner of an MBE-certified landscaping company commented, “Yes, I don’t have a high education in school, and it would be for the city to help people like me to have schools, how to teach us with the technology, like the Internet. We can be better in our business.” [#15]
- The non-Hispanic white male owner of a certified disabled-owned professional services company mentioned, “Technical assistance would be great because we’re always learning about work by email. It may not seem like a big deal but you’re getting three emails a day of opportunities. It seems like a small thing, but it’s really big for me, that we get information by email.” [#16]

On-the-job training programs. A few business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses, with one giving detailed comments. For example: [#3, #5, #13, #15]

- The Hispanic American male owner of an MBE-certified landscaping company shared his thoughts of on-the-job training, “I wish they [the city] would do more like teaching people how to learn landscaping, roofing, construction, electricity, and plumbing. There are people who need a lot of help with those jobs.” [#15]

Mentor/protégé relationships. Multiple business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses. For example: [#1, #3, #4, #5, #8, #11, #12, #13, #16, #22, #26]

- The Black American male owner of an MBE-, and DBE-certified trucking company shared his thoughts on mentor and protégé relationships stating, “Mentorship programs would be good. That was one thing that INDOT did after you became certified. You went through their classes, they would partner you up with someone else and you would go spend a day or two with them just to see how they run their operations, and be able to pick their brains INDOT would set that all up, it was helpful and valuable.” [#1]

- When asked if a mentor or protégé relationship would be helpful for small businesses the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company stated, “This is a great thing because it helps people just starting out to build their business so they can be a prime someday.” [#4]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company expressed her experience with the mentor protégé program, “I go through those with the Indiana construction roundtable and I love them. Mentor protégé programs I just absolutely adore; they are some of the best things ever that you can take advantage of.” [#8]
- The Native American male owner of an MBE-certified construction company mentioned his view on the mentor protégé relationships, “They would be very helpful. I always wonder here and am concerned with when the big GCs or the big construction managers, when they look at how we deliver things to them and are we getting them what they need in a useful manner. Do we look professional or are we lacking in that area? I think those relationships could be very helpful to have someone come in and say, ‘You know, this part of your organization is great. We need to work on this little piece and this piece.’ That could be huge.” [#11]
- The non-Hispanic white male owner of a certified disabled-owned professional services company stated, “Mentor and protégé relationships, you need to meet with somebody who has been doing this for a long time and knows what they’re doing. That would be an interesting thing to have somebody to meet with, and if the city helped with that, it would be great.” [#16]
- As a suggestion for increasing numbers of laborers, the non-Hispanic white male owner of an architecture firm suggested, “I just think that the fact that if there's more of the mentorship or the protege, whatever they wanted to call it, programs grouping and tying people together, that would help a lot. Help out regards to develop our workforce and potentially to be able to do projects.” [#22]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company commented on mentoring relationships, “I feel like it would be really helpful to have a mentorship program where you're able to work with someone else that owns their business that may be similar to yours that'd be willing to mentor you with your business. I think that would be a good idea, but somebody that is local. Like I didn't know of anybody that is willing to sit down and do that. Not the SBA, not that. I'm saying people that already own their own business that are willing to sit down and mentor you.” [#26]

Joint venture relationships. Some business owners and managers thought joint venture relationships are helpful for small and disadvantaged businesses. For example: [#1, #3, #5, #8, #12, #19, #20, #26]

- The Black American male owner of an MBE-, and DBE-certified trucking company shared his view on joint venture relationships, “I really do think it could be helpful absolutely, but trying to get companies to come together, share resources, and information would be a

different story. The city needs to promote it and suggest it because right now a lot of us are bidding individually on projects and we're not getting any. One of the reasons why is our truck capacity is not allowing us to get those bigger jobs and the prime contractors want to give the job to one company where they only have to make one phone call or one or two phone calls and that's it. In my industry if the minority companies could somewhat team up and come together and bid as one, it would be great." [#1]

- When asked about joint venture relationships the Black American male owner of an MBE-certified electrical supply company stated, "They can be helpful, because sometimes you build a working relationship where you actually work together. A formal joint venture may or may not be needed, but you're working closely together." [#3]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company shared his thoughts on joint venture relationships, "I think they're great, because I've learned from other joint relationships. It's usually good if you have what I call a big brother, big company, that can grow and bring along the smaller company. So, I do think joint ventures can be very successful." [#12]
- The Black American male owner of an MBE- and DVBE-certified professional services company mentioned joint venture relationships would be helpful for small businesses, "I would also accept it from the bigger corporations or conglomerates as well. All the positive stuff that can help my company grow, I'm open to it." [#19]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company commented on the potential helpfulness of joint ventures, but also stating, "I didn't know that until I looked that up after [the availability survey] had called me." [#26]

Financing assistance. Many business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses. For example: [#3, #4, #5, #8, #11, #13, #19, #21, #27, #29]

- The Native American male owner of an MBE-certified construction company mentioned how financing assistance could be very helpful for small disadvantaged businesses, "A couple years ago, that would have been helpful. I'm sure a lot of guys could use that because banks don't make it easy. One thing that I never understood is I would ask for a \$50,000.00 or a \$20,000.00 line of credit just in case I didn't get paid, and needed to make payroll, pay an invoice and I was a little short. For some reason, the bank always asked for way more than I ever did. Assistance that way, bringing lending institutions to an event or something with the contractors could be very helpful. That way, they can pair and match up, it's somebody that's possibly interested in loaning someone money instead of a guy that works for the bank that comes in here and says, 'Hey,' and then, 'No, we wasted your time. Thanks for filling out all the papers, sitting through the interview, but no.'" [#11]
- The owners of a majority owned electrical construction company suggested, "honestly I would say if there's something the city could do it would be to actually give the small

business... Give a way for the small business owners to actually acquire some of the funding so they can grow and be competitive for some of that stuff.” [#21]

- The non-Hispanic white female owner of a DBE- and WBE-certified landscaping company noted, “Financing assistance for these consultants would be great, because this last go-around when I got my credit line cut, this bank went to bat and got me an SBA. I didn't know anything about it, and it saved my bacon. Those kinds of things are needed. I've been at this business twenty-some years, it was a really good learning experience for me.” [#27]
- The Asian Pacific American male owner of a construction company commented on financing assistance, “for most of the stuff that I do, I don't really need financing, but if I get into larger projects, yeah, I think financing assistance would be ideal.” [#29]

Bonding assistance. Some business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses. [#3, #11, #13] For example:

- The Black American male owner of an MBE-certified electrical supply company commented about bonding assistance, “That can be very helpful, I've seen where a large firm will use their bonding capacity to help an XBE and a non-XBE. I've seen that, and that can be very helpful.” [#3]
- The Native American male owner of an MBE-certified construction company commented, “Bonding assistance, I'm sure could be very helpful. They want all your financials. They want to know everything about you. It can be difficult finding the right people. I was fortunate the bonding was in place here. All I had to do was fill out the financials that I still hate doing every year.” [#11]
- The non-Hispanic white male owner of a goods and services company commented about bonding assistance, “Definitely see the need for that. If I have to get a big bond sometimes it's hard for me.” [#13]

Assistance in using emerging technology. A variety of business owners and managers thought assistance in using emerging technology can be helpful for small and disadvantaged businesses. For example: [#1, #3, #4, #11, #13, #14, #19, #25]

- When asked if assistance with using emerging technology would be helpful for small business owners the Black American male owner of an MBE-, and DBE-certified trucking company expressed, “Yeah, especially with software, the city should make sure that everybody's up-to-date. Some of those folks that get into business may not know how to use Excel, PowerPoint, or any of those things and that's one of the things that the DBE class through INDOT taught you. It was a crash course for some business owners that didn't go to college, it was about how to use Excel, PowerPoint, Word, things of that nature.” [#1]
- The Native American male owner of an MBE-certified construction company stated, “Assistance in using emergency technology could be very helpful. You never know if you're lacking in areas.” [#11]

- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm stated, “I think that [assistance with emerging technology] would be very helpful. When we started getting more into going after work with the city, there’s a learning curve there so it’s nice to have some assistance with that.” [#25]

Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. A few owners agreed that start-up assistance is helpful. For example: [#3, #13, #18, #22, #23, #28, FG#3]

- When asked about other small business start-up assistance programs the Black American male owner of an MBE-certified electrical supply company commented, “Small business development centers, SBDCs. I’ve seen them help businesses get started. There are probably others as well, but that’s certainly one.” [#3]
- The non-Hispanic white male owner of a goods and services company mentioned, “Yeah that type of assistance would be good. I think it’s hard to get through it when you’re starting up your own business.” [#13]
- The Hispanic American male co-owner of a goods and services company mentioned how small business start-up assistance would be helpful, “To know a place that you can approach and they can guide you to the proper to the advertisement for your own business, or guide you with different people that can be fair and make sure that you get paid, would be great.” [#18]
- The non-Hispanic white male owner of an architecture firm suggested, “in regards to just helping businesses get established, if the city could reach out and provide those sort of basics of what you need to do to start a business, or how to run a business, yeah, that’d be a beneficial. I think starting a small business, there isn’t a lot of resources in regards to understanding. I know a lot of businesses get started and they don’t know the basic information or how to do bookkeeping or whatever. How to run a business.” [#22]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company sought out start up assistance, but described her experience saying, “we’ve been exploited. Didn’t we pay the woman? How much money were we paying her? I must have paid this lady, this company, at least \$3,000 dollars, over a period of time. Because, she was going to teach us how to do RFPs, and how to respond to them, and what to do, because she was our fee writer, or whatever. Nothing. How many times did she sit with you for like an hour, two hours? The city was putting on and leading the workshop. So then they saw us, and they’re like, “Ripe and ready. We can exploit this, no problem.” I told them we are brand new, we don’t have any money, we don’t have disposable funds. They screwed us royally on our website. Never delivered. They took the money. Lots of fighting, back and forth over it. I paid them \$1750 dollars, that I never saw. Then they dissolved the company. Then, at that time, we had paid them for helping us with our ... There was two things they were supposed to do. Neither one of those ever happened.” [#28]

- The female owner of a WBE-certified construction company commented on her personal resources, but the lack of formal resources for business guidance, “This network of working in the industry and people I call, and then you start wearing people out. And you've got to switch to somebody else. People that have done this type of work. How do you bill for your services? I don't know. I mean, when you're doing the work you don't get involved in how you bill. How do you determine what your bill rate is? How do you buy stuff, how do you know how much money should you have on hand? I never got a loan, I knew I was never going to get a loan, and I haven't gotten any money from today. But I just keep filling the buckets internally, to make really payroll is my biggest expense. So my point is, is just that there's a lot of questions, starting a business sounds really glamorous, but it is a lot of- what did I tell you? Knocking your head against the wall every single day. It's just the resource isn't there, and there's not anyone to say, "Hey, how do you do this?". You've got to just do it.” [FG#3]

Information on public agency contracting procedures and bidding opportunities.

