



2017 Disparity Study

Illinois Department of Transportation

FINAL REPORT

Final Report

February 9, 2018

2017 IDOT Disparity Study

Prepared for

Illinois Department of Transportation
2300 S Dirksen Pkwy
Springfield, Illinois 62764

Prepared by

BBC Research & Consulting
1999 Broadway, Suite 2200
Denver, Colorado 80202-9750
303.321.2547 fax 303.399.0448
www.bbcresearch.com
bbc@bbcresearch.com



Table of Contents

ES. Executive Summary

A. Analyses in the Disparity Study	ES-2
B. Availability Analysis Results.....	ES-3
C. Utilization Analysis Results.....	ES-4
D. Disparity Analysis Results.....	ES-6
E. Overall DBE Goal.....	ES-9
F. Program Implementation	ES-11

1. Introduction

A. Background	1-2
B. Study Scope	1-3
C. Study Team Members	1-7

2. Legal Framework

A. Program Elements.....	2-1
B. Legal Standards	2-3

3. Marketplace Conditions

A. Human Capital.....	3-2
B. Financial Capital	3-6
C. Business Ownership	3-9
D. Business Success	3-11
E. Summary.....	3-13

4. Collection and Analysis of Contract Data

A. Overview of Contracting Policies	4-1
B. Collection and Analysis of Contract Data	4-3
C. Collection of Vendor Data	4-5
D. Relevant Geographic Market Area.....	4-6
E. Relevant Types of Work.....	4-6
F. Collection of Bid and Proposal Data	4-7
G. Agency Review Process.....	4-7

Table of Contents

5. Availability Analysis

A. Purpose of the Availability Analysis	5-1
B. Potentially Available Businesses	5-1
C. Businesses in the Availability Database.....	5-3
D. Availability Calculations	5-4
E. Availability Results.....	5-6
F. Base Figure for Overall DBE Goal.....	5-9
G. Implications for DBE Contract Goals	5-10

6. Utilization Analysis

A. Overview of Utilization Analysis.....	6-1
B. Utilization Analysis Results.....	6-1

7. Disparity Analysis

A. Overview of Disparity Analysis.....	7-1
B. Disparity Analysis Results	7-5
C. Statistical Significance of Disparity Analysis Results	7-9
D. Case Study Analysis	7-12

8. Overall DBE Goal

A. Establishing a Base Figure	8-1
B. Considering a Step-2 Adjustment.....	8-2

9. Program Measures

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?	9-2
B. What has been the agency's past experience in meeting its overall DBE goal?	9-2
C. What has DBE participation been when the agency did not use race-or gender-conscious measures?.....	9-3
D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?.....	9-3

10. Program Implementation

A. Elements of the Federal DBE Program	10-1
B. Additional Considerations	10-10

Table of Contents

Appendices

- A. Definition of Terms
- B. Legal Framework and Analysis
- C. Quantitative Analyses of Marketplace Conditions
- D. Qualitative Analyses about Marketplace Conditions
- E. Availability Analysis Approach
- F. Disparity Tables

CHAPTER ES.

Executive Summary

CHAPTER ES.

Executive Summary

The Illinois Department of Transportation (IDOT) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help inform the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. As a Federal Highway Administration (FHWA) fund recipient, IDOT implements the Federal DBE Program to address potential discrimination against DBEs in the award and administration of FHWA-funded contracts. To do so, IDOT uses various measures to encourage the participation of minority- and woman-owned businesses in its FHWA-funded contracts including both *race- and gender-neutral* measures and *race- and gender-conscious* measures. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses in IDOT contracting, regardless of the race/ethnicity and gender of the owners. In contrast, race- and gender-conscious measures are designed to specifically encourage the participation of minority- and woman-owned businesses in IDOT contracting.

As part of the disparity study, BBC assessed whether there were any disparities between:

- The percentage of contracting dollars (including subcontract dollars) that minority- and woman-owned businesses received on transportation-related construction and professional services contracts that IDOT awarded between October 1, 2012 and September 30, 2016 (i.e., *utilization*); and
- The percentage of transportation-related construction and professional services contracting dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of IDOT prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding IDOT's implementation of the Federal DBE Program;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that IDOT currently has in place.

IDOT could use study information to help refine its implementation of the Federal DBE Program, including:

- Setting an overall DBE goal for the participation of minority- and woman-owned businesses in its transportation-related contracts;
- Determining which program measures to use to encourage the participation of minority- and woman-owned businesses; and
- Determining which groups would be eligible to participate in race- and gender-conscious measures that the agency decides to use as part of implementing the Federal DBE Program.

BBC summarizes key information from the disparity study in five parts:

- A. Analyses in the disparity study;
- B. Availability analysis results;
- C. Utilization analysis results;
- D. Disparity analysis results;
- E. Overall DBE Goal; and
- F. Program implementation.

A. Analyses in the Disparity Study

Along with measuring disparities between the participation and availability of minority- and woman-owned businesses in IDOT contracts, BBC also examined other quantitative and qualitative information related to IDOT's implementation of the Federal DBE Program:

- 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 federal, state, and local requirements related to the Federal DBE Program and other minority- and woman-owned business programs (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of the success of minorities; women; and minority- and woman-owned businesses throughout Illinois. In addition, BBC collected qualitative information about potential barriers that minority- and woman-owned 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).
- BBC analyzed the percentage of IDOT's transportation-related contracting dollars that minority- and woman-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 transportation-related construction and professional services contracts that IDOT awards (see Chapter 5 and Appendix E).
- BBC analyzed the dollars that minority- and woman-owned businesses received on the transportation-related construction and professional services contracts that IDOT awarded during the study period (see Chapter 6).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on the transportation-related construction and professional services contracts that IDOT awarded during the study period (see Chapter 7).
- BBC reviewed IDOT's current overall DBE goal and provided guidance related to setting its next overall DBE goal (see Chapter 8).
- BBC reviewed IDOT's current contracting practices and measures to encourage the participation of minority- and woman-owned businesses in its contracting and provided guidance related to additional program options and potential refinements to those practices and measures (see Chapter 9).

- BBC reviewed requirements of the Federal DBE Program as well as IDOT’s compliance with those requirements and provided guidance related to potential refinements to the agency’s implementation of the program (see Chapter 10).

B. Availability Analysis Results

BBC used a *custom census* availability analysis to analyze the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on IDOT’s transportation-related construction and professional services prime contracts and subcontracts. BBC’s approach relied on information from surveys that the study team conducted with potentially available businesses located throughout Illinois that perform work within relevant work specializations, or *subindustries*. That approach allowed BBC to develop a representative, unbiased, and statistically-valid database of potentially available businesses and estimate the availability of minority- and woman-owned businesses in an accurate, statistically-valid manner.

Overall results. Figure ES-1 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for the transportation-related construction and professional services prime contracts and subcontracts that IDOT awarded during the study period. Overall, the availability of minority- and woman-owned businesses for those contracts is 19.9 percent. In other words, one would expect minority- and woman-owned businesses to receive 19.9 percent of the transportation-related contracting dollars that IDOT awards based on their availability for that work. Non-Hispanic white woman-owned businesses (13.6%) and Hispanic American-owned businesses (2.9%) exhibited the highest availability among the relevant business groups.

Figure ES-1.
Availability estimates by racial/ethnic and gender group

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 %
Asian Pacific American-owned	0.5 %
Black American-owned	1.5
Hispanic American-owned	2.9
Native American-owned	0.0
Subcontinent Asian American-owned	1.4
Non-Hispanic white woman-owned	13.6 %
Total Minority- and Woman-owned	19.9 %

Results by contract goal status. IDOT used DBE contract goals to award most of its contracts during the study period to encourage the participation of minority- and woman-owned businesses. IDOT’s use of DBE contract goals is a race- and gender-conscious measure. It is useful to examine availability analysis results separately for contracts that IDOT awards with the use of DBE contract goals (*goal contracts*) and contracts that IDOT awards without the use of those goals (*no-goal contracts*). Figure ES-2 presents availability estimates separately for goal and no-goal contracts. As shown in Figure ES-2, the availability of minority- and woman-owned businesses considered together is lower for goal contracts (19.1%) than for no-goal contracts (29.4%).

Figure ES-2.
Availability estimates by contract goal status

Note:

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

For more detail, see Figures F-18 and F-19 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Goal status	
	Goal contracts	No-goal contracts
Asian Pacific American-owned	0.5 %	0.2 %
Black American-owned	1.5	1.8
Hispanic American-owned	2.5	7.7
Native American-owned	0.0	0.1
Subcontinent Asian American-owned	1.4	1.5
<u>Non-Hispanic white woman-owned</u>	<u>13.2 %</u>	<u>18.1 %</u>
Total Minority- and Woman-owned	19.1 %	29.4 %

Results by 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 prime contracts and subcontracts. Figure ES-3 presents those results. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is lower for IDOT prime contracts (15.2%) than for IDOT subcontracts (34.4%).

Figure ES-3.
Availability estimates by contract role

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contract	Subcontract
Asian Pacific American-owned	0.2 %	1.4 %
Black American-owned	1.5	1.5
Hispanic American-owned	1.5	7.6
Native American-owned	0.0	0.0
Subcontinent Asian American-owned	1.2	1.9
<u>Non-Hispanic white woman-owned</u>	<u>10.9 %</u>	<u>22.1 %</u>
Total Minority- and Woman-owned	15.2 %	34.4 %

C. Utilization Analysis Results

BBC measured the participation of minority- and woman-owned businesses in IDOT's transportation-related contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on IDOT prime contracts and subcontracts during the study period.

Overall results. Figure ES-4 presents the percentage of contracting dollars that minority- and woman-owned businesses considered together received on transportation-related construction and professional services contracts that IDOT awarded during the study period (including both prime contracts and subcontracts). As shown in Figure ES-4, overall, minority- and woman-owned businesses received 15.5 percent of the relevant contracting dollars that IDOT awarded during the study period. The majority of those contracting dollars—13.1 percent—went to certified DBEs. Non-Hispanic white woman-owned businesses (6.9%) and Hispanic American-owned businesses (5.2%) exhibited higher levels of participation on IDOT contracts than the other relevant groups.

Figure ES-4.
Overall utilization results

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.

Utilization %	
Minority- and Woman-owned	
Asian Pacific American-owned	0.5 %
Black American-owned	1.7
Hispanic American-owned	5.2
Native American-owned	0.2
Subcontinent Asian American-owned	1.0
Non-Hispanic white woman-owned	6.9
Total Minority- and Woman-owned	15.5 %
DBEs	
Asian Pacific American-owned	0.5 %
Black American-owned	1.7
Hispanic American-owned	5.2
Native American-owned	0.1
Subcontinent Asian American-owned	0.7
Non-Hispanic white woman-owned	4.9
Total DBE	13.1 %

Results by contract goal status. IDOT used DBE contract goals to award many contracts during the study period to encourage the participation of minority- and woman-owned businesses. It is instructive to compare the participation of minority- and woman-owned businesses between goal contracts no-goal contracts. Doing so provides useful information about outcomes for minority- and woman-owned businesses on contracts that IDOT awarded in a race- and gender-neutral environment and the efficacy of DBE contract goals in encouraging the participation of minority- and woman-owned businesses in IDOT’s transportation-related contracts. Figure ES-5 presents utilization results separately for IDOT goal contracts and no-goal contracts. As shown in Figure ES-5, minority- and woman-owned businesses considered together showed higher participation in goal contracts (15.9%) than in no-goal contracts (11.5%). Those results indicate the effectiveness of DBE contract goals in encouraging the participation of minority- and woman-owned businesses in IDOT’s transportation-related contracts.

Figure ES-5.
Utilization results by contract goal status

Note:
Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals.
For more detail, see Figures F-18 and F-19 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Goal status	
	Goal contracts	No-goal contracts
Asian Pacific American-owned	0.5	0.2 %
Black American-owned	1.7	1.8
Hispanic American-owned	5.4	7.7
Native American-owned	0.2	0.1
Subcontinent Asian American-owned	1.0	1.5
Non-Hispanic white woman-owned	7.0	6.7
Total Minority- and Woman-owned	15.9	11.5 %

Results by contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it might be reasonable to expect higher participation of minority- and woman-owned business in subcontracts than in prime contracts. Figure ES-6 presents utilization results for minority- and woman-owned businesses separately for prime

contracts and subcontracts. As shown in Figure ES-6, the participation of minority- and woman-owned businesses considered together was in fact much higher in IDOT subcontracts (47.9%) than prime contracts (5.2%).

Figure ES-6.
Utilization results by contract role

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

Source:
BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Asian Pacific American-owned	0.3	1.2 %
Black American-owned	0.6	5.0
Hispanic American-owned	0.9	18.7
Native American-owned	0.0	0.6
Subcontinent Asian American-owned	0.8	1.4
Non-Hispanic white woman-owned	2.5	20.8
Total Minority- and Woman-owned	5.2	47.9 %

D. Disparity Analysis Results

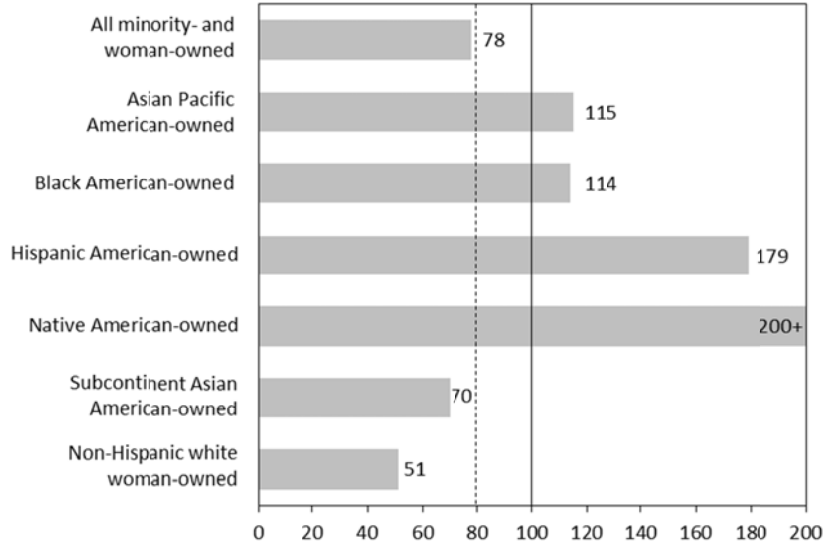
Although information about the participation of minority- and woman-owned businesses in IDOT contracts is useful on its own, it is even more useful when it is compared with the level of participation that might be expected based on the availability of minority- and woman-owned businesses for IDOT work. BBC compared the participation of minority- and woman-owned businesses in IDOT 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 participation by percent availability and multiplying that quotient by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular set of contracts (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.

Overall results. Figure ES-7 presents disparity indices for all relevant prime contracts and subcontracts that IDOT awarded during the study period. The line drawn at a disparity index level of 100 indicates parity, and the line drawn at a disparity index level of 80 indicates a substantial disparity. As shown in Figure ES-7, overall, the participation of minority- and woman-owned businesses in contracts that IDOT 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 78 indicates that minority- and woman-owned businesses considered together received approximately \$0.78 for every dollar that they might be expected to receive based on their availability for transportation-related contracts that IDOT awarded during the study period. Disparity analysis results by individual group indicated that Subcontinent Asian American-owned businesses (disparity index of 70) and non-Hispanic white woman-owned businesses (disparity index of 51) exhibited substantial disparities.

**Figure ES-7.
Disparity indices by group**

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

Source:
BBC Research & Consulting disparity
analysis.



IDOT used DBE contract goals to award most of the transportation-related contracts that it awarded during the study period. The disparity analysis results shown in Figure ES-7 are largely reflective of the use of those measures. A crucial question is whether any disparities exist between the participation and availability of minority- and woman-owned businesses on contracts that IDOT awarded without the use of those goals.

Results by goals status. IDOT used DBE contract goals to award most contracts—both FHWA- and state-funded contracts—during the study period to encourage the participation of minority- and woman-owned businesses. IDOT’s use of DBE contract goals is a race- and gender-conscious measure. It is useful to examine disparity analysis results separately for goal contracts and no-goal contracts. Assessing whether any disparities exist for no-goal contracts provides useful information about outcomes for minority- and woman-owned businesses on contracts that IDOT awarded in a race- and gender-neutral environment and whether there is evidence that certain groups face any discrimination or barriers as part of IDOT contracting.^{1, 2, 3}

Figure ES-8 presents disparity analysis results separately for goal and no-goal contracts. As shown in Figure ES-8, minority- and woman-owned businesses considered together showed a disparity that was close to the threshold of being considered substantial on goal contracts (disparity index of 83). Moreover, they showed a substantial disparity on no-goal contracts (disparity index of 39). Disparity analysis results by individual group indicated that:

- Subcontinent Asian American-owned businesses (disparity index of 75) and non-Hispanic white woman-owned businesses (disparity index of 53) exhibited substantial disparities on goal contracts; and

¹ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, 1192, 1196 (9th Cir. 2013).

² *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 985, 987-88 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003).

³ *H. B. Rowe Co., Inc. v. Lyndo Tippett, NCDOT, et al.*, 615 F.3d 233,246 (4th Cir. 2010).

- All groups except Asian Pacific American-owned businesses (disparity index of 108) exhibited substantial disparities on no-goal contracts.

Taken together, the results presented in Figure ES-8 show that IDOT’s use of DBE contract goals is somewhat effective in encouraging the participation of minority- and woman-owned businesses in its contracts. Moreover, those results indicate that when IDOT does not use race- and gender-conscious measures, nearly all relevant business groups are substantially underutilized in IDOT’s transportation-related contracting.