Business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities. Some thought the information is helpful for small and disadvantaged businesses. For example: [#3, #13, #25, #26, #29]

- The Black American male owner of an MBE-certified electrical supply company provided his thoughts on public agencies contracting procedures and bidding opportunities, “There's plenty of information, they [agencies] send emails. If someone's saying they're not getting the information, they're not reading their emails, because they send it early and often, the city and the state.” [#3]
- The non-Hispanic white female owner of a DBE- and WBE-certified civil engineering firm expressed her thoughts about obtaining information on public agency contracting procedures, “That would definitely be helpful, especially when you're first starting in this industry.” [#25]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company commented on the public bidding process, “I feel like they need to do a better job with letting people know that if they offer that assistance that they do, because as far as I'm concerned I've never heard of them offering that. The way that I found out about government contracts again was through a friend that has a business that she partners with her state. I heard that from a friend, I didn't hear that from anybody in the city.” [#26]
- The Asian Pacific American male owner of a construction company suggested that there be more, “recommending. For example, whatever organizations that are federal funds for these projects. If they could maybe compile a list or I don't know if there is a list somewhere, but those organizations. And that would make it easier for someone like me to reach out to.” [#29]

Online registration with a public agency as a potential bidder. Multiple business owners and managers thought online registration with public agencies as a potential bidder are helpful for small and disadvantaged businesses. For example: [#3, #8, #13, #14, #19, #20, #21]

- When asked if online registration with a public agency as a potential bidder is helpful or available to small businesses the Black American male owner of an MBE-certified electrical supply company commented, “Yes, that’s very good, it’s well-established and available.” [#3]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company expressed her experience with online registration with a public agency as a potential bidder, “Those have been helpful and I’ve registered.” [#8]
- When asked if online registration with public agencies as a potential bidder is helpful for small businesses the non-Hispanic white male owner of a goods and services company stated, “Yes, assistance would be good because some of it is pretty complicated sometimes.” [#13]
- The owners of a majority owned electrical construction company noted, in regards to electronic bidding and its required software, “They’re very expensive. Like five grand expensive.” [#21]

Hard copy of electronic directory of potential subcontractors. Some business owners and managers thought a hard copy of electronic directories of potential subcontractors would be helpful for small and disadvantaged businesses. For example: [#3, #13, #19, #21, #22, #25, #26]

- When asked about hard copies of electronic directories of potential subcontractors the Black American male owner of an MBE-certified electrical supply company mentioned the directory is helpful and generally available to everyone. [#3]
- The owners of a majority owned electrical construction company stated how helpful a directory would be in high volume seasons, “there have definitely been times where we’ve run into stuff. Actually, this winter, we were so busy we actually called another electric company that we knew did good work and said, “Hey, if we have a few of these jobs come along, can we pass them off to you?” They said, “No, we’re booked out three weeks too.”” [#21]
- The non-Hispanic white male owner of an architecture firm suggested that information on potential subcontractors would be helpful, stating, “what happens a lot of times, we’re receiving bids on a project I’ll have sub-contractors call me and want to know who else is bidding on the project so they can submit.” [#22]
- When asked about directories of potential subcontractors, the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company commented, “I think that that would be helpful. Especially with my business, because if you were trying to fill an order and if that order was too big just for the companies or the vendors that you

deal with, then there may be someone else that you could partner with that could fill that order. In that business, I think that would be very useful.” [#26]

Pre-bid conferences where subs and primes meet. Multiple business owners and managers thought pre-bid conferences where subs and primes meet are helpful for small and disadvantaged businesses. For example: [#3, #5, #8, #12, #13, #19, FG#6]

- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm shared her thoughts on pre-bid conferences, “They do that a lot, and that's good. I think it's more important on the construction side, because on our side of things, if you don't know about it already, it's already been figured out who is partnering with who.” [#5]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company shared her thoughts on pre-bid conferences where subs and primes meet, “Those are probably the most helpful, because you are face to face now with people who are looking at the job. Even if you don't get that job, you've already met that contractor. They put you on a list for another job. Those are the best things ever.” [#8]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company shared his thoughts on pre-bid conferences, “That could always be a good one, the meet-and-greets like that would be good. If they keep those up, it'd be very beneficial.” [#12]
- The Black American male owner of an MBE-certified electrical supply company noted the utility of conferences, “Sometimes the construction round table's got something going on, and then sometimes just different agencies are doing extra things, and as you go to them, you start to hear, oh man, that's coming down the pipe.” [FG#6]

Distribution list of plan holders or other lists of possible prime bidders to potential subcontractors. Business owners and managers thought distribution list of plan holders or other lists of possible prime bidders to potential subcontractors are helpful for small and disadvantaged businesses. For example: [#1, #3, #8, #13, #20, #29]

- When asked if the distribution list of plan holders and other lists of possible prime bidders are helpful to small businesses the Black American male owner of an MBE-, and DBE-certified trucking company commented, “Well, yeah, it gives you a list of the contractors that ask for the plans and at that time you can start calling them and letting them know I'm interested or I want to make sure that I'm on your subcontractor list, things of that nature. That's definitely a tool that I use to potentially reach out to new customers that I haven't already been receiving solicitations from.” [#1]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company mentioned, “Had it not been for that distribution list of plan holders and other possible prime bidder information, we wouldn't have been able to bid on projects because we wouldn't have known who was out there.” [#8]

- The Asian Pacific American male owner of a construction company noted, “that's definitely helpful. I definitely, some of the plans that I've looked at, and again, I haven't really got into it. Yeah it would definitely be helpful to know who was awarded the contract so you can directly reach out to them.” [#29]

Other agency outreach. Business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. For example: [#1, #3, #8, #12, #13, #22, #24, #26, #28]

- The Black American male owner of an MBE-, and DBE-certified trucking company stated that he attends outreach programs but felt they are a waste of time stating, “The contractors and customers that I deal with, a lot of them already know if they get the job who their subs are going to be. So, it's kind of just a dog-and-pony show. A lot of these guys they want to see the minorities come to these outreach programs I think to make themselves look good. But they already know if they get the job, they have their team of subs that they use on a regular basis that probably have performed well for them in the past, done a great job so they tend to stick with those guys.” [#1]
- The Hispanic American female owner of a WBE-, and MBE-certified safety supply company commented about other agency outreach, “The city does it twice a year where they bring the reverse trade show. That is super helpful, I go there every year, it's one of those can't miss events. You're finding a lot of people all in the same space all looking for the same thing. Sometimes you can't find who to get in front of at a particular place, with this event they're bringing them to you. They're not just bringing the supplier diversity specialist; they are bringing the decision makers to these shows. For example, Eskenazi I hadn't seen them at anything but, they came to the trade show. Now you're in front of the people who are making the decisions. Granted, you're not going to walk out of there with a contract but you're walking out of there with contact people. So, it's a big deal. Their trade show is twice a year. That's probably one of the best trade shows that I think are put on because people show up. It's not huge but who does show up is extremely helpful. You're also getting in front of other people who are also walking the trade show. It's not just the people of the trade show themselves. It's the people who are also there looking for business.” [#8]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company mentioned, “Outreaches can never hurt. The airport does a great job; they probably do one of the best. The minority council, here local, is fantastic; they put on a great one as well.” [#12]
- The non-Hispanic white male owner of an architecture firm commented on agency outreach, “I think mostly the city does not make people aware in regards to what projects are out there always.” [#22]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company noted that the agencies “could do some in services or whatever or some classes or something that the state could offer for entrepreneurs just getting started, like that sort of thing. I'm assuming that's what the SBA does, although like I said, I got my appointment

canceled so I never went back down there. Then I just got a mentor, but I'm pretty sure that they offer it through the SBA." [#26]

- In discussing the lack of outreach, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company articulated, "It's a roundabout with about eight roads coming up to it. They tell us, "Okay, here's your certification." So, you're on the roundabout. Now you're going around in circles. Every path looks great, but you have no idea how to go. How to take, which one is right, which one is not. There's no help, there's no direction." [#28]

Streamlining/simplification of bidding procedures. Several business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses. For example: [#3, #13, #14, #19, #22, #25]

- When asked if streamlining bidding procedures would be helpful to small businesses the non-Hispanic white male representative of a majority owned goods and services company mentioned, "Yes absolutely, that would be something that we would definitely be interested in. I mean I'm just thinking of my industry, streamlining or simplification of the bidding procedures would be like getting a faster streamlined process." [#14]
- In regard to streamlining the bidding procedure, the non-Hispanic white male owner of an architecture firm commented, "sometimes there's so many documents either, should be able to get it on one. Also in regards to with the city, one should be able to register online and that just migrate into ... instead of repeating it every time. It's like, I don't know how many times I put my email down on a piece of paper for the city to ... For every meeting. It's like, well, you know who I am. Just give me a number and I'll put the number down and you can just pull up my information." [#22]

Breaking up large contracts into smaller pieces. Multiple business owners and managers thought breaking up large contracts into smaller pieces could be helpful for small and disadvantaged businesses. For example: [#1, #3, #4, #5, #13, #22, #25, #28, #29]

- The Black American male owner of an MBE-, and DBE-certified trucking company noted that breaking up large contracts into smaller pieces for small businesses would be helpful stating, "Yeah, that would be nice, it would be helpful. I would say that the minority requirements would need to be increased. If you're going to break them down into smaller projects, definitely increase the minority percentage so that a smaller firm could stay on the job from start to finish." [#1]
- When asked if breaking up large contracts into smaller pieces would be helpful for small businesses the Black American male owner of an MBE-certified electrical supply company expressed, "They can always do better, but they break them up. You know, you've got to watch it, because there's a point of inefficiency and it will drive their cost up. So, I understand some hesitancy. It's a careful balance, but I think they do a decent job of that." [#3]

- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company expressed how breaking up large contracts into smaller pieces has been helpful for small businesses, “This has been pretty beneficial to small companies. On the other side of the table, I can see that maybe this might be harder on the tax payer.” [#4]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm shared her thoughts on breaking up large contracts into smaller pieces, “Yeah, that would be great. I think, especially, for startups. Our first job that we won with the City, we were the first DBE to win a job as a prime. It was a small project just so we could convince them that we can handle it and how to manage it and everything. But having those it's good to have large ones, it's good to have medium, it's good to have a range. I know it's sometimes harder. Those small ones are really hard to manage. You don't make money on them. If you want to get your foot in the door, you've got to be willing to do it.” [#5]
- The non-Hispanic white male owner of an architecture firm noted that breaking down contracts into smaller pieces, “be helpful for people. The only problem is usually a project might be too big.” [#22]
- In commenting on breaking up contracts to create initial opportunities for businesses, the Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company stated, “Because I'm a processed person, I can tell there is this much money earmarked, under \$30,000. \$29,999 dollars can be given without an RFP. Okay. Well, within that, we need to make sure that within this space we have these 30 companies, and we're going one, by one, by one, and asking them, “Do you want this opportunity?” Yes, we want this opportunity. “Okay, go ahead, build your resume. We're going to give you three opportunities.” Okay. Because, you know what, I don't want all of them. But, I want three, because they ask, always, for three. “What is your past experience? Give us three, tops.” Give me three opportunities, allow me to do the work, I'll do the work, I'll deliver, I'll do whatever I need to, and if I don't do well, don't give me a recommendation. If I do well give me a recommendation so I can then start working.” [#28]
- The Asian Pacific American male owner of a construction company noted that breaking up larger contracts would be helpful, but, “in all honesty if it was broken up, when I pull up a plan and I'm looking at 100 pages of specs it's really hard for me because there's a lot of things in there that I don't understand. So, whatever I know is mainly on the outside, like the siding or the masonry or the roofing, the guttering and all that kind of stuff. So it's really hard for someone like me to be able to go through all those pages. So if it was split up, like the exterior, that would make it a lot easier for someone like me to bid.” [#29]

Price or evaluation preferences for small businesses. A couple business owners and managers thought price or evaluation preferences for small businesses are helpful. [#1, #29] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company provided his thoughts on price or evaluation preferences for small businesses, “Yeah, that would be good. Any way to incentivize them to use more minorities I think it would be great. They [non-minority primes] might not like it but if they allowed them [small minority owned businesses] to be able to bid on more work, increase their capacity, it would help.” [#1]
- The Asian Pacific American male owner of a construction company commented on price evaluations, “I’ll get people to tell me hey we need to get it done for this price, this is our budget. And then sometimes I can make it happen and sometimes I say hey I think you’re crazy for thinking we can do it for this price and I’m sorry but I respectfully decline to work on it with you.” [#29]

Small business set-asides. Some business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses if well designed. For example: [#3, #5, #22]

- When asked if small business set-asides were helpful the Black American male owner of an MBE-certified electrical supply company stated, “I’m not a fan of it, you’re spending taxpayer money, so set-asides where only small businesses are bidding that’s a dangerous trail because you can drive your cost up.” [#3]
- The non-Hispanic white male owner of an architecture firm commented on small business set-asides saying, “yeah. I think sometimes even with the really large projects, the city has a tendency to go outside the city with a firm instead of keeping the work local.” [#22]

Mandatory subcontracting minimums. Business owners and managers thought mandatory subcontracting minimums are helpful for small and disadvantaged businesses. [#14, #29, FG#15] For example:

- The non-Hispanic white male representative of a majority owned goods and services company provided his thoughts about mandatory subcontracting minimums, “Mandatory subcontracting of bigger companies in my area would be awesome because the smaller companies would get more business, which would up jobs.” [#14]
- The Asian Pacific American male owner of a construction company commented on the benefits of subcontracting minimums, “absolutely. If there was like a certain percentage that had to go to a minority business.” [#29]
- The male representative of a trucking company noted, “sometimes you can lock a guy in to be minority, and then they’ll come in and do their part of the job and then the contractor get rid of them for the rest of the job. And I’m trying to figure out if there’s some kind of other credit that can be established outside it. Don’t just stop me at the goal of 15 or 8% or whatever it is. Give me the whole job and promise me I can continue to work on that job

until it's done. Instead of letting the contractor have credit on other jobs ready to private work, anything that's not is going to be required minority where they can halfway get some kind of incentive on using us daily and year round, not just when this job comes up that they need a minority. And I think that would solve it. That would help a lot because you beating everybody down because they're just saying, we just need him for this 200,000 and then we out of here. I think you need to make it where all the way across the board, every contractor in this city that works for the city of Indianapolis needs to allow to show good faith effort every day on every job, and I think it will help bring those numbers down. Because like they said you can't wait for the next job to come up that's going to be minority. You need to be working every day and the majority's constantly working waiting for you to get out the way." (FG#15)