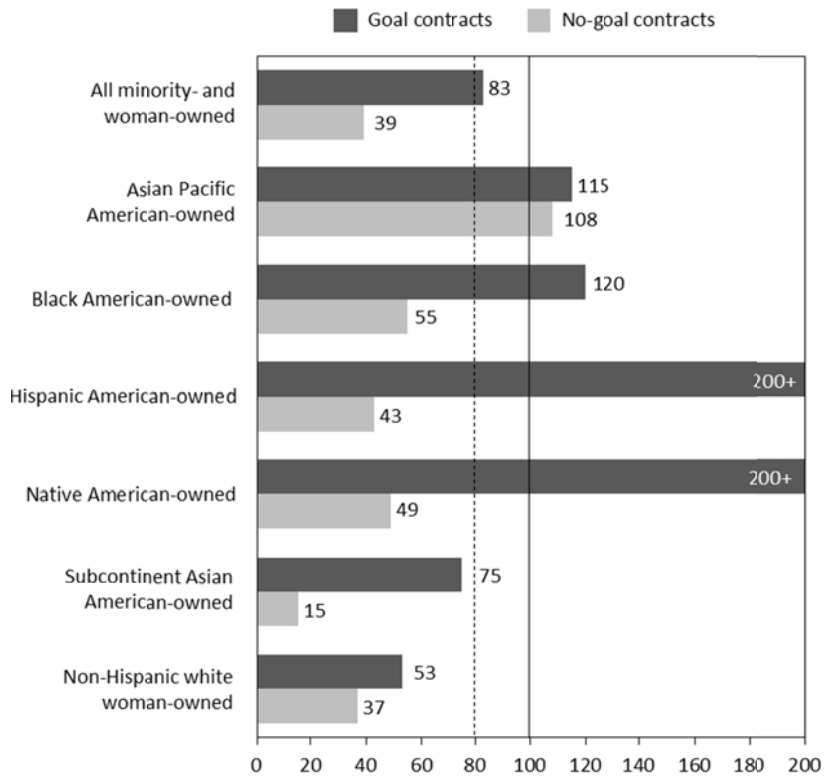
Figure ES-8.
Disparity indices for goal and no-goal contracts

Note:

For more detail, see Figures F-18 and F-19 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



Results by contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. In addition, IDOT’s use of DBE contract goals is a subcontracting program, so the use of those goals does not directly affect the participation of minority- and woman-owned businesses in prime contracts. Thus, it is useful to examine disparity analysis results separately for prime contracts and subcontracts to provide additional information about outcomes for minority- and woman-owned businesses on contracts that IDOT awarded during the study period. Figure ES-9 presents those results. As shown in Figure ES-9, whereas minority- and woman-owned businesses considered together did not show a disparity for subcontracts (disparity index of 139), they showed a substantial disparity for prime contracts (disparity index of 34). Disparity analysis results by individual group indicated that:

- All groups except Asian Pacific American-owned businesses (disparity index of 91) exhibited substantial disparities on prime contracts; and
- Subcontinent Asian American-owned businesses (disparity index of 74) exhibited a substantial disparity on subcontracts.

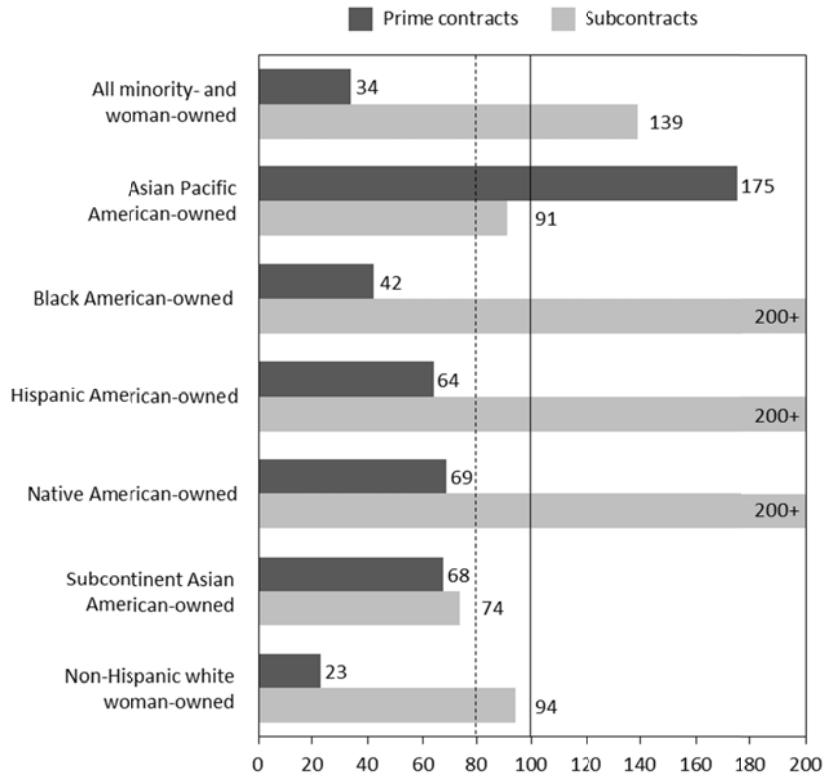
Figure ES-9.
Disparity indices for prime contracts and subcontracts

Note:

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

Source:

BBC Research & Consulting disparity analysis.



E. Overall DBE Goal

As part of its implementation of the Federal DBE Program, IDOT is required to set an overall goal for DBE participation in its FHWA-funded contracts. Agencies that implement the Federal DBE Program must develop overall DBE goals every three years. However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its FHWA-funded contracts every year. 49 CFR Part 26.45 outlines a two-step process for agencies to set their overall DBE goals: 1) establishing a base figure; and 2) considering a *step-2 adjustment*.

Establishing a base figure. For the purposes of helping IDOT establish a base figure for its overall DBE goal, BBC used information from the availability analysis. The study team considered information about the availability of *potential DBEs*—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26.65—for FHWA-funded prime contracts and subcontracts that IDOT awarded during the study period. Figure ES-10 presents the availability of potential DBEs for the FHWA-funded construction and professional services prime contracts and subcontracts that IDOT awarded during the study period. As show in Figure ES-10, potential DBEs might be expected to receive 17.6 percent of IDOT’s FHWA-funded prime contract and subcontract dollars based on their availability for that work. IDOT might consider 17.6 percent as the base figure for its overall DBE goal if the agency anticipates that the types, sizes, and locations of FHWA-funded contracts that it will award in the future will be similar to the FHWA-funded contracts that it awarded during the study period.

Figure ES-10.
Availability components of the base figure

a. Business group	Base figure component		
	b. Construction	c. Professional Services	d. Total
Asian Pacific American-owned	0.4 %	1.7 %	0.4 %
Black American-owned	0.6	8.9	0.9
Hispanic American-owned	2.6	1.8	2.6
Native American-owned	0.0	0.0	0.0
Subcontinent Asian American-owned	0.9	4.5	1.0
Non-Hispanic white woman-owned	12.9	10.6	12.7
Total potential DBEs	17.3 %	24.8 %	17.6 %
Industry weight	97 %	3 %	

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

Source: BBC Research & Consulting availability analysis.

Considering a step-2 adjustment. The Federal DBE Program requires IDOT to consider a potential step-2 adjustment to its base figure as part of determining its overall DBE goal and outlines several factors that the agency must consider when assessing whether to make any adjustment:

- Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.⁴

BBC completed an analysis of each of the above step-2 factors. Much of the information that BBC examined was not easily quantifiable but is still relevant to IDOT as it determines whether to make a step-2 adjustment. Taken together, the quantitative and qualitative evidence that the study team collected as part of the disparity study may support a step-2 adjustment to the base figure as IDOT considers setting its overall DBE goal. Based on information from the disparity study, there are reasons why IDOT might consider an upward adjustment to its base figure:

- IDOT might adjust its base figure upward to account for barriers that minorities and women face in human capital and owning businesses in the local contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”⁵
- IDOT might also adjust its base figure upward in light of evidence of barriers that affect minorities; women; and minority- and woman-owned businesses in obtaining financing,

⁴ 49 CFR Section 26.45.

⁵ 49 CFR Section 26.45 (b).

bonding, and insurance and evidence that minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men.

There are also reasons why IDOT might consider a downward adjustment to its base figure. IDOT's utilization reports for FFYs 2012 through 2016 indicated median annual DBE participation of 14.6 percent for those years, which is lower than its base figure. USDOT's "Tips for Goal-Setting" suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. BBC's analysis of DBE participation in IDOT's FHWA-funded contracts also indicates DBE participation (12.6%) that is lower than the base figure. If IDOT were to adjust its base figure based on past DBE participation, it might consider taking the average of the 17.6 base figure and the 14.6 percent (or 12.6 percent) past DBE participation.

USDOT regulations clearly state that IDOT is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment—either upward or downward—to its base figure. However, IDOT is not required to make an adjustment as long as it can explain what factors it considered and can explain its decision as part of its goal-setting process.

F. Program Implementation

Chapters 9 and 10 review additional information relevant to IDOT's implementation of the Federal DBE Program including program measures that the agency could consider using to encourage the participation of minority- and woman-owned businesses in its contracting. IDOT should review that information as well as other relevant information as it makes decisions concerning the future implementation of the Federal DBE Program. To that end, BBC presents the following areas of potential refinement for IDOT's consideration:

- IDOT should consider continuing its efforts to network with minority- and woman-owned businesses, but the agency might also consider broadening its efforts to include more partnerships with local trade organizations and other public agencies. IDOT might also consider creating a consortium of local organizations and public agencies that would jointly host quarterly outreach and networking events and training sessions for businesses seeking public sector contracts.
- To further encourage the participation of small businesses—including many minority- and woman-owned businesses—IDOT should consider making efforts to unbundle relatively large contracts into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation.
- IDOT should consider exploring ways to increase prime contracting and subcontracting opportunities for small businesses, including many minority- and woman-owned businesses. With regard to prime contract opportunities, IDOT might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. With regard to subcontract opportunities, IDOT could consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals.