Small business subcontracting goals. Some business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses. For example: [#13]

- The Black American male owner of an MBE-, and DBE-certified trucking company shared his views on small business subcontracting goals, "Yeah, I think it would help. I think we'd all grow if we all got a fair chance to obtain work. In my industry, I can't really speak about any other industry, what is preventing a lot of minority companies to grow is that there's one or two, maybe three trucking companies here in Indianapolis that are getting all the work. So once again, it's forcing us to either work through them for a lesser rate than we really need to work for, forcing us out of business or forcing us to work way outside of the city limits, just to focus on the state or city projects." [#1]
- The non-Hispanic white female owner of a WBE-certified engineering firm provided her thoughts on small business subcontracting goals, "It would be nice to increase the limits a little bit and it all depends on the project. It would be nice to have some flexibility there if it is a larger project and they know they can bring in more subs to do the work." [#24]
- The Native American female owner of a WBE-, MBE- and VBE-certified goods and services company thinks small business subcontracting goals would be helpful, however, "I had no idea that they set money aside for veterans, minorities, women. I had no idea." [#26]

Formal complaint/grievance procedures. Some business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses. [#1, #3, #4, #5, #7, #19] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company commented about the current formal complaint procedures, "Yeah, you'd go to the office and speak with someone but I think there has to be a written statement that you have to submit to the city to the MBE office there downtown. It should be kept anonymous because if you submit something you have to put your name down and your business name so if someone is called out, they can ask who filed that complaint and retaliate or be black-balled from getting future projects. So, somehow if it could just be kept anonymous, that would help. That would be great." [#1]

- When asked if there is a good process for formal complaints or grievance procedures the Black American male owner of an MBE-certified electrical supply company expressed, “No, because we wouldn’t have these payment problems, it’s too one-off. So, a prime isn’t paying me timey or a sub, I go to someone, and it’s kind of a one-off thing, there is no process involved, except Citizens interview. That’s the only place I know where there’s a formal process, anywhere else, you’re just pulling teeth. It needs to be improved. It’s like all the owners do is make sure that someone’s including minority businesses. The only time I benefit is when I finally get paid and no one’s helping me get paid timely, it’s a big problem.” [#3]
- When asked of formal complaints or grievance procedures would be good for small disadvantaged businesses the non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm stated, “I think it would be great, but I don’t think anybody would use it, out of fear for retaliation. Just to be honest.” [#5]
- The Black American female owner of an MBE-, WBE-, and DBE-certified trucking company shared her thoughts on formal complaints and grievance procedures, “That is one thing that small businesses stay away from because they don’t want to be black balled because you will be black balled.” [#7]

K. Insights Regarding Any Other Race-/Ethnicity-/Gender-/Disability- or Veteran-based Measures

Business owners and representatives shared their experience with the City’s XBE program and provided recommendations for making it more inclusive. For example:

- Experience with the City’s XBE program (*page 109*); and
- Recommendations about race-/ethnicity-/gender-/disability-/ or veteran-based programs (*page 110*).

Experience with the City’s XBE program. Business owners and representatives described their experiences with the city of Indianapolis’ XBE program. [#1, #28, FG#3, FG#7] Examples include:

- The Black American male owner of an MBE-, and DBE-certified trucking company shared his experience with the City’s XBE program, “I think it’s helpful, it opens up doors for minority companies. It doesn’t guarantee you anything but it gets you off the sideline and into the ballgame. The City needs find a way of making sure that the companies that are getting certified are legit, that they’re more than a shell company, that they’re a true legitimate company.” [#1]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company articulated her views on the program, “I have a lot of respect for the city, for the state, for all of their processes, everything. But, what I think, is there’s a huge gap between all the stuff that they are doing for people like us, and what people like us are actually receiving. There’s this huge place, this void, where everything’s getting lost, if they

are in fact doing that. I am certified. I demand that I get an opportunity. If I don't do well, then fine. There should be starter opportunities. Companies that have never worked with us, "We want you to do the small stuff, so you can build your history." There's no such opportunity." [#28]

- The female owner of a WBE-certified construction company commented on the XBE program, "So if the XBE is funded only partially by the city, then usually the goals aren't either, the initiative isn't there, it's not definitely like guiding principles, they're not usually made the first five of really what's important on the job. So a lot of these bigger jobs though, especially on professional service, it's very very political. In my opinion. It's tough to get in. And I've noticed doing this the last 15 years, is really this whole XBE thing is all about how the project's getting funded. So if we know where the money's coming from, we'll know if it's an opportunity to use that as a tool, or just to run after it because we have the skill sets to do it. So the XBE is not the only tool in the toolbox. We need to know what to lead with. Some of the bigger jobs the XBE is the tool to lead with, but some of the other ones, maybe that's not the tool." [FG#3]
- The Black American female owner of a no-longer operating trucking company commented on the effectiveness of the XBE program, "in 1988 when all this started to help the minorities get into the trucking field, the very reason the program was started, the disadvantage through the woman, the minority, is to help them. But as of today we are back to that point. We're back to the point where the non-minority controls the market. They control everything." (FG#7)

Recommendations about race-/ethnicity-/gender-/disability- or veteran-based programs.

Business owners and representatives discussed a variety of suggestions for improving race-/ethnicity-/gender-/disability- or veteran-based programs. [#1, FG#2, FG#3, FG#9, FG#10, FG#13, FG#17] For example:

- The Black American male owner of an MBE-, and DBE-certified trucking company shared recommendations for the City on how to help small businesses, "Increase their resources, having people out in the field to interview, review compliance, make sure that these companies are who they say that they are, just really investigate, do their homework. I think at some point they said there was a goal to get as many minority companies certified as possible. Some of them were just pushed through not really realizing that they were front companies." [#1]
- The Black American female owner of a DBE-, MBE-, and WBE-certified construction company commented, "if you happen to be the minority and the woman, we don't get any extra credit. We have to choose one for you to count." [FG#2]
- The female owner of a WBE-certified construction company noted, "the majority of the partnerships are only with MBEs not WBEs, because the goal for the WBE is too small. So if the goal for the WBE was larger, we could potentially get into the partner. It would be nice. I mean that is a battle I fight daily." [FG#3]

- The male representative of a trucking company suggested, “I don't know if the city could possibly put in the contract to a prime but hey, to meet your minority goals on transportation, they can be non-union. That would definitely help out. Now, at that point the city of Indianapolis has a stronger influence upon a union contractor by saying, “Hey, they've imposed this upon us.” It will help with the city getting a better value for their dollar going with a non-union minority trucking whether it's a W or a M or whatever they may need. I think it would be something that would definitely help us to where prime contractors could go back to the union and say, “Hey, the city of Indianapolis has X amount of work, they're putting us out here. I'm going to have to use so and so truck.” And I think that would definitely help. I don't know if it's legal. I don't know if it's possible but that would definitely lift some of the issues that we're having.” (FG#9)
- The Black American male representative of a trucking company offered recommendations for improving XBE-goals, “It seemed like they started watering down the minority status, too. Because they already having a problem meeting their goals as it is, and then when they start trying this XBE and making them all under one, that's something that I think need to be talked about. I'm just speaking as a black man, African-American. And when they start diluting it, it's like they're diluting whiskey. Where they putting water in it. When you start adding the women and all the different type of veterans and all that different stuff and they breaking it down, we already wasn't getting a fair shake. Now it's even harder to get it because they switching them dollars around to other places. It's making it even less than what you was getting at the get go.” (FG#10)
- The male representative of a trucking company noted that there could be increased clarity in the minority goals, “you also have where in the minority category, you have all of these minority ethnic groups all lumped up into one group which you don't adequately get a feel for how many dollars is really spent in the African-American community. And when you look at the percentage of African-Americans in the city, we would like to see a better representation of those dollars. And we're not even able to see the breakdown between the different groups.” (FG#13)
- The male representative of a trucking company noted, “I think a recommendation could be that if they are not meeting their minority participation goals, as they request the [invoice], that [invoice] can be withheld until they're bringing those numbers up and that allows the city to even dive in further with the, on the compliance piece” (FG#15)
- The male representative of a trucking company suggested, “there needs to be additional funding for them [Office of Women and Minority business Development] to employ compliance officers to keep on the job sites as well as the paperwork flow.” (FG#17)

L. Any Other Insights and Recommendations

Interviewees provided other suggestions to the City of Indianapolis and surrounding county agencies about how to improve their XBE programs. Interviewees also shared other insights or recommendations. For example:

- Enhance the availability and participation of small businesses (*page 112*); and

- Other recommendations for the City of Indianapolis or other public agencies in the Indianapolis area (*page 113*).

Enhance the availability and participation of small businesses.

- The Black American male owner of an MBE-, and DBE-certified construction company shared insights on how the city can increase participation of small businesses stating, “This administration ought to be doing a lot more and no one's held them accountable. I haven't seen anything the mayor's doing for minority businesses. I don't even know who runs that department anymore, that was never the case for the last eight years. The City needs to cultivate minority businesses but they've [the city] been literally invisible.” [#2]
- The non-Hispanic white female owner of a WBE-, and DBE-certified engineering firm shared her thoughts on how to enhance the availability and participation of small businesses, “Now that we're at this size, where do we go from here type of program. I don't know how they could put something together that would be specific to the intermediate size. This is a comment I hear from a lot of the firms that are like us. They're in this in-between point. We all commiserate together because we're established but it's like, okay, now where do we go? It may just be that it's on us to figure out and that's okay if that's the answer. It would just be nice if there was a program like that.” [#5]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company provided recommendations for enhancing the availability and participation of small businesses, “I do believe that sometimes they [the City] gets stagnant, it seems like you're just seeing the same companies over and over and over. I do understand you get comfortable with a company, because a company does good work. Just remember, some small companies could do great work or good work if given the opportunity. It's all about the opportunity, that's really all I can say that would be fair.” [#12]
- As a suggestion for the city, the Native American female owner of a WBE-, MBE- and VBE-certified goods and services company noted, “do a regional meeting with all the small businesses, and that way they could do even growth for the small businesses that are in the area that are women owned, minority owned. Maybe there's something that they need to do so that they could communicate with the small businesses.” [#26]
- The Subcontinent Asian American female owner of a WBE- and MBE-certified professional services company suggested, “we need them to help us get started. Even when we went with disk assessments, with our partner. Even they gave us a starter kit. A box came in the mail, and it was like, “Here's how you start.” But, nothing. The city was like, “Yeah, you're certified. See ya.” . I mean, I'm fine with no follow up, but give us a starter kit. Say, “Here are your three projects that you need to deliver on in the next one year, or in the next two years, this is what we need to see you do.” Or alternatively, if you want us to do something on our own, or whatever that might be, then tell us, “This is how we will measure this.” Give us help doing RFP, if not many. Give us a resource that we can take it to, and say, “We want to respond to this one. Help us fill that.” So then once we have it, then we can replicate, and what have you. But, “Oh, we do some workshops.” DBE, they do workshops to teach you

how to do RFPs. None of those workshops have ever taught how to do an RFP. They just talk. They talk, and they talk, and they talk, and all of that. I am yet to go to a workshop where they actually fill one out with you. They just randomly tell you, "Well, this happens, that happens, this happens. Respond on time." See, I know that. Respond on time. I got that, but nothing else. So, give a resource." [#28]

- The owner of a VBE- and DOBE-certified engineering firm provided recommendations for enhancing the participation of small businesses, "The current system in place for M/W/VBE firms promotes them to continuously be a subconsultant. The current percentage levels do not enable firms to grow to capacity to lead projects which would in turn promote firms to grow into self-sustaining roles. The city should strive to set-aside projects that are smaller in scale to these firms allowing them opportunities to lead projects. The larger projects would be able to utilize a percentage system as it currently establishes." [WT#3]

Other recommendations for the City of Indianapolis or other public agencies in the Indianapolis area.