- Disparity analysis results indicated that most racial/ethnic and gender groups did not show disparities on contracts that IDOT awarded with the use of DBE contract goals during the study period. In contrast, most racial/ethnic and gender groups showed substantial disparities on contracts that IDOT awarded without the use of DBE contract goals. IDOT should consider continuing its use of DBE contract goals in the future. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).
- IDOT should consider implementing processes to help ensure that it collects comprehensive information on all the prime contracts and subcontracts that it awards and that those data are maintained and organized in an intuitive manner, including data on pass-through contracting that the City of Chicago awards. Doing so will allow IDOT to monitor the participation of minority- and woman-owned businesses as accurately as possible.

As part of the disparity study, the study team also examined information concerning conditions in the local marketplace for minorities; women; and minority- and woman-owned businesses including results for different racial/ethnic and gender groups. IDOT should review the full disparity study report, as well as other information it may have, in determining whether it needs to continue using race- or gender-conscious measures as part of its implementation of the Federal DBE Program, and if so, in determining what actions it might take based on study results.

CHAPTER 1.

Introduction

CHAPTER 1.

Introduction

The Illinois Department of Transportation (IDOT) is responsible for the planning, construction, operation, and maintenance of the transportation system throughout Illinois including highways and bridges; airports; public transit; rail freight; and rail passenger systems. As a United States Department of Transportation (USDOT) fund recipient, IDOT implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts.

IDOT retained BBC Research & Consulting (BBC) to conduct a disparity study to help evaluate the effectiveness of its implementation of the Federal DBE Program in encouraging the participation of minority- and woman-owned businesses in its federally-funded contracts. As part of the disparity study, BBC examined whether there are any disparities between:

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

BBC also assessed other quantitative and qualitative information related to:

- The legal framework surrounding IDOT's implementation of the Federal DBE Program;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that IDOT currently has in place.

There are several reasons why the disparity study will be useful to IDOT as it makes decisions about its implementation of the Federal DBE Program:

- The types of research that BBC conducted as part of the disparity study provide information that will be useful to IDOT as it makes decisions about different aspects of its implementation of the Federal DBE Program (e.g., setting an overall DBE goal);
- The disparity study provides insights into how to improve contracting opportunities for small businesses as well as minority- and woman-owned businesses;
- An independent, objective review of the participation of minority- and woman-owned businesses in IDOT's contracting will be valuable to agency leadership and to external groups that may be monitoring IDOT's contracting practices; and
- State and local agencies that have successfully defended implementations of the Federal DBE Program in court have typically relied on information from disparity studies.

BBC introduces the 2017 IDOT Disparity Study in three parts:

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

A. Background

The Federal DBE Program is a program designed to increase the participation of minority- and woman-owned businesses in USDOT-funded contracts. As a recipient of USDOT funds, IDOT must implement the Federal DBE Program and comply with corresponding federal regulations.

Setting an overall goal for DBE participation. As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts.¹ Although an agency is required to set the goal every three years, the overall DBE goal is an annual goal in that the agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable the agency to meet the goal in the next year.

The Federal DBE Program describes the steps an agency must follow in establishing its overall DBE goal. To begin the goal-setting process, an agency must develop a base figure based on demonstrable evidence of the availability of DBEs to participate in the agency's USDOT-funded contracts. Then, the agency must consider conditions in the local marketplace for minority- and woman-owned businesses and make an upward, downward, or no adjustment to its base figure as it determines its overall DBE goal (referred to as a "step-2" adjustment).

Projecting the portion of the overall DBE goal to be met through race- and gender-neutral means. According to 49 Code of Federal Regulations (CFR) Part 26, an agency must meet the maximum feasible portion of its overall DBE goal through the use of *race- and gender-neutral program measures*.² Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or all small businesses—in an agency's contracting (for examples of race- and gender-neutral measures, see 49 CFR Section 26.51(b)). Participation in such measures is not limited to minority- and woman-owned businesses or to certified DBEs. If an agency cannot meet its goal solely through the use of race- and gender-neutral measures, then it must consider also using *race- and gender-conscious program measures*. Race- and gender-conscious measures are designed to specifically encourage the participation of minority- and woman-owned businesses in an agency's contracting (e.g., using DBE goals on individual contracts). The Federal DBE Program requires an agency to project the portion of its overall DBE goal that it will meet through race- and gender-neutral measures and the portion

¹ <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

² 49 CFR Section 26.51.

that it will meet through any race- or gender-conscious measures. USDOT has outlined a number of factors for an agency to consider when making such determinations.³

Determining whether all groups will be eligible for race- and gender-conscious measures. If an agency determines that race- or gender-conscious measures—such as DBE contract goals—are appropriate for its implementation of the Federal DBE Program, then it must also determine which racial/ethnic or gender groups are eligible for participation in those measures. Eligibility for such measures is limited to only those racial/ethnic or gender groups for which compelling evidence of discrimination exists in the local marketplace. USDOT provides a waiver provision if an agency determines that its implementation of the Federal DBE Program should only include certain racial/ethnic or gender groups in the race- or gender-conscious measures that it uses.

B. Study Scope

Information from the disparity study will help IDOT continue to encourage the participation of minority- and woman-owned businesses in its federally-funded contracts. In addition, information from the study will help IDOT continue to implement the Federal DBE Program in a legally-defensible manner.

Definitions of minority- and woman-owned businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how the study team treats minority- and woman-owned businesses and businesses that are certified as DBEs with IDOT. It is also important to understand how the study team treats businesses owned by minority women in its analyses.

Minority- and woman-owned businesses. The study team focused its analyses on the minority- and woman-owned business groups that the Federal DBE Program presumes to be disadvantaged: Asian Pacific American-, Black American-, Hispanic American-, Native American, Subcontinent Asian American-, and non-Hispanic white woman-owned businesses. The study team analyzed the possibility that race- or gender-based discrimination affected the participation of minority- and woman-owned businesses in IDOT work based specifically on the race/ethnicity and gender of business ownership. Therefore, the study team counted businesses as minority- or woman-owned regardless of whether they were, or could be, certified as DBEs through IDOT. Analyzing the participation and availability of minority- and woman-owned businesses regardless of DBE certification allowed the study team to assess whether there are disparities affecting all minority- and woman-owned businesses and not just certified businesses.

DBEs. DBEs are minority- and woman-owned businesses that are specifically certified as such through IDOT. A determination of DBE eligibility includes assessing businesses' gross revenues and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs

³ <http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc>

because of gross revenue or net worth requirements.⁴ Businesses seeking DBE certification in Illinois are required to submit an application to IDOT. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of their owners. IDOT reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm business information.

Because the Federal DBE Program requires agencies to track the participation of certified DBEs, BBC reports utilization results for all minority- and woman-owned businesses and separately for those minority- and woman-owned businesses that are certified as DBEs. However, BBC does not report availability or disparity analysis results separately for certified DBEs.

Potential DBEs. Potential DBEs are minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26 (regardless of actual certification). The study team did not count businesses that have been decertified or have graduated from the DBE Program as potential DBEs. BBC examined the availability of potential DBEs as part of helping IDOT calculate the base figure of its overall DBE goal. Figure 1-1 provides further explanation of potential DBEs.

Minority woman-owned businesses. BBC considered four options when considering how to classify businesses owned by minority women:

- Classifying those businesses as both minority-owned and woman-owned;
- Creating unique groups of minority woman-owned businesses;
- Classifying minority woman-owned businesses with all other woman-owned businesses; and
- Classifying minority woman-owned businesses with their corresponding minority groups.

Figure 1-1. Definition of potential DBEs

To help IDOT calculate its overall DBE goal, BBC did not include the following types of minority- and woman-owned businesses in its definition of potential DBEs:

- Minority- and woman-owned businesses that have graduated from the DBE Program and have not been recertified;
- Minority- and woman-owned businesses that are not currently DBE-certified but that have applied for DBE certification with IDOT and have been denied; and
- Minority- and woman-owned businesses that are not currently DBE-certified that appear to have average annual revenues over the most recent three years so high as to deem them ineligible for DBE certification.

At the time of this study, the overall revenue limit for DBE certification was \$22,410,000 based on a three-year average of gross receipts. There were lower revenue limits for specific subindustries according to United States Small Business Administration (SBA) small business size standards. Only a few minority- and woman-owned businesses appeared to have exceeded those revenue limits based on information that they provided as part of availability surveys.

Business owners must also meet USDOT personal net worth limits for their businesses to qualify for DBE certification. The personal net worth of business owners was not available as part of this study and thus was not considered when determining potential DBE status.

⁴ Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

BBC chose not to code businesses as both woman-owned and minority-owned to avoid double-counting certain businesses when reporting disparity study results. Creating groups of minority woman-owned businesses that were distinct from businesses owned by minority men (e.g., Black American woman-owned businesses versus businesses owned by Black American men) was also unworkable because some minority groups exhibited such low participation that further disaggregation by gender would have made it even more difficult to interpret the results.