- The Black American male owner of an MBE-, and DBE-certified trucking company provided recommendations that would help small disadvantaged businesses stating, "The city should kind of mimic what INDOT used to do. The weekend classes and week-long classes that INDOT used to have, I don't think that they do that anymore. In my industry, I'm pretty sure it happens in other industries, a lot of these folks go out and start a business, they get certified and they don't really know how to quote a job or bid on a job or even navigate through the system. I think that would be helpful if the city could put on some type of program that could help newly certified companies go through that process." [#1]
- When asked if there were any recommendations for the City of Indianapolis the Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company stated, "Overall I think the city is doing a good job and is moving in the right direction. Their percentages are quite good for XBE requirements. I think providing bonding for jobs would be great for small businesses as it adds a layer of credibility to the job." [#4]
- When asked if there were any recommendations for the City of Indianapolis the Black American male owner of an MBE- and DBE-certified construction supply company stated, "I think as a whole, the city's program is working. I do think the policing, they need to work on that a little bit. The recertification process could be a little less intense, a little less involved with the repetition of the recertification, but it's improved since I started it. One thing I should mention is I've pounded on policing, and saying that there should be a consequence for contractors that get caught using a certificate or forging waivers saying that they've used us and haven't. Maybe if you got all of the certified people together with the city, there could be some conversation about how to monitor that better. And maybe if you got everybody in one room, some people wouldn't speak up because they don't know who each person is in the room, but maybe if there were smaller groups, of a dozen people, we could brainstorm and come up with an idea or maybe we could report to the city to help checks and balances." [#6]

- The Black American female owner of an MBE-, WBE-, and DBE-certified trucking company provided recommendations for the City, “Work needs to be done in the building capacity of these larger firms. Prime contractors should be taking some of these smaller firms alongside and employing them just like somebody had helped them. It's all an effort of good faith and there should be requirements on how they build those buildings in our area. We pay taxes, we need opportunities as well.” [#7]
- The Subcontinent Asian American male owner of an MBE-, and DBE-certified construction company provided his recommendations for improving the meet-and-greets hosted by the City and the minority council stating, “The only thing I would say is have more during the fall and wintertime versus the summertime, because as business owners, summertime for construction is your primetime. When you have them in June and July, a lot of owners are focusing on their business because it's busy. So, if you can have them starting in October and run through March, that is what I call more of the idle time, and you can plan for it.” [#12]
- The non-Hispanic white male owner of a certified disabled-owned professional services company commented, “I want to say that everybody at the City of Indianapolis who helped the DOBE certification, I appreciate that. I know being disabled may be new to people and putting it on this list, but I can tell you that I've encountered difficulties that I would have never imagined as a business owner and their help, does level the playing field a lot, and I really appreciate everybody there doing everything they can.” [#16]
- The non-Hispanic white male representative of a majority owned professional services company provided recommendations for the City stating, “The city needs to fix our roads, they're in terrible shape, Indiana and Indianapolis are so much better than that. The city needs to fix the school system. You're not going to produce future workers in this city until you start repairing the school system. You're just perpetuating a problem, every graduating class or every group that doesn't graduate is another group that's not prepared for the workforce. You've got to start when the population is young in public schools and anything the city can do to improve on that would improve the health and wellbeing of the city overall as a place to do business. There's a lot of other great reasons to do it, but that's a good one.” [#17]
- The owners of a majority owned electrical construction company stated, “I think the back-office help and financial help are the two biggest things that the city would be real helpful.” [#21]
- The non-Hispanic white male owner of an architecture firm suggested, “I think training is also something that the city needs realizing. I hear this from a lot of contractor subs, is the fact that vocation even in the schools, isn't as strong as it needs to be because vocation is a track and vocation is very important. I know schools are focusing a lot in regards to getting kids to know how to do code. Yeah, that's fine, but there's still ... and manufacturing jobs, I'm sorry. Those who have gone away, a majority of them. So labor forces, especially construction, that's still being done by individuals.” [#22]

APPENDIX E.

Availability Analysis Approach

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Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of minority-, woman-, veteran-, and disabled-owned businesses for construction; architecture and engineering; other professional services; and goods and services prime contracts and subcontracts that the City of Indianapolis and Marion County (referred to together as *the City*) and municipal corporations (MCs) award.^{1,2} Appendix E expands on the information presented in Chapter 5 to describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

A. Availability data

BBC contracted with Engaging Solutions to conduct telephone surveys with hundreds of business establishments throughout the *relevant geographic market area* for City and MC contracting, which BBC identified as Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Morgan, and Shelby Counties in Indiana. Business establishments that Engaging Solutions surveyed were businesses with locations in the relevant geographic market area that the study team identified as doing work in fields closely related to the types of contracts and procurements that the City and MCs awarded between January 1, 2014 and December 31, 2018 (i.e., *the study period*). The study team began the survey process by determining the work specializations, or *subindustries*, for each relevant City and MC prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations.

As part of the telephone survey effort, the study team attempted to contact 5,541 local business establishments that perform work that is relevant to City and MC contracting. That total included 2,084 construction establishments; 210 architecture and engineering establishments; 1,498 other professional services establishments; 1,740 goods and services establishments; and 9

¹ “Woman-owned businesses” refers to non-Hispanic white woman-owned businesses. Information and results for minority woman-owned businesses are included along with their corresponding racial/ethnic groups.

² MCs are organizations that operate autonomously but are owned by Marion County. The MCs included in the disparity study were the Capital Improvement Board; Eskenazi Health; the Health & Hospital Corporation of Marion County; the Indianapolis Airport Authority; the Indianapolis Bond Bank; the Indianapolis-Marion County Building Authority; Indianapolis Public Library; and the Indianapolis Public Transportation Corporation.

establishments with a primary line of work that turned out to be outside of the contracting areas relevant to the disparity study. (Those 9 business establishments were not considered further as part of the availability analysis.) The study team was able to successfully contact 2,986 of those business establishments (241 business establishments did not have valid phone listings). Of business establishments that the study team contacted successfully, 677 establishments completed availability surveys.

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business that is operating in the relevant geographic market area. Instead, it was to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of minority-, woman-, veteran-, and disabled-owned businesses in an accurate, statistically-valid manner. In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction; architecture and engineering; other professional services; or goods and services work. Instead, BBC determined the types of work that were most relevant to City and MC contracting by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period.

Figure E-1 lists the 8-digit work specialization codes within construction; architecture and engineering; other professional services; and goods and services that were most related to the contract and procurement dollars that the City and MCs awarded during the study period, and that BBC included as part of the availability analysis. The study team grouped those specializations into distinct *subindustries*, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect information from relevant business establishments located in the relevant geographic market area. As an example, the survey instrument that the study team used with construction establishments is presented at the end of Appendix E. The study team modified the construction survey instrument slightly for use with establishments working in other industries in order to reflect terms more commonly used in those industries (e.g., the study team substituted the words "prime contractor" and "subcontractor" with "prime consultant" and "subconsultant" when surveying other professional services establishments).³

Survey structure. The availability survey included 14 sections, and Engaging Solutions attempted to cover all sections with each business establishment that the study team successfully contacted and that was willing to complete a survey.

1. Identification of purpose. The surveys began by identifying the City as the survey sponsor and describing the purpose of the study. (e.g., "The City is conducting a survey to develop a list of

³ BBC also developed fax and online versions of the survey instrument for business establishments that preferred to complete the survey in those formats.

companies interested in providing construction-related services to the City of Indianapolis and other public agencies.”)

2. Verification of correct business name. The surveyor verified that he or she had reached the correct business. If the business name was not correct, surveyors asked if the respondent knew how to contact the correct business. Engaging Solutions then followed up with the correct business based on the new contact information (see areas “X” and “Y” of the availability survey instrument).

3. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

4. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B’s work specialization codes were incorrect, businesses described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work that they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

5. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4). The study team also asked business owners or managers where their businesses were headquartered (Question A5 and A6) and if their businesses were subsidiaries or affiliates of other businesses (Questions A7 and A8).

6. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past government and private sector contracts. Engaging Solutions asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).⁴

7. Interest in future work. The surveyor asked about businesses’ interest in future work with the City and other government agencies. Engaging Solutions asked those questions in connection with both prime contracts and subcontracts (Questions B3 and B4).⁵

8. Geographic area. The surveyor asked whether businesses perform work or serve customers in various parts of Indiana, including in Indianapolis (Questions C1 through C4e).

9. Year established. The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

10. Largest contracts. The study team asked businesses about the value of the largest contracts on which they had bid or had been awarded during the past five years. (Questions D2 and D3).

⁴ Neither goods suppliers nor non-professional services providers were asked questions about subcontract work.

⁵ Neither goods suppliers nor non-professional services providers were asked questions about their interest in subcontract work.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Architecture and Engineering			
Architectural and design services		Engineering (Continued)	
07810201	Landscape architects	87120101	Architectural engineering
73890600	Interior design services	Environmental services	
87120000	Architectural services	17990800	Decontamination services
Construction management		87110101	Pollution control engineering
87419902	Construction management	87449904	Environmental remediation
87420402	Construction project management consultant	87489905	Environmental consultant
Construction testing services		89990701	Geological consultant
87480100	Testing services	Surveying and mapmaking	
Engineering		87130000	Surveying services
87110000	Engineering services	Transportation and urban planning	
87110402	Civil engineering	87420410	Transportation consultant
87119903	Consulting engineer	87480200	Urban planning and consulting services
Construction			
Building construction		Concrete work	
15419909	Renovation, remodeling and repairs: industrial buildings	17710000	Concrete work
15420000	Nonresidential construction	17719902	Concrete repair
15420100	Commercial and office building contractors	Electrical work	
15420101	Commercial and office building, new construction	17310000	Electrical work
17910000	Structural steel erection	17319903	General electrical contractor
Concrete, asphalt, and related products		17319904	Lighting contractor
14420000	Construction sand and gravel	Excavation	
29510201	Asphalt and asphaltic paving mixtures	16290105	Drainage system construction
32719902	Blocks, concrete or cinder: standard	17940000	Excavation work
32720303	Concrete products, precast, nec	17949901	Excavation and grading, building construction
32730000	Ready-mixed concrete		
50329908	Stone, crushed or broken		

Figure E-1.
Subindustries included in the availability analysis (Continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (Continued)			
Fencing, guardrails, and signs		Other construction materials (Continued)	
16110101	Guardrail construction, highways	50750200	Warm air heating equipment and supplies
16110102	Highway and street sign installation	50820302	Contractor's materials
17999912	Fence construction	52119907	Fencing
Heavy construction equipment rental		Other construction services	
50820300	General construction machinery and equipment	17510000	Carpentry work
Highway, street, and bridge construction		17930000	Glass and glazing work
16110000	Highway and street construction	Painting and pavement markings	
16110200	Surfacing and paving	16119903	Highway reflector installation
16110204	Highway and street paving contractor	17210200	Commercial painting
16119901	General contractor, highway and street constructio	17210303	Pavement marking contractor
16119902	Highway and street maintenance	Plumbing and HVAC	
16229901	Bridge construction	17110000	Plumbing, heating, air-conditioning
17710301	Blacktop (asphalt) work	17110401	Mechanical contractor
Insulation, drywall, and weatherproofing		Roofing and flooring contractors	
17410000	Masonry and other stonework	17610103	Roofing contractor
17990200	Coating, caulking, and weather, water, and firepro	17719903	Flooring contractor
17990201	Caulking (construction)	Traffic control and safety	
17990203	Coating of metal structures at construction site	73899921	Flagging service (traffic control)
17990209	Waterproofing	Trucking, hauling, and storage	
Landscape services		42120000	Local trucking, without storage
07810200	Landscape services	42129905	Dump truck haulage
07820200	Lawn services	42130000	Trucking, except local
07820207	Sodding contractor	Water, sewer, and utility lines	
07829903	Landscape contractors	16230300	Water and sewer line construction
07830100	Planting, pruning, and trimming services	16239903	Pipe laying construction
Other construction materials		16239906	Underground utilities contractor
34490101	Bars, concrete reinforcing: fabricated steel		
50320000	Brick, stone, and related material		

Figure E-1.
Subindustries included in the availability analysis (Continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Services			
Airport terminal services		Law enforcement / Fire equipment and supplies (Continued)	
45819904	Airport terminal services	50499903	Law enforcement equipment and supplies
Automobiles		59999917	Police supply stores
50120208	Trucks, commercial	Office equipment and supplies	
55119901	Automobiles, new and used	50440000	Office equipment
Cleaning and janitorial services		51120000	Stationery and office supplies
73490104	Janitorial service, contract basis	Other goods	
87440000	Facilities support services	35690200	Firefighting and related equipment
87449900	Facilities support services, nec	35690201	Firefighting apparatus
Cleaning and janitorial supplies		38230506	Water quality monitoring and control systems
50870304	Janitors' supplies	50750102	Air filters
Communications equipment		50870500	Firefighting equipment
50990500	Video and audio equipment	51480000	Fresh fruits and vegetables
Food and concessions		59990100	Alarm and safety equipment stores
58129903	Caterers	Parking services	
58129906	Contract food services	17990700	Parking facility equipment and maintenance
Furniture		75210101	Parking lots
57129904	Office furniture	Petroleum and petroleum products	
Industrial chemicals		28690400	Fuels
51699907	Industrial chemicals	51720000	Petroleum products, nec
Industrial equipment and machinery		51720102	Gases, liquefied petroleum (propane)
50750103	Air pollution control equipment and supplies	Safety training	
50830300	Agricultural machinery and equipment	87489909	Safety training service
50840805	Pumps and pumping equipment, nec	Security guard services	
50840910	Waste compactors	73810105	Security guard service
50850000	Industrial supplies	Security systems services	
50850600	Industrial tools	17310400	Safety and security specialization
Law enforcement / Fire equipment and supplies		17310402	Closed circuit television installation
36990500	Security devices	73820000	Security systems services
		73829901	Burglar alarm maintenance and monitoring

Figure E-1.
Subindustries included in the availability analysis (Continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Services (Continued)			
Specialized waste removal		Uniforms and linens (Continued)	
49530100	Hazardous waste collection and disposal	56990103	Work clothing
49539904	Medical waste disposal	72130204	Uniform supply
50939904	Junk and scrap	72180203	Industrial uniform supply
Specialty vehicles		Vehicle parts and supplies	
37130201	Ambulance bodies	50130108	Automotive supplies
50120203	Fire trucks	50130119	Truck parts and accessories
Uniforms and linens		55310107	Truck equipment and parts
23890200	Uniforms and vestments	55319901	Automotive tires
51360603	Uniforms, men's and boys'	Vehicle repair services	
56990100	Uniforms and work clothing	75340000	Tire retreading and repair shops
56990102	Uniforms	75490100	Automotive maintenance services
Other Professional Services			
Advertising, marketing, and public relations		Health and biological laboratories	
73110000	Advertising agencies	80710103	Blood analysis laboratory
73119901	Advertising consultant	87349904	Forensic laboratory
87430000	Public relations services	Human resources and job training services	
Business services and consulting		73610000	Employment agencies
72990600	Personal document and information services	73610100	Placement agencies
73899953	Translation services	87420200	Human resource consulting services
87320102	Business economic service	Insurance and real estate	
87429902	Business management consultant	64110302	Insurance brokers, nec
87429904	General management consultant	64110305	Property and casualty insurance agent
Correctional facility management		IT and data services	
87449902	Correctional facility	73790100	Computer related maintenance services
87449903	Jails, privately operated	73790200	Computer related consulting services
Finance consulting and accounting		Legal services	
87210100	Auditing services	81110100	Specialized legal services
87210200	Accounting services, except auditing	81119902	General practice law office
		87439901	Lobbyist

11. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities, women, veterans, or individuals with disabilities (Questions E1 through E5). If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of the business's ownership (Question E3). The study team confirmed that information through several other data sources, including:

- The City's directory of certified businesses;
- City and MC vendor data;
- City and MC review; and
- Information from D&B and other sources.

12. Business revenue. The surveyor asked several questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also asked about their revenues and number of employees across all locations (Questions F1 through F3).

13. Potential barriers in the marketplace. The surveyor asked open-ended questions concerning working with the City and general insights about conditions in the local marketplace (Questions G1a and G1b). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

14. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

D. Survey Execution

Engaging Solutions conducted all availability surveys in 2019. The firm made up to eight attempts during different times of the day and on different days of the week to successfully reach each business establishment. Engaging Solutions attempted to survey a company representative such as the owner, manager, or other officer who could provide accurate and detailed responses to survey questions.

Establishments that the study team successfully contacted. Figure E-2 presents the disposition of the 5,541 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 2,986 establishments that the study team was able to successfully contact.

Non-working or wrong phone numbers. Some of the business listings that the study team purchased from D&B and that Engaging Solutions attempted to contact were:

- Duplicate phone numbers (37 listings);
- Non-working phone numbers (58 listings); or
- Wrong numbers for the desired businesses (146 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

Figure E-2.
Disposition of attempts to survey business establishments

Source:
2019 availability surveys.

	Number of Establishments
Beginning list	5,541
Less duplicate phone numbers	37
Less non-working phone numbers	58
Less wrong number/business	146
Unique business listings with working phone numbers	5,300
Less no answer	2,168
Less could not reach responsible staff member	146
Establishments successfully contacted	2,986

Working phone numbers. As shown in Figure E-2, there were 5,300 business establishments with working phone numbers that Engaging Solutions attempted to contact. Engaging Solutions was unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after eight attempts at different times of the day and on different days of the week for 2,168 establishments.
- The firm could not reach a responsible staff member after eight attempts at different times of the day on different days of the week for 146 establishments.

Thus, Engaging Solutions was able to successfully contact 2,986 business establishments.

Establishments included in the availability database. Figure E-3 presents the disposition of the 2,986 business establishments that Engaging Solutions successfully contacted and how that number resulted in the 558 businesses that the study team included in the availability database and that the study team considered potentially available for City and MC work.

Figure E-3.
Disposition of successfully contacted business establishments

Source:
2019 availability surveys.

	Number of Establishments
Establishments successfully contacted	2,986
Less establishments not interested in discussing availability for work	2,176
Less unreturned fax/online surveys	133
Establishments that completed surveys	677
Less not a for-profit business	9
Less line of work outside of study scope	7
Less no interest in future work	98
Less multiple establishments	5
Establishments potentially available for entity work	558

Establishments not interested in discussing availability for City and MC work. Of the 2,986 business establishments that the study team successfully contacted, 2,176 establishments were not interested in discussing their availability for City and MC work. In addition, BBC sent hardcopy fax availability surveys or invitations to complete the survey online upon request but did not receive completed surveys from 133 establishments. In total, 677 successfully-contacted business establishments completed availability surveys.

Establishments available for City and MC work. The study team deemed only a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that the City and MCs awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded nine establishments that indicated that their organizations were not for-profit businesses.
- BBC excluded seven establishments that indicated that their main lines of business were outside of the study scope.
- BBC excluded 98 establishments that reported not being interested in either prime contracting or subcontracting opportunities with the City or other government agencies.
- Five establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions, BBC compiled a database of 558 businesses that were considered potentially available for City and MC work.

Coding responses from multi-location businesses. Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work (i.e., prime contractor or subcontractor) that establishments of the same business reported into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.⁶
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the business' relative capacity (i.e., the largest contract for which the business could be considered available).

⁶ Neither goods nor non-professional services providers were asked questions about subcontract work.

- BBC coded businesses as minority-owned, woman-owned, veteran-owned, or disabled-owned if the majority of its establishments reported such status.

E. Additional Considerations

BBC made several additional considerations related to its approach to measuring availability to ensure that estimates of the availability of businesses for City and MC work were accurate and appropriate.

Providing representative estimates of business availability. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of City and MC contracting dollars for which minority-, woman-, veteran-, and disabled-owned businesses are ready, willing, and able to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for City and MC work and should not be used in that way. Federal courts have approved BBC's approach to measuring availability. In addition, federal regulations around minority- and woman-owned business programs recommend similar approaches to measuring availability for organizations implementing business assistance programs.

Using a custom census approach to measuring availability. Federal guidance around measuring the availability of minority- and woman-owned businesses recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when measuring the availability of businesses for City and MC work is that dividing a simple headcount of certified businesses by the total number of businesses does not account for business characteristics that are crucial to estimating availability accurately. The methodology that BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple headcount approach. For example, the availability surveys that the study team conducted provided data on qualifications, relative capacity, and interest in City and MC work for each business, which allowed BBC to take a more detailed approach to measuring availability. Court cases involving implementations of minority- and woman-owned business programs have approved the use of such approaches to measuring availability.

Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. For example, it was not possible for BBC to include all businesses possibly doing work in relevant industries without conducting surveys with nearly every business located in the relevant geographic market area. In addition, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business

difficult and imprecise. When the study team asked business owners and managers to identify their main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

Non-response. An analysis of non-response considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response due to:

- Research sponsorship; and
- Work specializations.

Research sponsorship. Surveyors introduced themselves by identifying the City as the survey sponsor, because businesses may be less likely to answer somewhat sensitive business questions if the surveyor was unable to identify the sponsor. In past survey efforts—particularly those related to availability analyses—BBC has found that identifying the sponsor substantially increases response rates.

Work specializations. Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate the availability of small disadvantaged businesses would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone. However, work specialization as a potential source of non-response bias in the BBC availability analysis is minimized, because the availability analysis examines businesses within particular work fields before calculating overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures.

BBC explored the reliability of survey responses in a number of ways.

Certification lists. BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from the City and MCs. For example, certification databases include data on the race/ethnicity and gender of the

owners of certified businesses. The study team compared survey responses concerning business ownership with such information.

Contract data. BBC examined City and MC contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual City and MC contract data.

City and MC review. The City and MCs reviewed contract and vendor data that the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Engaging Solutions. We are calling on behalf of the City of Indianapolis. This is not a sales call. The City is conducting a survey to develop a list of companies interested in providing construction-related services to the City of Indianapolis and other public agencies. The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE CITY AND OTHER LOCAL OR STATE AGENCIES]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [*firm name*]?

1=Right company – **SKIP TO A2**

2=Not right company

99=Refuse to give information – **TERMINATE**

Y1. What is the name of this firm?

1=Verbatim

Y2. Can you give me any information about [*new firm name*]?

1=Yes, same owner doing business under a different name – **SKIP TO Y6**

2=Yes, can give information about named company

3=Company bought/sold/changed ownership

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

Y3. Can you give me the complete address or city for [*new firm name*]?

[RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

Y4. Can you give me the name of the owner or manager of [*new firm name*]?

[ENTER UPDATED NAME]

1=Verbatim

Y5. Can I have a telephone number for him/her?

[ENTER UPDATED PHONE]

1=Verbatim

Y6. Do you work for this new company?

1=Yes

2=No – TERMINATE

A2. Let me confirm that [*firm name/new firm name*] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other – TERMINATE

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [*SIC Code description*]. Is that correct?

[IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes – SKIP TO A3c

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of business at [firm name/new firm name]?

[IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]

1=Verbatim

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=Verbatim

97=(NONE)

A4. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location – SKIP TO A7

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A5. Is this location the headquarters for your business, or is your business headquartered at another location?

1=Headquartered here – SKIP TO A7

2=Headquartered at another location

98=(DON'T KNOW)

99=(REFUSED)

A6. What is the city and state of your business' headquarters?

(ENTER VERBATIM CITY, ST)

1=Verbatim

A7. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – SKIP TO B1

99=(REFUSED) – SKIP TO B1

A8. What is the name of your parent company?

1=Verbatim

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or received an award for any part of a contract as either a prime contractor or subcontractor?

[THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]

1=Yes

2=No – SKIP TO B3

98=(DON'T KNOW) – SKIP TO B3

99=(REFUSED) – SKIP TO B3

B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

5= Other - SPECIFY _____

98=(DON'T KNOW)

99=(REFUSED)

B3a. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company *interested* in working with the City of Indianapolis?

1= Yes

2= No - SKIP TO B4a

98= (DON'T KNOW) - SKIP TO B4a

99=(REFUSED) - SKIP TO B4a

B3b. Is your company interested in working with the City of Indianapolis as a prime contractor; a subcontractor/trucker/supplier; or both?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 98= (DON'T KNOW)
- 99=(REFUSED)

B4a. Is your company *interested* in working with other cities, towns, or municipalities in Indiana?

- 1= Yes
- 2= No - SKIP TO B5a
- 98= (DON'T KNOW) - SKIP TO B5a
- 99=(REFUSED) - SKIP TO B5a

B4b. Is your company interested in working with other cities, towns, or municipalities as a prime contractor; a subcontractor/trucker/supplier; or both?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 98= (DON'T KNOW)
- 99=(REFUSED)

B5a. Is your company *interested* in working with state-level government organizations in Indiana?

- 1= Yes
- 2= No - SKIP TO C1
- 98= (DON'T KNOW) - SKIP TO C1
- 99=(REFUSED) - SKIP TO C1

B5b. Is your company interested in working with state-level government organizations as a prime contractor; a subcontractor/trucker/supplier; or both?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 98= (DON'T KNOW)
- 99=(REFUSED)

C1. Now I want to ask you about the geographic areas your company serves within Indiana. As you answer, think about whether your company could be involved in potential work throughout the entire state or only within specific regions. Is your company able to do work or serve customers in all regions of Indiana or only certain areas of the state?

- 1=All of the state – **SKIP TO D1**
- 2=Only parts of the state
- 98=(DON'T KNOW)
- 99=(REFUSED)

C2. Is your company able to do work or serve customers in any part of Northern Indiana?

[NORTHERN INDIANA INCLUDES THE GARY, MICHIGAN CITY-LA PORTE, SOUTH BEND, ELKHART AND FORT WAYNE AREAS.]