After rejecting the first two options, BBC then considered whether to group minority woman-owned businesses with all other woman-owned businesses or with their corresponding minority groups. BBC chose the latter (e.g., grouping Black American woman-owned businesses with all other Black American-owned businesses). Thus, *woman-owned businesses* in this report refers to non-Hispanic white woman-owned businesses.

Majority-owned businesses. Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white men). In core disparity study analyses, the study team coded each business as minority-, woman-, or majority-owned.

Analyses in the disparity study. The disparity study examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on IDOT contracts. The study focused on transportation-related construction and professional services contracts that IDOT awarded between October 1, 2012 and September 30, 2016 (i.e., the study period). During the study period, IDOT applied DBE contract goals to many of the federally-funded contracts that it awarded.

In addition to the core utilization, availability, and disparity analyses, the disparity study also includes:

- A review of legal issues surrounding implementation of the Federal DBE Program;
- An analysis of local marketplace conditions for minority- and woman-owned businesses;
- An assessment of IDOT's contracting practices and business assistance programs; and
- Other information for IDOT to consider as it refines its implementation of the Federal DBE Program.

That information is organized in the disparity study report in the following manner:

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 IDOT's implementation of the Federal DBE Program. The legal framework and analysis for the study is summarized in **Chapter 2** and presented in detail in **Appendix B**.

Marketplace conditions. BBC conducted quantitative analyses of the success of minorities and women and minority- and woman-owned businesses in the local contracting industries. BBC compared business outcomes for minorities, women, and minority- and woman-owned businesses to outcomes for non-Hispanic white men and majority-owned businesses. In addition, the study team collected qualitative information about potential barriers that small businesses

and minority- and woman-owned businesses face in Illinois through in-depth interviews. Information about marketplace conditions is presented in **Chapter 3, Appendix C, and Appendix D.**

Data collection and analysis. BBC examined data from multiple sources to complete the utilization and availability analyses. In addition, the study team conducted telephone surveys with thousands of businesses throughout Illinois. The scope of the study team’s data collection and analysis as it pertains to the utilization and availability analyses is presented in **Chapter 4.**

Availability analysis. BBC analyzed the percentage of minority- and woman-owned businesses that are *ready, willing, and able* to perform on IDOT prime contracts and subcontracts. That analysis was based on IDOT data and telephone surveys that the study team conducted with thousands of Illinois businesses that work in industries related to the types of contracting dollars that IDOT awards. BBC analyzed availability separately for businesses owned by specific minority groups and non-Hispanic white women and for different types of contracts. Results from the availability analysis are presented in **Chapter 5 and Appendix E.**

Utilization analysis. BBC analyzed contract dollars that IDOT spent with minority- and woman-owned businesses on transportation-related contracts that the agency awarded between October 1, 2012 and September 30, 2016. Those data included information about associated subcontracts.⁵ IDOT applied DBE contract goals to many of those contracts. BBC analyzed utilization separately for businesses owned by specific minority groups and non-Hispanic women and for different types of contracts. Results from the utilization analysis are presented in **Chapter 6.**

Disparity analysis. BBC examined whether there were any disparities between the utilization of minority- and woman-owned businesses on contracts that IDOT awarded during the study period and the availability of those businesses for that work. BBC analyzed disparity analysis results separately for businesses owned by specific minority groups and non-Hispanic white women and for different types of contracts. The study team also assessed whether any observed disparities were statistically significant. BBC further explored results for subsets of IDOT contracts and examined bid and proposal information for relevant IDOT contracts. Results from the disparity analysis and further explorations of disparities are presented in **Chapter 7 and Appendix F.**

Overall DBE goal. Based on information from the availability analysis and other research, BBC provided IDOT with information that will help the agency set its overall DBE goal including the base figure and consideration of a step-2 adjustment. Information about IDOT’s overall DBE goal is presented in **Chapter 8.**

Race- and gender-neutral measures. BBC reviewed information regarding evidence of discrimination in the Illinois contracting marketplace; analyzed IDOT’s experience with meeting its overall DBE goal in the past; and provided information about IDOT’s past performance in

⁵ Prime contractors—not IDOT—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to IDOT as *awarding* subcontracts.

encouraging the participation of minority- and woman-owned businesses using race- and gender-neutral measures. Information from those analyses is presented in **Chapter 9**.

Federal DBE Program. BBC reviewed IDOT's implementation of the Federal DBE Program. BBC provided guidance related to additional program options. The study team's review and guidance is presented in **Chapter 10**.

C. Study Team Members

The BBC study team was made up of seven firms that, collectively, possess decades of experience related to conducting disparity studies in connection with the Federal DBE Program.

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

B2B Consulting. B2B Consulting is a Black American woman-owned consulting and training firm located in North Riverside, Illinois. B2B Consulting conducted in-person, in-depth anecdotal interviews with business owners and trade association representatives and helped facilitate community engagement efforts throughout the local marketplace.

Customer Research International (CRI). CRI is a Subcontinent Asian American-owned survey fieldwork firm based in San Marcos, Texas. CRI conducted telephone surveys with thousands of Illinois businesses to gather information for the utilization and availability analyses.

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

Keen Independent Research (Keen Independent). Keen Independent is an Arizona-based research firm. Keen Independent helped manage the in-depth interview process as part of the study team's qualitative analyses of marketplace conditions.

SC-B Consulting. SC-B Consulting is a non-Hispanic white woman-owned management and business consulting firm located in Urbana-Champaign, Illinois. SC-B Consulting conducted in-person, in-depth anecdotal interviews with business owners and trade association representatives throughout the local marketplace.

Zann & Associates. Zann & Associates is a Black American woman-owned management consulting firm based in Chicago, Illinois. Zann & Associates reviewed the practices and procedures that IDOT uses to award contracts and the measure it uses to encourage the participation of minority- and woman-owned businesses in its contracting.

CHAPTER 2.

Legal Framework

CHAPTER 2.

Legal Analysis

As a recipient of United States Department of Transportation (USDOT) funds, the Illinois Department of Transportation (IDOT) implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is governed by 49 Code of Federal Regulations (CFR) Part 26 and related federal regulations. BBC Research & Consulting (BBC) presents the Legal Analysis for the 2017 IDOT Disparity Study in two parts:

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

A. Program Elements

The Federal DBE Program is designed to encourage the participation of minority- and woman-owned businesses in an agency's contracting, and more specifically, in its USDOT-funded contracts.¹ As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts.² Although an agency is required to set the goal every three years, the overall DBE goal is an *annual* goal in that the agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures that will address the difference and enable the agency to meet the goal in the next year.

Definition of DBE. According to 49 CFR Part 26, a DBE is a business that is owned and controlled by one or more individuals who are socially and economically disadvantaged according to the guidelines in the Federal DBE Program. The following groups are presumed to be socially and economically disadvantaged according to the Federal DBE Program:

- Asian Pacific Americans;
- Black Americans;
- Hispanic Americans;
- Native Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

A determination of economic disadvantage includes assessing businesses' gross revenues and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because

¹ BBC considers a contract as USDOT-funded if it includes at least one dollar of USDOT funding.

² <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Certification requirements. Businesses seeking DBE certification in Illinois are required to submit an application to IDOT. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. IDOT reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

Measures to encourage DBE participation. Regulations that govern an agency's implementation of the Federal DBE Program require that the agency meets the maximum feasible portion of its overall DBE goal through the use of *race- and gender-neutral measures*.³ Race- and gender-neutral measures are designed to encourage the participation of all businesses—or, all small businesses—in an agency's contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified DBEs. If an agency cannot meet its overall DBE goal solely through race- and gender-neutral means, then it is required to consider using *race- and gender-conscious measures* as part of its implementation of the Federal DBE Program. Race- and gender-conscious measures are designed to specifically encourage the participation of minority- and woman-owned businesses in an agency's contracting (e.g., using DBE goals on individual USDOT-funded contracts). Given that context, there are several approaches that agencies could use to implement the Federal DBE Program.

1. Using a combination of race- and gender-neutral and race- and gender-conscious measures with all DBEs considered eligible. Many agencies use a combination of race- and gender-neutral and race- and gender-conscious measures when implementing the Federal DBE Program with all certified DBEs being considered eligible to participate in the race- and gender-conscious measures. Those agencies use various measures that are designed to encourage the participation of small and emerging businesses in their contracting. In addition, they also use DBE contract goals on individual contracts, and the participation of all certified DBEs—regardless of race/ethnicity or gender—count toward meeting those goals.

IDOT implements the Federal DBE Program in this manner. The agency uses a combination of race- and gender-neutral and race- and gender-conscious measures and considers all certified DBEs as eligible to participate in race- and gender-conscious measures.