- 1=Yes
- 2=No – **SKIP TO C3**
- 98=(DON'T KNOW) – **SKIP TO C3**
- 99=(REFUSED) – **SKIP TO C3**

C2a. Is your company able to serve all of Northern Indiana or only certain parts of the region?

- 1=All of the region – **SKIP TO C3**
- 2=Only parts of the region
- 98=(DON'T KNOW)
- 99=(REFUSED) – **SKIP TO C3**

C2b. Is your company able to serve the greater Gary area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2c. Is your company able to serve the Michigan City-La Porte area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2d. Is your company able to serve the South Bend area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2e. Is your company able to serve the Elkhart area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C2f. Is your company able to serve the Fort Wayne area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3. Is your company able to do work or serve customers in any part of Central Indiana?

[CENTRAL INDIANA INCLUDES THE INDIANAPOLIS, LAFAYETTE, KOKOMO, ANDERSON, MUNCIE AND TERRE HAUTE AREAS.]

1=Yes

2=No – SKIP TO C4

98=(DON'T KNOW) – SKIP TO C4

99=(REFUSED) – SKIP TO C4

C3a. Is your company able to serve all of Central Indiana or only certain parts of the region?

1=All of the region – SKIP TO C4

2=Only parts of the region

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO C4

C3b. Is your company able to serve the Indianapolis area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3c. Is your company able to serve the Lafayette area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3d. Is your company able to serve the Kokomo area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3e. Is your company able to serve the Anderson area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3f. Is your company able to serve the Muncie area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3g. Is your company able to serve the Terre Haute area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4. Is your company able to do work or serve customers in any part of Southern Indiana?

[SOUTHERN INDIANA INCLUDES THE BLOOMINGTON, COLUMBUS, VINCENNES AND EVANSVILLE AREAS.]

1=Yes

2=No – SKIP TO D1

98=(DON'T KNOW) – SKIP TO D1

99=(REFUSED) – SKIP TO D1

C4a. Is your company able to serve all of Southern Indiana or only certain parts of the region?

1=All of the region – SKIP TO D1

2=Only parts of the region

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO D1

C4b. Is your company able to serve the Bloomington area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4c. Is your company able to serve the Columbus area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4d. Is your company able to serve the Vincennes area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4e. Is your company able to serve the Evansville area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. About what year was your firm established?

1=NUMERIC (1600-2019)

98 = (DON'T KNOW)

99 = (REFUSED)

D2. What was the largest prime contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.

[READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=\$200 million or greater |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED)/(NO PRIME BIDS) |
| 8=More than \$10 million to \$20 million | |

D3. What was the largest subcontract or supply contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.

[READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=\$200 million or greater |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED)/(NO SUB BIDS) |
| 8=More than \$10 million to \$20 million | |

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [*firm name / new firm name*] a woman-owned business?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by individual(s) who identify as Black American, Asian American, Hispanic American, or Native American. By this definition, is [*firm name / new firm name*] a minority-owned business?

1=Yes

2=No – **SKIP TO E4**

98=(DON'T KNOW) – **SKIP TO E4**

99=(REFUSED) – **SKIP TO E4**

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=Black American

2=Asian-Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

E4. A business is defined as veteran-owned if more than half—that is, 51 percent or more—of the ownership and control is by a veteran of the U.S. military. By this definition, is [*firm name / new firm name*] a veteran-owned business?

[U.S. MILITARY SERVICES INCLUDE THE U.S. ARMY, AIR FORCE, NAVY, MARINES, OR COAST GUARD.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E5. A business is defined as disability-owned if more than half—that is, 51 percent or more—of the ownership and control is by an individual with a physical or mental impairment that substantially limits one or more major life activities. By this definition, is [firm name / new firm name] a disability-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

F1. Just considering your location, Dun & Bradstreet lists the average annual gross revenue of your company to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue over the last three years?

1=Yes – **SKIP TO F3**

2=No

98=(DON'T KNOW) – **SKIP TO F3**

99=(REFUSED) – **SKIP TO F3**

F2. What was the average annual gross revenue of your company over the last three years, just considering your location? Would you say . . .

[READ LIST]

1=Less than \$750,000

2=\$750,000 - \$5.5 Million

3=\$5.6 Million - \$7.4 Million

4=\$7.5 Million - \$11 Million

5=\$11.1 Million - \$15 Million

6=\$15.1 Million - \$18 Million

7=\$18.1 Million - \$20.5 Million

8=\$20.6 Million - \$24 Million

9=\$24.1 Million or more

98= (DON'T KNOW)

99= (REFUSED)

F3. [ONLY IF A4 = 2] Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .

[READ LIST]

- | | |
|---------------------------------|-----------------------------------|
| 1=Less than \$750,000 | 7=\$18.1 Million - \$20.5 Million |
| 2=\$750,000 - \$5.5 Million | 8=\$20.6 Million - \$24 Million |
| 3=\$5.6 Million - \$7.4 Million | 9=\$24.1 Million or more |
| 4=\$7.5 Million - \$11 Million | 98= (DON'T KNOW) |
| 5=\$11.1 Million - \$15 Million | 99= (REFUSED) |
| 6=\$15.1 Million - \$18 Million | |

G1a. We're interested in whether your company has experienced barriers or difficulties related to working with, or attempting to work with, the City of Indianapolis. Do you have any thoughts to share?

- 1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)
- 97=(NOTHING/NONE/NO COMMENTS)
- 98=(DON'T KNOW)
- 99=(REFUSED)

G1b. Do you have any additional thoughts to share regarding general marketplace conditions in Indiana, starting or expanding a business in your industry, or obtaining work?

- 1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)
- 97=(NOTHING/NONE/NO COMMENTS)
- 98=(DON'T KNOW)
- 99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

H1. Just a few last questions. What is your name?

- 1=VERBATIM

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _____

99=(REFUSED)

Thank you very much for your participation. If you have any questions or concerns, please contact Camille Blunt, Director of the Office of Minority and Women's Business Development for the City of Indianapolis at 317-327-5262.

APPENDIX F.

Disparity Tables

Figure F-1.

Table	Characteristics					
	Time period	Agency	Contract area	Contract role	Contract size	OMWBD reviewed
F-2	01/01/14 - 12/31/18	City and County	All industries	Prime contracts and subcontracts	N/A	All contracts
F-3	01/01/14 - 12/31/16	City and County	All industries	Prime contracts and subcontracts	N/A	All contracts
F-4	01/01/17 - 12/31/18	City and County	All industries	Prime contracts and subcontracts	N/A	All contracts
F-5	01/01/14 - 12/31/18	City and County	Construction	Prime contracts and subcontracts	N/A	All contracts
F-6	01/01/14 - 12/31/18	City and County	Architecture and engineering	Prime contracts and subcontracts	N/A	All contracts
F-7	01/01/14 - 12/31/18	City and County	Other professional services	Prime contracts and subcontracts	N/A	All contracts
F-8	01/01/14 - 12/31/18	City and County	Goods and services	Prime contracts and subcontracts	N/A	All contracts
F-9	01/01/14 - 12/31/18	City and County	All industries	Prime contracts	N/A	All contracts
F-10	01/01/14 - 12/31/18	City and County	All industries	Subcontracts	N/A	All contracts
F-11	01/01/14 - 12/31/18	City and County	Construction and goods and services	Prime contracts and subcontracts	N/A	OMWBD-reviewed
F-12	01/01/14 - 12/31/18	City and County	Construction and goods and services	Prime contracts and subcontracts	N/A	Non-reviewed
F-13	01/01/14 - 12/31/18	City and County	All industries	Prime contracts	Large	All contracts
F-14	01/01/14 - 12/31/18	City and County	All industries	Prime contracts	Small	All contracts
F-15	01/01/14 - 12/31/18	Municipal Corporations	All industries	Prime contracts and subcontracts	N/A	All contracts
F-16	01/01/14 - 12/31/18	Capital Improvement Board	All industries	Prime contracts and subcontracts	N/A	All contracts
F-17	01/01/14 - 12/31/18	Indianapolis Airport Authority	All industries	Prime contracts and subcontracts	N/A	All contracts
F-18	01/01/14 - 12/31/18	Indianapolis Public Library	All industries	Prime contracts and subcontracts	N/A	All contracts
F-19	01/01/14 - 12/31/18	Indianapolis Public Transportation Corporation	All industries	Prime contracts and subcontracts	N/A	All contracts

Figure F-2.

Time period: 01/01/2014 - 12/31/2018

Contract area: All industries

Contract role: Prime contracts and subcontracts

Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	93,619	\$875,714	\$875,714				
(2) Minority and woman-owned businesses	6,712	\$128,104	\$128,104	14.6	19.3	-4.6	75.9
(3) Non-Hispanic white woman-owned	4,267	\$57,818	\$57,818	6.6	8.5	-1.9	77.8
(4) Minority-owned	2,445	\$70,285	\$70,285	8.0	10.8	-2.8	74.4
(5) Asian Pacific American-owned	42	\$2,395	\$2,395	0.3	1.2	-1.0	22.2
(6) Black American-owned	1,704	\$39,041	\$39,041	4.5	6.1	-1.6	73.4
(7) Hispanic American-owned	380	\$9,862	\$9,862	1.1	0.8	0.3	136.0
(8) Native American-owned	57	\$3,975	\$3,975	0.5	0.3	0.1	132.3
(9) Subcontinent Asian American-owned	262	\$15,013	\$15,013	1.7	2.3	-0.6	74.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	4,191	\$106,755	\$106,755	12.2			
(12) Non-Hispanic white woman-owned XBE	2,154	\$46,265	\$46,265	5.3			
(13) Minority-owned XBE	2,037	\$60,491	\$60,491	6.9			
(14) Asian Pacific American-owned XBE	34	\$2,210	\$2,210	0.3			
(15) Black American-owned XBE	1,563	\$32,271	\$32,271	3.7			
(16) Hispanic American-owned XBE	134	\$7,839	\$7,839	0.9			
(17) Native American-owned XBE	46	\$3,211	\$3,211	0.4			
(18) Subcontinent Asian American-owned XBE	260	\$14,959	\$14,959	1.7			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Time period: 01/01/2014 - 12/31/2016
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	55,757	\$545,876	\$545,876				
(2) Minority and woman-owned businesses	3,753	\$74,548	\$74,548	13.7	19.3	-5.7	70.6
(3) Non-Hispanic white woman-owned	2,531	\$35,353	\$35,353	6.5	8.9	-2.5	72.5
(4) Minority-owned	1,222	\$39,195	\$39,195	7.2	10.4	-3.2	69.0
(5) Asian Pacific American-owned	14	\$1,066	\$1,066	0.2	1.2	-1.0	17.0
(6) Black American-owned	861	\$22,136	\$22,136	4.1	5.9	-1.8	68.9
(7) Hispanic American-owned	167	\$6,091	\$6,091	1.1	0.8	0.3	135.5
(8) Native American-owned	30	\$1,560	\$1,560	0.3	0.4	-0.1	76.9
(9) Subcontinent Asian American-owned	150	\$8,341	\$8,341	1.5	2.2	-0.7	69.9
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	2,201	\$60,591	\$60,591	11.1			
(12) Non-Hispanic white woman-owned XBE	1,167	\$27,091	\$27,091	5.0			
(13) Minority-owned XBE	1,034	\$33,500	\$33,500	6.1			
(14) Asian Pacific American-owned XBE	9	\$961	\$961	0.2			
(15) Black American-owned XBE	784	\$18,309	\$18,309	3.4			
(16) Hispanic American-owned XBE	71	\$5,036	\$5,036	0.9			
(17) Native American-owned XBE	22	\$905	\$905	0.2			
(18) Subcontinent Asian American-owned XBE	148	\$8,288	\$8,288	1.5			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Time period: 01/01/2017 - 12/31/2018
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	37,862	\$329,838	\$329,838				
(2) Minority and woman-owned businesses	2,959	\$53,556	\$53,556	16.2	19.2	-2.9	84.8
(3) Non-Hispanic white woman-owned	1,736	\$22,465	\$22,465	6.8	7.7	-0.9	88.0
(4) Minority-owned	1,223	\$31,090	\$31,090	9.4	11.4	-2.0	82.6
(5) Asian Pacific American-owned	28	\$1,328	\$1,328	0.4	1.4	-1.0	29.5
(6) Black American-owned	843	\$16,905	\$16,905	5.1	6.4	-1.3	80.2
(7) Hispanic American-owned	213	\$3,770	\$3,770	1.1	0.8	0.3	137.0
(8) Native American-owned	27	\$2,415	\$2,415	0.7	0.3	0.4	200+
(9) Subcontinent Asian American-owned	112	\$6,671	\$6,671	2.0	2.5	-0.5	80.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	1,990	\$46,165	\$46,165	14.0			
(12) Non-Hispanic white woman-owned XBE	987	\$19,174	\$19,174	5.8			
(13) Minority-owned XBE	1,003	\$26,990	\$26,990	8.2			
(14) Asian Pacific American-owned XBE	25	\$1,249	\$1,249	0.4			
(15) Black American-owned XBE	779	\$13,962	\$13,962	4.2			
(16) Hispanic American-owned XBE	63	\$2,803	\$2,803	0.8			
(17) Native American-owned XBE	24	\$2,306	\$2,306	0.7			
(18) Subcontinent Asian American-owned XBE	112	\$6,671	\$6,671	2.0			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Time period: 01/01/2014 - 12/31/2018
Contract area: Construction
Contract role: Prime contracts and subcontracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,637	\$362,465	\$362,465				
(2) Minority and woman-owned businesses	1,149	\$55,501	\$55,501	15.3	19.0	-3.7	80.6
(3) Non-Hispanic white woman-owned	539	\$26,119	\$26,119	7.2	9.7	-2.5	74.0
(4) Minority-owned	610	\$29,382	\$29,382	8.1	9.2	-1.1	87.6
(5) Asian Pacific American-owned	7	\$379	\$379	0.1	0.8	-0.7	13.5
(6) Black American-owned	483	\$19,071	\$19,071	5.3	5.3	-0.1	98.5
(7) Hispanic American-owned	64	\$5,933	\$5,933	1.6	1.1	0.6	151.8
(8) Native American-owned	41	\$3,231	\$3,231	0.9	0.3	0.6	200+
(9) Subcontinent Asian American-owned	15	\$768	\$768	0.2	1.8	-1.6	11.8
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	1,006	\$48,342	\$48,342	13.3			
(12) Non-Hispanic white woman-owned XBE	455	\$22,281	\$22,281	6.1			
(13) Minority-owned XBE	551	\$26,061	\$26,061	7.2			
(14) Asian Pacific American-owned XBE	7	\$379	\$379	0.1			
(15) Black American-owned XBE	433	\$17,040	\$17,040	4.7			
(16) Hispanic American-owned XBE	58	\$4,971	\$4,971	1.4			
(17) Native American-owned XBE	38	\$2,903	\$2,903	0.8			
(18) Subcontinent Asian American-owned XBE	15	\$768	\$768	0.2			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Time period: 01/01/2014 - 12/31/2018
Contract area: Architecture and engineering
Contract role: Prime contracts and subcontracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,736	\$159,944	\$159,944				
(2) Minority and woman-owned businesses	895	\$43,611	\$43,611	27.3	19.7	7.6	138.4
(3) Non-Hispanic white woman-owned	366	\$14,725	\$14,725	9.2	6.3	2.9	146.0
(4) Minority-owned	529	\$28,886	\$28,886	18.1	13.4	4.7	134.9
(5) Asian Pacific American-owned	3	\$58	\$58	0.0	2.2	-2.2	1.7
(6) Black American-owned	221	\$11,509	\$11,509	7.2	2.9	4.3	200+
(7) Hispanic American-owned	48	\$2,586	\$2,586	1.6	0.0	1.6	200+
(8) Native American-owned	13	\$557	\$557	0.3	0.0	0.3	200+
(9) Subcontinent Asian American-owned	244	\$14,175	\$14,175	8.9	8.2	0.6	107.6
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	839	\$41,136	\$41,136	25.7			
(12) Non-Hispanic white woman-owned XBE	318	\$12,762	\$12,762	8.0			
(13) Minority-owned XBE	521	\$28,375	\$28,375	17.7			
(14) Asian Pacific American-owned XBE	2	\$39	\$39	0.0			
(15) Black American-owned XBE	219	\$11,265	\$11,265	7.0			
(16) Hispanic American-owned XBE	48	\$2,586	\$2,586	1.6			
(17) Native American-owned XBE	8	\$308	\$308	0.2			
(18) Subcontinent Asian American-owned XBE	244	\$14,175	\$14,175	8.9			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.
Time period: 01/01/2014 - 12/31/2018
Contract area: Other professional services
Contract role: Prime contracts and subcontracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,932	\$113,902	\$113,902				
(2) Minority and woman-owned businesses	599	\$10,904	\$10,904	9.6	16.8	-7.2	57.0
(3) Non-Hispanic white woman-owned	503	\$6,026	\$6,026	5.3	9.0	-3.8	58.5
(4) Minority-owned	96	\$4,878	\$4,878	4.3	7.8	-3.5	55.2
(5) Asian Pacific American-owned	8	\$1,429	\$1,429	1.3	1.2	0.1	107.5
(6) Black American-owned	77	\$3,080	\$3,080	2.7	4.1	-1.4	66.3
(7) Hispanic American-owned	6	\$113	\$113	0.1	0.2	-0.1	56.2
(8) Native American-owned	3	\$187	\$187	0.2	1.8	-1.7	9.0
(9) Subcontinent Asian American-owned	2	\$69	\$69	0.1	0.5	-0.4	12.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	61	\$3,315	\$3,315	2.9			
(12) Non-Hispanic white woman-owned XBE	35	\$1,255	\$1,255	1.1			
(13) Minority-owned XBE	26	\$2,060	\$2,060	1.8			
(14) Asian Pacific American-owned XBE	3	\$1,278	\$1,278	1.1			
(15) Black American-owned XBE	16	\$653	\$653	0.6			
(16) Hispanic American-owned XBE	6	\$113	\$113	0.1			
(17) Native American-owned XBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned XBE	1	\$16	\$16	0.0			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Time period: 01/01/2014 - 12/31/2018
Contract area: Goods and services
Contract role: Prime contracts and subcontracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	80,314	\$239,402	\$239,402				
(2) Minority and woman-owned businesses	4,069	\$18,088	\$18,088	7.6	20.6	-13.0	36.7
(3) Non-Hispanic white woman-owned	2,859	\$10,948	\$10,948	4.6	7.8	-3.2	58.9
(4) Minority-owned	1,210	\$7,139	\$7,139	3.0	12.8	-9.8	23.3
(5) Asian Pacific American-owned	24	\$528	\$528	0.2	1.3	-1.1	17.0
(6) Black American-owned	923	\$5,381	\$5,381	2.2	10.2	-8.0	21.9
(7) Hispanic American-owned	262	\$1,229	\$1,229	0.5	1.3	-0.8	40.1
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	1	\$1	\$1	0.0	0.0	0.0	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	2,285	\$13,962	\$13,962	5.8			
(12) Non-Hispanic white woman-owned XBE	1,346	\$9,968	\$9,968	4.2			
(13) Minority-owned XBE	939	\$3,995	\$3,995	1.7			
(14) Asian Pacific American-owned XBE	22	\$514	\$514	0.2			
(15) Black American-owned XBE	895	\$3,312	\$3,312	1.4			
(16) Hispanic American-owned XBE	22	\$169	\$169	0.1			
(17) Native American-owned XBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned XBE	0	\$0	\$0	0.0			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.
Time period: 01/01/2014 - 12/31/2018
Contract area: All industries
Contract role: Prime contracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	90,855	\$746,467	\$746,467				
(2) Minority and woman-owned businesses	5,191	\$61,577	\$61,577	8.2	17.2	-9.0	47.8
(3) Non-Hispanic white woman-owned	3,519	\$32,353	\$32,353	4.3	7.7	-3.3	56.5
(4) Minority-owned	1,672	\$29,224	\$29,224	3.9	9.6	-5.7	40.9
(5) Asian Pacific American-owned	32	\$932	\$932	0.1	1.2	-1.0	10.7
(6) Black American-owned	1,280	\$16,205	\$16,205	2.2	5.6	-3.4	38.8
(7) Hispanic American-owned	269	\$2,886	\$2,886	0.4	0.5	-0.1	76.4
(8) Native American-owned	41	\$2,592	\$2,592	0.3	0.3	0.0	101.5
(9) Subcontinent Asian American-owned	50	\$6,608	\$6,608	0.9	2.0	-1.1	45.2
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	2,760	\$42,110	\$42,110	5.6			
(12) Non-Hispanic white woman-owned XBE	1,483	\$22,245	\$22,245	3.0			
(13) Minority-owned XBE	1,277	\$19,865	\$19,865	2.7			
(14) Asian Pacific American-owned XBE	25	\$767	\$767	0.1			
(15) Black American-owned XBE	1,143	\$9,595	\$9,595	1.3			
(16) Hispanic American-owned XBE	28	\$1,049	\$1,049	0.1			
(17) Native American-owned XBE	32	\$1,846	\$1,846	0.2			
(18) Subcontinent Asian American-owned XBE	49	\$6,607	\$6,607	0.9			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.
Time period: 01/01/2014 - 12/31/2018
Contract area: All industries
Contract role: Subcontracts
Agency: City and County

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,764	\$129,247	\$129,247				
(2) Minority and woman-owned businesses	1,521	\$66,527	\$66,527	51.5	31.0	20.5	166.1
(3) Non-Hispanic white woman-owned	748	\$25,465	\$25,465	19.7	13.2	6.5	149.7
(4) Minority-owned	773	\$41,061	\$41,061	31.8	17.8	13.9	178.1
(5) Asian Pacific American-owned	10	\$1,463	\$1,463	1.1	1.6	-0.5	70.7
(6) Black American-owned	424	\$22,836	\$22,836	17.7	8.8	8.8	200+
(7) Hispanic American-owned	111	\$6,975	\$6,975	5.4	2.7	2.7	200+
(8) Native American-owned	16	\$1,383	\$1,383	1.1	0.3	0.7	200+
(9) Subcontinent Asian American-owned	212	\$8,405	\$8,405	6.5	4.4	2.1	148.9
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	1,431	\$64,645	\$64,645	50.0			
(12) Non-Hispanic white woman-owned XBE	671	\$24,019	\$24,019	18.6			
(13) Minority-owned XBE	760	\$40,626	\$40,626	31.4			
(14) Asian Pacific American-owned XBE	9	\$1,444	\$1,444	1.1			
(15) Black American-owned XBE	420	\$22,676	\$22,676	17.5			
(16) Hispanic American-owned XBE	106	\$6,790	\$6,790	5.3			
(17) Native American-owned XBE	14	\$1,365	\$1,365	1.1			
(18) Subcontinent Asian American-owned XBE	211	\$8,352	\$8,352	6.5			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.

Time period: 01/01/2014 - 12/31/2018

Contract area: Construction and goods and services

Contract role: Prime contracts and subcontracts

Agency: City and County

OMWBD-reviewed

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,267	\$523,874	\$523,874				
(2) Minority and woman-owned businesses	729	\$63,856	\$63,856	12.2	18.6	-6.4	65.7
(3) Non-Hispanic white woman-owned	410	\$33,089	\$33,089	6.3	8.7	-2.4	72.6
(4) Minority-owned	319	\$30,766	\$30,766	5.9	9.9	-4.0	59.6
(5) Asian Pacific American-owned	8	\$828	\$828	0.2	0.7	-0.5	24.2
(6) Black American-owned	227	\$20,007	\$20,007	3.8	7.0	-3.2	54.2
(7) Hispanic American-owned	56	\$6,012	\$6,012	1.1	0.9	0.3	134.3
(8) Native American-owned	15	\$3,156	\$3,156	0.6	0.2	0.4	200+
(9) Subcontinent Asian American-owned	13	\$764	\$764	0.1	1.1	-1.0	12.8
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	671	\$54,824	\$54,824	10.5			
(12) Non-Hispanic white woman-owned XBE	378	\$29,406	\$29,406	5.6			
(13) Minority-owned XBE	293	\$25,419	\$25,419	4.9			
(14) Asian Pacific American-owned XBE	8	\$828	\$828	0.2			
(15) Black American-owned XBE	211	\$16,284	\$16,284	3.1			
(16) Hispanic American-owned XBE	49	\$4,715	\$4,715	0.9			
(17) Native American-owned XBE	12	\$2,827	\$2,827	0.5			
(18) Subcontinent Asian American-owned XBE	13	\$764	\$764	0.1			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.