2. Applying a combination of race- and gender-neutral and race- and gender-conscious measures with only certain DBEs considered eligible. Some agencies limit DBE participation in race- and gender-conscious measures to certain racial/ethnic or gender groups based on evidence of those groups facing discrimination within the agencies' respective relevant geographic market areas (*underutilized DBEs*, or *UDBEs*). For example, the California Department of Transportation (Caltrans) sets DBE contract goals for which only UDBEs—which do not include all DBE groups—are considered eligible. Caltrans counts the participation of all DBEs toward meeting its overall DBE goal, but only UDBE participation counts toward prime contractors meeting DBE contract

³ 49 CFR Section 26.51.

goals on individual contracts. Caltrans determined which DBE groups were UDBEs by examining results of a disparity study for individual racial/ethnic and gender groups. The Colorado Department of Transportation and the Oregon Department of Transportation, among other agencies, have implemented the Federal DBE Program in similar ways.

3. Applying a combination of race- and gender-neutral and more aggressive race- and gender-conscious measures in extreme circumstances. The Federal DBE Program provides that an agency may not use more aggressive race- and gender-conscious program measures—such as setting aside contracts exclusively for DBE bidding—except in limited and extreme circumstances. An agency may only use set asides when no other method could be reasonably expected to redress egregious instances of discrimination.⁴ Specific quotas for DBE participation are strictly prohibited under the Federal DBE Program.

4. Operating an entirely race- and gender-neutral program. Some agencies have implemented the Federal DBE Program without the use of DBE contract goals or other race- and gender-conscious measures. Instead, those agencies only use race- and gender-neutral measures as part of their implementations of the Federal DBE Program. For example, the Florida Department of Transportation and the Port of Seattle implement the Federal DBE Program using only race- and gender-neutral program measures.

B. Legal Standards

IDOT's use of DBE contract goals is considered a race- and gender-conscious measure. Prime contractors can meet DBE contract goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to meet the goals but could not do so. The United States Supreme Court has established that government programs that include race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.⁵ The two key U.S. Supreme Court cases that established the strict scrutiny standard for such measures 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;⁶ and
- The 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.⁷

An agency 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.

⁴ 49 CFR Section 26.43.

⁵ Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

⁶ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Compelling governmental interest. An agency must demonstrate a *compelling governmental interest* in remedying past identified discrimination in order to use race- or gender-conscious measures. An agency that uses race- or gender-conscious measures as part of a minority- or woman-owned business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Agencies 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.⁸ It is not necessary for a government agency itself to have discriminated against minority- or woman-owned businesses for it to act. In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, “if [the governmental entity] 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.”

Many agencies have used information from disparity studies—specifically, evidence of disparities between the participation and availability of minority- and woman-owned businesses—as part of determining whether their contracting practices are affected by race-or gender-based discrimination. In *City of Richmond v. J.A. Croson Company*, the U.S. 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.

Narrow tailoring. In addition to demonstrating a compelling governmental interest, an agency must also demonstrate that its use of race- and gender-conscious measures is *narrowly tailored*. There are a number of factors that courts consider 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.⁹

⁸ See *e.g.*, *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

⁹ 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).

Meeting the strict scrutiny standard. 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 related case law.

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

In the 19th and early 20th centuries, minorities in Illinois faced barriers that were similar to those that minorities faced nationwide. Discriminatory treatment was common for minorities in Illinois. Black Americans were forced to live in racially-segregated neighborhoods and send their children to segregated schools. In the early to mid-20th century, Black Americans were forced to use separate facilities at area restaurants and cultural institutions. Disparate treatment also extended into the labor market. Black Americans were concentrated in low wage work in manufacturing industries with few opportunities for advancement.^{6,7}

In the middle of the 20th century, many legal and workplace reforms opened up new opportunities for minorities and women nationwide. *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of race- and gender-based discrimination. Workplaces adopted formalized 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}

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- or gender-based discrimination in that marketplace.^{16, 17, 18} 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 their 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.^{19, 20, 21}

The study team conducted quantitative and qualitative analyses to assess whether minorities; women; and minority- and woman-owned businesses face any barriers in the Illinois construction and professional services industries. The study team also examined the potential effects that any such barriers have on the formation and success of minority- and woman-owned businesses and on their participation in and availability for contracts that the Illinois Department of Transportation awards. The study team examined local marketplace conditions primarily in four areas:

- **Human capital**, to assess whether minorities and women face any barriers related to education, employment, and gaining managerial experience in relevant industries;
- **Financial capital**, to assess whether minorities and women face any barriers related to wages, homeownership, personal wealth, and access to 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 in the area of race- and gender-based discrimination as well as from primary research that the study team conducted of current marketplace conditions. Additional quantitative and qualitative analyses of 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. Factors such as education, business experience, and managerial experience have been shown to be related to business success.^{22, 23, 24, 25} Any race- or gender-based barriers in those areas may make it more difficult for minorities and women 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. 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.^{26, 27} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education that they receive.^{28, 29} Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³⁰ In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.³¹ 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.³²

Educational outcomes for minorities in Illinois are similar to those for minorities nationwide. The study team’s analyses of the Illinois 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 Illinois workers that have earned a four-year college degree by racial/ethnic and gender group. As shown in Figure 3-1, Black American, Hispanic American, and Native American workers in Illinois are substantially less likely than non-Hispanic white workers to have four-year college degrees.

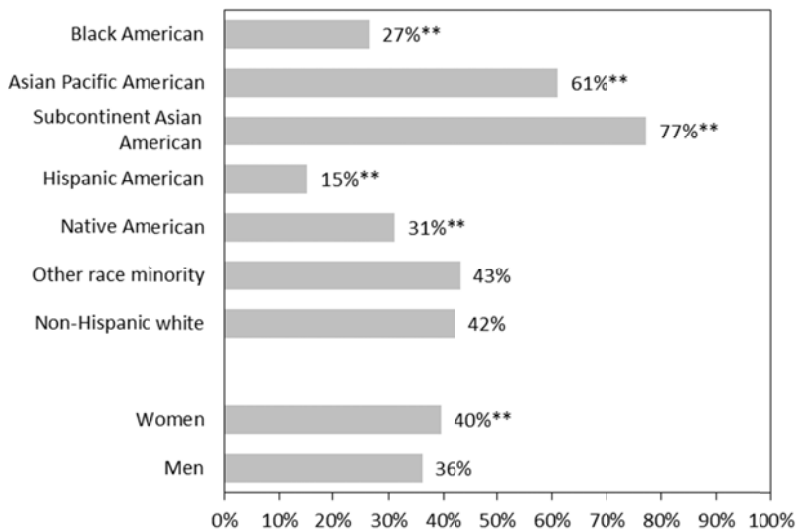
Figure 3-1.
Percentage of all workers 25 and older with at least a four-year degree, Illinois, 2011-2015

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level.

Source:

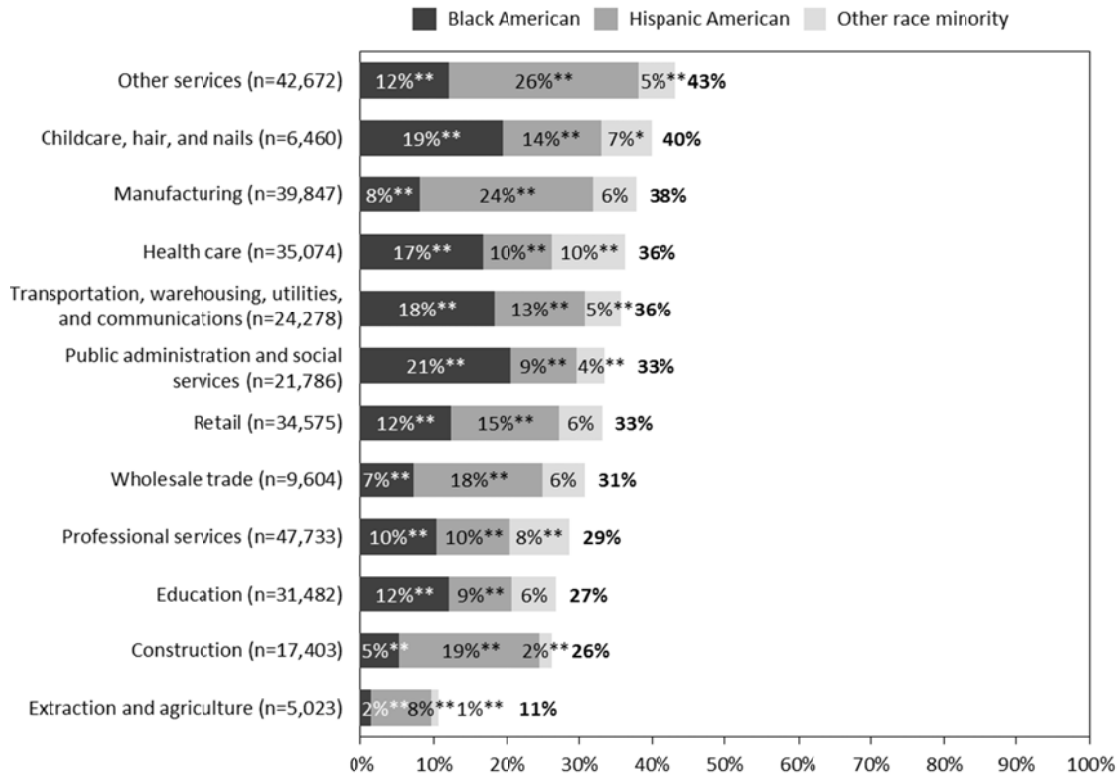
BBC Research & Consulting from 2011-2015 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



Employment and management experience. An important precursor to business ownership and success is acquiring direct work and management experience in relevant industries. Any barriers that limit minorities and women 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 of business ownership and success. However, minorities and women are often unable to acquire relevant work experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{33, 34, 35} When employed, they are also often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.^{36, 37, 38, 39, 40} In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in Illinois and nationwide, which contributes to a number of labor difficulties including difficulties finding jobs and relatively slow wage growth.^{41, 42, 43, 44} The study team’s analyses of the labor force in Illinois are largely consistent with those findings. Figures 3-2 and 3-3 present the representations of minority and women workers in various Illinois industries. As shown in Figure 3-2, the Illinois industries with the highest representations of minority workers are other services; childcare, hair, and nails; and manufacturing. The Illinois industries with the lowest representations of minority workers are education; construction; and extraction and agriculture.