Time period: 01/01/2014 - 12/31/2018

Contract area: Construction and goods and services

Contract role: Prime contracts and subcontracts

Agency: City and County

No-review

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	87,684	\$77,993	\$77,993				
(2) Minority and woman-owned businesses	4,489	\$9,733	\$9,733	12.5	26.8	-14.3	46.5
(3) Non-Hispanic white woman-owned	2,988	\$3,978	\$3,978	5.1	10.7	-5.6	47.9
(4) Minority-owned	1,501	\$5,755	\$5,755	7.4	16.2	-8.8	45.7
(5) Asian Pacific American-owned	23	\$79	\$79	0.1	3.2	-3.1	3.2
(6) Black American-owned	1,179	\$4,445	\$4,445	5.7	9.0	-3.3	63.7
(7) Hispanic American-owned	270	\$1,151	\$1,151	1.5	3.2	-1.7	46.1
(8) Native American-owned	26	\$76	\$76	0.1	0.1	0.0	116.1
(9) Subcontinent Asian American-owned	3	\$5	\$5	0.0	0.7	-0.7	0.9
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	2,620	\$7,480	\$7,480	9.6			
(12) Non-Hispanic white woman-owned XBE	1,423	\$2,843	\$2,843	3.6			
(13) Minority-owned XBE	1,197	\$4,638	\$4,638	5.9			
(14) Asian Pacific American-owned XBE	21	\$65	\$65	0.1			
(15) Black American-owned XBE	1,117	\$4,068	\$4,068	5.2			
(16) Hispanic American-owned XBE	31	\$425	\$425	0.5			
(17) Native American-owned XBE	26	\$76	\$76	0.1			
(18) Subcontinent Asian American-owned XBE	2	\$4	\$4	0.0			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.

Time period: 01/01/2014 - 12/31/2018

Contract area: All industries

Contract role: Prime contracts

Agency: City and County

Large prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,473	\$669,122	\$669,122				
(2) Minority and woman-owned businesses	213	\$52,492	\$52,492	7.8	16.2	-8.4	48.3
(3) Non-Hispanic white woman-owned	104	\$27,218	\$27,218	4.1	7.4	-3.3	55.2
(4) Minority-owned	109	\$25,274	\$25,274	3.8	8.9	-5.1	42.6
(5) Asian Pacific American-owned	4	\$702	\$702	0.1	1.0	-0.9	10.3
(6) Black American-owned	59	\$13,913	\$13,913	2.1	5.3	-3.2	39.6
(7) Hispanic American-owned	5	\$1,973	\$1,973	0.3	0.2	0.1	122.6
(8) Native American-owned	6	\$2,213	\$2,213	0.3	0.3	0.0	117.7
(9) Subcontinent Asian American-owned	35	\$6,473	\$6,473	1.0	2.1	-1.1	46.7
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	160	\$37,673	\$37,673	5.6			
(12) Non-Hispanic white woman-owned XBE	73	\$19,752	\$19,752	3.0			
(13) Minority-owned XBE	87	\$17,922	\$17,922	2.7			
(14) Asian Pacific American-owned XBE	4	\$702	\$702	0.1			
(15) Black American-owned XBE	41	\$8,168	\$8,168	1.2			
(16) Hispanic American-owned XBE	3	\$862	\$862	0.1			
(17) Native American-owned XBE	4	\$1,717	\$1,717	0.3			
(18) Subcontinent Asian American-owned XBE	35	\$6,473	\$6,473	1.0			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.

Time period: 01/01/2014 - 12/31/2018

Contract area: All industries

Contract role: Prime contracts

Agency: City and County

Small prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	89,382	\$77,345	\$77,345				
(2) Minority and woman-owned businesses	4,978	\$9,086	\$9,086	11.7	25.9	-14.1	45.4
(3) Non-Hispanic white woman-owned	3,415	\$5,135	\$5,135	6.6	10.2	-3.6	64.8
(4) Minority-owned	1,563	\$3,950	\$3,950	5.1	15.6	-10.5	32.6
(5) Asian Pacific American-owned	28	\$230	\$230	0.3	2.5	-2.2	12.1
(6) Black American-owned	1,221	\$2,292	\$2,292	3.0	8.5	-5.6	34.8
(7) Hispanic American-owned	264	\$914	\$914	1.2	2.8	-1.6	42.2
(8) Native American-owned	35	\$380	\$380	0.5	0.9	-0.4	56.3
(9) Subcontinent Asian American-owned	15	\$135	\$135	0.2	1.0	-0.8	17.3
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	2,600	\$4,437	\$4,437	5.7			
(12) Non-Hispanic white woman-owned XBE	1,410	\$2,494	\$2,494	3.2			
(13) Minority-owned XBE	1,190	\$1,943	\$1,943	2.5			
(14) Asian Pacific American-owned XBE	21	\$65	\$65	0.1			
(15) Black American-owned XBE	1,102	\$1,427	\$1,427	1.8			
(16) Hispanic American-owned XBE	25	\$188	\$188	0.2			
(17) Native American-owned XBE	28	\$130	\$130	0.2			
(18) Subcontinent Asian American-owned XBE	14	\$134	\$134	0.2			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.

Time period: 01/01/2014 - 12/31/2018

Contract area: All industries

Contract role: Prime contracts and subcontracts

Agency: Municipal Corporations

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,111	\$760,215	\$760,215				
(2) Minority and woman-owned businesses	612	\$159,214	\$159,214	20.9	27.1	-6.2	77.2
(3) Non-Hispanic white woman-owned	282	\$63,133	\$63,133	8.3	11.6	-3.3	71.4
(4) Minority-owned	330	\$96,080	\$96,080	12.6	15.5	-2.8	81.6
(5) Asian Pacific American-owned	26	\$5,285	\$5,285	0.7	2.8	-2.1	25.1
(6) Black American-owned	191	\$57,196	\$57,196	7.5	10.2	-2.7	73.8
(7) Hispanic American-owned	70	\$27,455	\$27,455	3.6	0.4	3.2	200+
(8) Native American-owned	16	\$3,278	\$3,278	0.4	0.7	-0.3	60.7
(9) Subcontinent Asian American-owned	27	\$2,867	\$2,867	0.4	1.4	-1.0	27.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	556	\$147,050	\$147,050	19.3			
(12) Non-Hispanic white woman-owned XBE	239	\$52,318	\$52,318	6.9			
(13) Minority-owned XBE	317	\$94,732	\$94,732	12.5			
(14) Asian Pacific American-owned XBE	22	\$4,790	\$4,790	0.6			
(15) Black American-owned XBE	187	\$56,982	\$56,982	7.5			
(16) Hispanic American-owned XBE	65	\$26,816	\$26,816	3.5			
(17) Native American-owned XBE	16	\$3,278	\$3,278	0.4			
(18) Subcontinent Asian American-owned XBE	27	\$2,867	\$2,867	0.4			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.

Time period: 01/01/2014 - 12/31/2018

Contract area: All industries

Contract role: Prime contracts and subcontracts

Agency: Capital Improvement Board

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	379	\$126,626	\$126,626				
(2) Minority and woman-owned businesses	119	\$39,256	\$39,256	31.0	30.4	0.6	101.8
(3) Non-Hispanic white woman-owned	48	\$6,658	\$6,658	5.3	11.1	-5.9	47.2
(4) Minority-owned	71	\$32,598	\$32,598	25.7	19.3	6.4	133.4
(5) Asian Pacific American-owned	12	\$2,713	\$2,713	2.1	3.9	-1.8	54.7
(6) Black American-owned	29	\$14,643	\$14,643	11.6	13.7	-2.1	84.6
(7) Hispanic American-owned	25	\$14,661	\$14,661	11.6	0.9	10.7	200+
(8) Native American-owned	0	\$0	\$0	0.0	0.6	-0.6	0.0
(9) Subcontinent Asian American-owned	5	\$581	\$581	0.5	0.3	0.2	166.8
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	101	\$37,716	\$37,716	29.8			
(12) Non-Hispanic white woman-owned XBE	33	\$5,238	\$5,238	4.1			
(13) Minority-owned XBE	68	\$32,479	\$32,479	25.6			
(14) Asian Pacific American-owned XBE	12	\$2,713	\$2,713	2.1			
(15) Black American-owned XBE	28	\$14,580	\$14,580	11.5			
(16) Hispanic American-owned XBE	23	\$14,605	\$14,605	11.5			
(17) Native American-owned XBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned XBE	5	\$581	\$581	0.5			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.

Time period: 01/01/2014 - 12/31/2018

Contract area: All industries

Contract role: Prime contracts and subcontracts

Agency: Indianapolis Airport Authority

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	735	\$279,929	\$279,929				
(2) Minority and woman-owned businesses	281	\$78,400	\$78,400	28.0	25.2	2.8	111.0
(3) Non-Hispanic white woman-owned	146	\$37,524	\$37,524	13.4	9.0	4.4	149.2
(4) Minority-owned	135	\$40,876	\$40,876	14.6	16.3	-1.7	89.8
(5) Asian Pacific American-owned	4	\$81	\$81	0.0	1.2	-1.2	2.4
(6) Black American-owned	77	\$28,220	\$28,220	10.1	12.4	-2.3	81.6
(7) Hispanic American-owned	24	\$7,711	\$7,711	2.8	0.3	2.5	200+
(8) Native American-owned	11	\$2,966	\$2,966	1.1	0.5	0.6	200+
(9) Subcontinent Asian American-owned	19	\$1,897	\$1,897	0.7	1.9	-1.2	35.8
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	274	\$76,896	\$76,896	27.5			
(12) Non-Hispanic white woman-owned XBE	139	\$36,020	\$36,020	12.9			
(13) Minority-owned XBE	135	\$40,876	\$40,876	14.6			
(14) Asian Pacific American-owned XBE	4	\$81	\$81	0.0			
(15) Black American-owned XBE	77	\$28,220	\$28,220	10.1			
(16) Hispanic American-owned XBE	24	\$7,711	\$7,711	2.8			
(17) Native American-owned XBE	11	\$2,966	\$2,966	1.1			
(18) Subcontinent Asian American-owned XBE	19	\$1,897	\$1,897	0.7			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.

Time period: 01/01/2014 - 12/31/2018

Contract area: All industries

Contract role: Prime contracts and subcontracts

Agency: Indianapolis Public Library

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	83	\$35,134	\$35,134				
(2) Minority and woman-owned businesses	32	\$8,708	\$8,708	24.8	14.9	9.9	166.7
(3) Non-Hispanic white woman-owned	14	\$3,448	\$3,448	9.8	5.5	4.3	177.8
(4) Minority-owned	18	\$5,260	\$5,260	15.0	9.3	5.6	160.1
(5) Asian Pacific American-owned	2	\$1,314	\$1,314	3.7	1.5	2.2	200+
(6) Black American-owned	7	\$850	\$850	2.4	6.0	-3.6	40.2
(7) Hispanic American-owned	6	\$2,934	\$2,934	8.4	0.2	8.2	200+
(8) Native American-owned	3	\$161	\$161	0.5	0.6	-0.1	80.2
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	1.1	-1.1	0.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	29	\$8,317	\$8,317	23.7			
(12) Non-Hispanic white woman-owned XBE	11	\$3,057	\$3,057	8.7			
(13) Minority-owned XBE	18	\$5,260	\$5,260	15.0			
(14) Asian Pacific American-owned XBE	2	\$1,314	\$1,314	3.7			
(15) Black American-owned XBE	7	\$850	\$850	2.4			
(16) Hispanic American-owned XBE	6	\$2,934	\$2,934	8.4			
(17) Native American-owned XBE	3	\$161	\$161	0.5			
(18) Subcontinent Asian American-owned XBE	0	\$0	\$0	0.0			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.
Time period: 01/01/2014 - 12/31/2018
Contract area: All industries
Contract role: Prime contracts and subcontracts
Agency: Indianapolis Public Transportation Corporation

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	45	\$43,884	\$43,884				
(2) Minority and woman-owned businesses	14	\$2,017	\$2,017	4.6	25.6	-21.0	18.0
(3) Non-Hispanic white woman-owned	5	\$1,395	\$1,395	3.2	16.7	-13.5	19.0
(4) Minority-owned	9	\$622	\$622	1.4	8.8	-7.4	16.0
(5) Asian Pacific American-owned	2	\$233	\$233	0.5	5.2	-4.6	10.3
(6) Black American-owned	4	\$162	\$162	0.4	3.2	-2.8	11.5
(7) Hispanic American-owned	1	\$77	\$77	0.2	0.0	0.2	200+
(8) Native American-owned	2	\$150	\$150	0.3	0.3	0.0	104.8
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned XBE	12	\$1,870	\$1,870	4.3			
(12) Non-Hispanic white woman-owned XBE	4	\$1,283	\$1,283	2.9			
(13) Minority-owned XBE	8	\$588	\$588	1.3			
(14) Asian Pacific American-owned XBE	2	\$233	\$233	0.5			
(15) Black American-owned XBE	3	\$127	\$127	0.3			
(16) Hispanic American-owned XBE	1	\$77	\$77	0.2			
(17) Native American-owned XBE	2	\$150	\$150	0.3			
(18) Subcontinent Asian American-owned XBE	0	\$0	\$0	0.0			
(19) Unknown minority-owned XBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned XBEs were allocated to minority and XBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.