Figure 3-2.
Percent representation of minorities in various industries in Illinois, 2011-2015



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all Illinois workers is 13% for Black Americans, 16% for Hispanic Americans, 6% for other race minorities, and 35% for all minorities considered together.

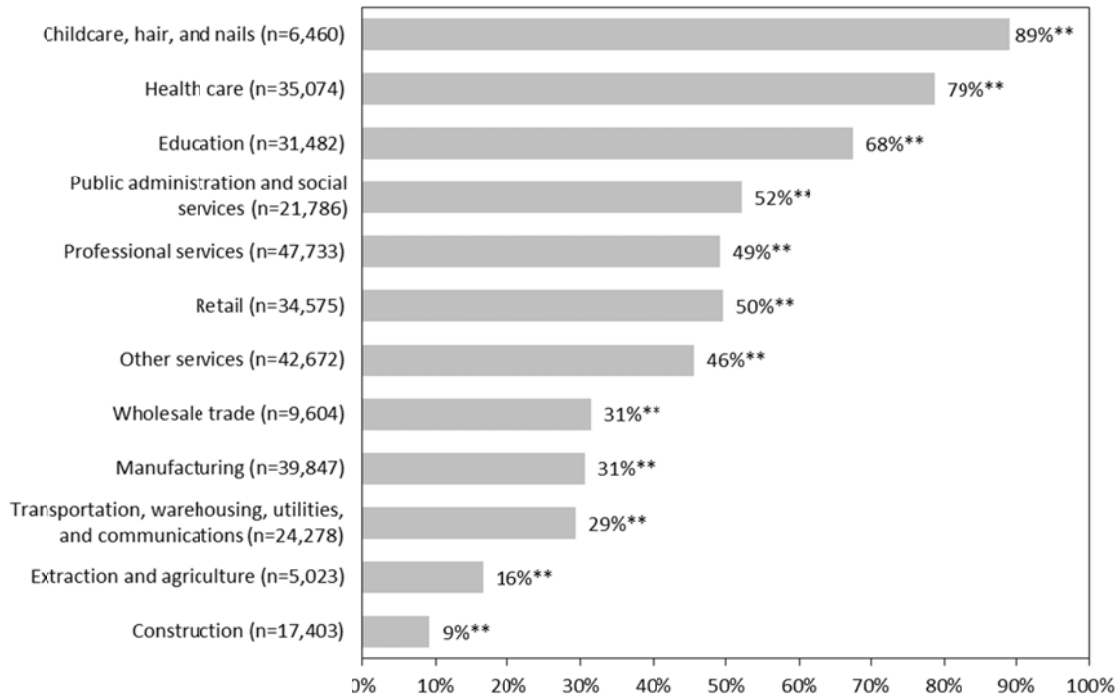
"Other race minority" includes Asian Pacific Americans, Subcontinent Asian Americans, Native Americans, and other races.

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 2011-2015 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 3-3 indicates that the Illinois industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The Illinois industries with the lowest representations of women workers are transportation, warehousing, utilities, and communications; extraction and agriculture; and construction.

Figure 3-3.
Percent representation of women in various industries in Illinois, 2011-2015



Note: *, ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of women among all Illinois 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 2011-2015 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, race- and gender-based discrimination remains a persistent obstacle to greater diversity in management positions.^{45, 46, 47} Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.^{48, 49} Similar outcomes appear to exist for minorities and women in Illinois. The study team examined the concentration of minorities and women in management positions in the Illinois construction and professional services industries. As shown in Figure 3-4:

- Compared to non-Hispanic whites, smaller percentages of Hispanic Americans work as managers in the Illinois construction industry.
- Compared to non-Hispanic whites, smaller percentages of Hispanic Americans work as managers in the Illinois professional services industry.
- Compared to men, a smaller percentage of women work as managers in the Illinois professional services industry.

Figure 3-4.
Percentage of workers who worked as a manager in each study-related industry, Illinois, 2011-2015

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 90% and 95% confidence level, respectively.

"Other race minority" omitted due to small sample size.

† Denotes that statistical significance was not assessed due to small sample sizes.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Illinois	Construction	Professional Services
Race/ethnicity		
Black American	7.6 %	3.3 %
Asian Pacific American	9.3	6.0
Subcontinent Asian American	20.8	9.2
Hispanic American	1.9 **	1.0 *
Native American	6.6	0.0 †
Non-Hispanic white	7.9	3.8
Gender		
Women	7.6 %	2.4 % **
Men	6.7	4.3
All individuals	6.8 %	3.8 %

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.^{50, 51} That lack of experience makes it more 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.^{52, 53, 54} Individuals can acquire financial capital through many sources including employment wages, personal wealth, homeownership, and financing. If race- or gender-based discrimination exists in those capital markets, minorities and women 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 factors unrelated to race and gender.^{55, 56, 57} 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.^{58, 59} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 84 percent the median hourly wage of men.⁶⁰ Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

BBC observed wage gaps in Illinois consistent with the gaps that researchers have observed nationally. Figure 3-5 presents mean annual wages for Illinois workers by race/ethnicity and gender. As shown in Figure 3-5, Black Americans, Hispanic Americans, Native Americans, and other race minorities in Illinois earn substantially less than non-Hispanic whites. In addition, women workers earn substantially less than men. BBC also conducted regression analyses to

assess whether wage disparities exist even after accounting for various race- and gender-neutral factors such as age, education, and family status. Those analyses indicated that being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority is associated with substantially lower earnings than being non-Hispanic white, even after accounting for various race- and gender-neutral factors. Similarly, being a woman is associated with lower earnings than being a man (for details, see Figure C-10 in Appendix C).

Figure 3-5.
Mean annual wages,
Illinois, 2011-2015

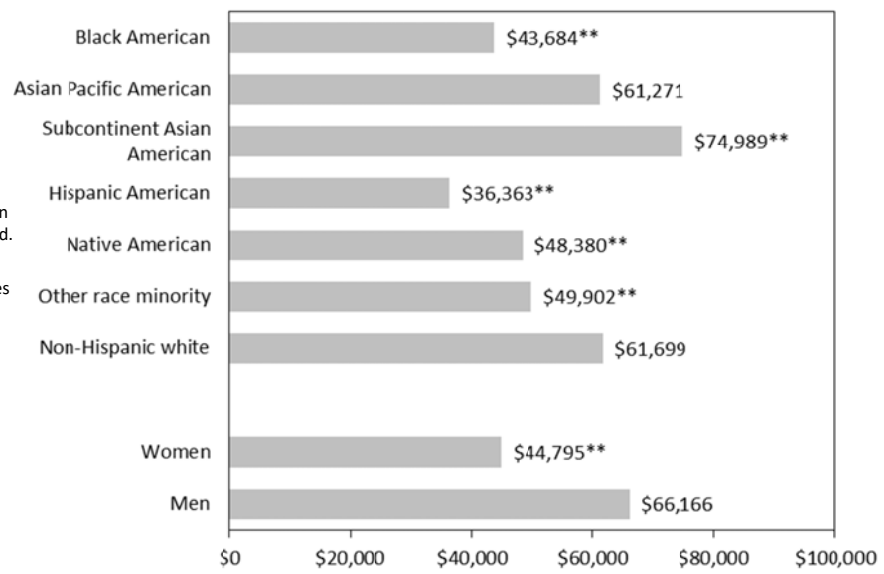
Note:

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) or from men (for women) at the 95% confidence level.

Source:

BBC Research & Consulting from 2011-2015 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/>.



Personal wealth. Another important potential 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.^{61, 62} 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 Illinois and nationwide, approximately one-quarter of Black Americans and Hispanic Americans are living in poverty, about double the comparable rates for non-Hispanic whites.⁶³ 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.⁶⁴

Homeownership. Homeownership and home equity have been shown to be key sources of business capital.^{65, 66} 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.⁶⁷ 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.^{68, 69} 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.^{70, 71} 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.^{72, 73}

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

Figure 3-6.
Home Ownership Rates,
Illinois, 2011-2015

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 2011-2015 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/>.

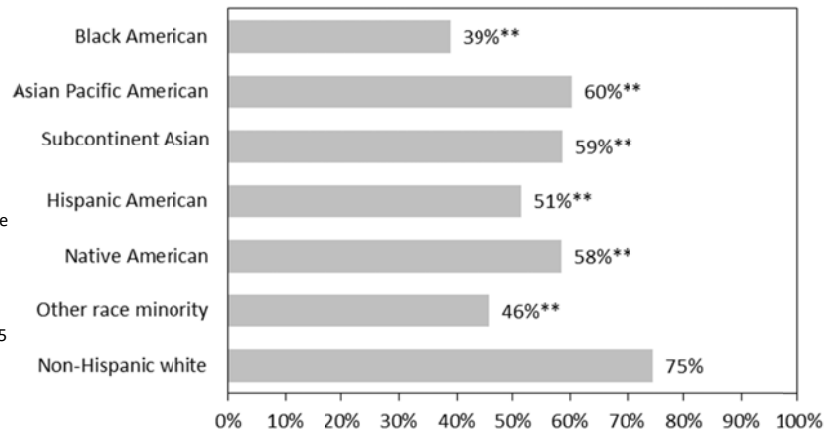
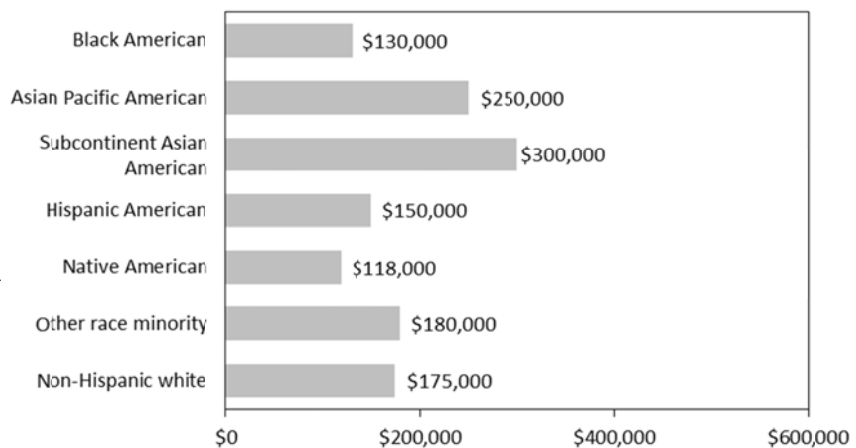


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Illinois. Consistent with national trends, homeowners of certain minority groups—Black Americans, Hispanic Americans, and Native Americans—own homes that, on average, are worth substantially less than those of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

Figure 3-7.
Median home values,
Illinois, 2011-2015

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

Source:
BBC Research & Consulting from 2011-2015 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.^{74, 75, 76, 77, 78, 79} The study team summarizes results related to difficulties that minorities; women; and minority- and woman-owned businesses face in the 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.^{80, 81, 82, 83, 84} Race- and gender-based barriers in home credit markets, as well as the recent foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{85, 86, 87, 88}

To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for Illinois and the United States as a whole. As shown in Figure 3-8, Black Americans, Asian Americans, Hispanic Americans, and Native Americans exhibit higher home loan denial rates than non-Hispanic whites when considering both the United States as a whole and Illinois in particular. In addition, the study team’s analyses indicate that certain minority groups in Illinois are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-15 in Appendix C).

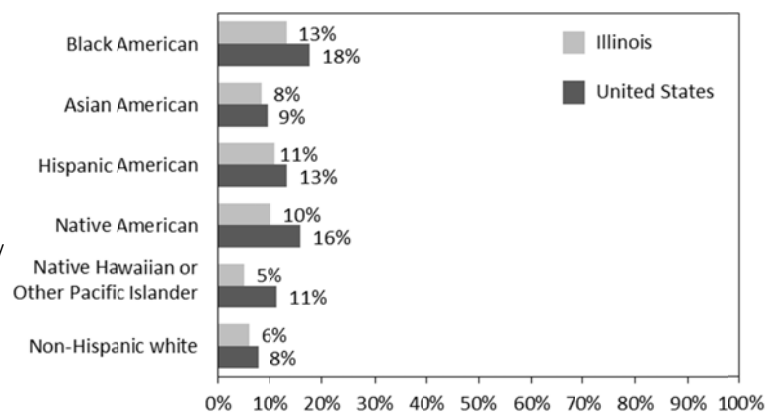
Figure 3-8.
Denial rates of conventional purchase loans for high-income households, Illinois and the United States, 2015

Note:

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

Source:

FFIEC HMDA data 2015. The raw data extract was obtained from the 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.⁸⁹ 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.^{90, 91, 92} In addition, women are less likely to apply for credit and receive loans of less value when they do.^{93, 94} 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.^{95, 96, 97, 98}

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, the number of Black American-owned businesses increased by 35 percent, and the number of Hispanic American-owned businesses increased by 46 percent.⁹⁹ Despite the progress that minorities and women have made with regard to rates of business ownership, 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.^{100, 101, 102, 103} 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.^{104, 105, 106}

The study team examined rates of business ownership in the Illinois construction and professional services industries by race/ethnicity and gender. As shown in Figure 3-9:

- Hispanic Americans and Native Americans exhibit lower rates of business ownership than non-Hispanic whites in the Illinois construction industry.
- Women exhibit lower rates of business ownership than men in the Illinois construction industry.
- Black Americans, Asian Pacific Americans, and Hispanic Americans exhibit lower rates of business ownership than non-Hispanic whites in the Illinois professional services industry.
- Women exhibit lower rates of business ownership than men in the Illinois professional services industry.

Figure 3-9.
Self-employment rates in study-related industries, Illinois, 2011-2015

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 90% and 95% confidence level, respectively.

"Other race minority" omitted due to small sample size.

† Denotes that statistical significance was not assessed due to small sample sizes.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Illinois	Construction	Professional Services
Race/ethnicity		
Black American	21.7 %	4.2 % **
Asian Pacific American	30.1	2.3 **
Subcontinent Asian American	20.3	12.6
Hispanic American	16.4 **	2.2 **
Native American	13.9 **	5.5 †
Non-Hispanic white	24.3	11.5
Gender		
Women	17.6 % **	7.1 % **
Men	<u>23.1</u>	<u>10.9</u>
All individuals	22.6 %	10.0 %

BBC also conducted regression analyses to determine whether differences in business ownership rates between minorities and non-Hispanic whites and between women and men exist even after statistically controlling for various race- and gender-neutral factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. Figure 3-10 presents race- and gender-based factors that were significantly and independently related to business ownership for the construction and professional services industries.

Figure 3-10.
Statistically significant relationships between race/ethnicity and gender and business ownership in study-related industries in Illinois, 2011-2015

Source:
 BBC Research & Consulting from 2011-2015 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 Group	Coefficient
Construction	
Black American	-0.1235
Hispanic American	-0.2655
Women	-0.2849
Professional Services	
Black American	-0.5867
Asian Pacific American	-1.0467
Hispanic American	-0.5910

As shown in Figure 3-10, even after accounting for race- and gender-neutral factors:

- Being Black American or Hispanic American is associated with lower rates of business ownership in the construction industry. In addition, being a woman is associated with lower rates of business ownership in the construction industry.
- Being Black American, Asian Pacific American, or Hispanic American is associated with lower rates of business ownership in the professional services industry.

Thus, disparities in business ownership rates between minorities and non-Hispanic whites and between women and men are not completely explained by differences in race- and gender-neutral factors such as income, education, and familial status. Disparities in business ownership rates exist for several groups in both relevant industries even after accounting for such factors.

D. Business Success

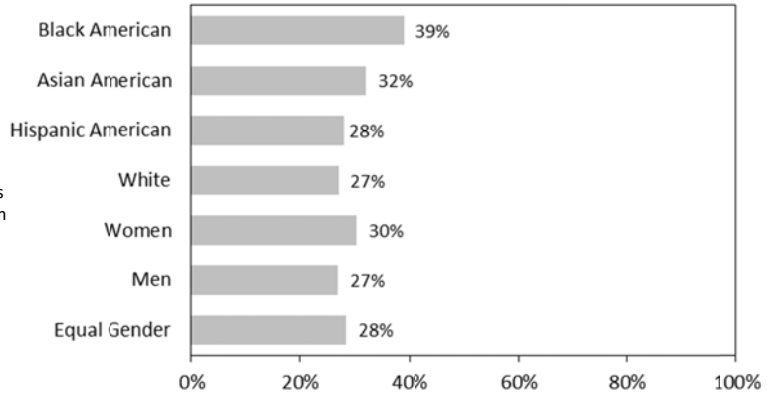
There is a great deal of research indicating that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of transitioning from business ownership to 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 using a number of different indicators such as profits, closure rates, and business size (but also see Robb and Watson 2012).^{107,108, 109} The study team examined data on business closure, business receipts, and business owner earnings to further explore the success of minority- and woman-owned businesses in Illinois.

Business closure. The study team examined rates of closure among Illinois businesses by the race/ethnicity and gender of the owners. Figure 3-11 presents those results. As shown in Figure 3-11, Black American-owned businesses, Asian American-owned businesses, and Hispanic American-owned businesses in Illinois appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses in Illinois 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 Illinois.

Figure 3-11.
Rates of business closure in
Illinois, 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.

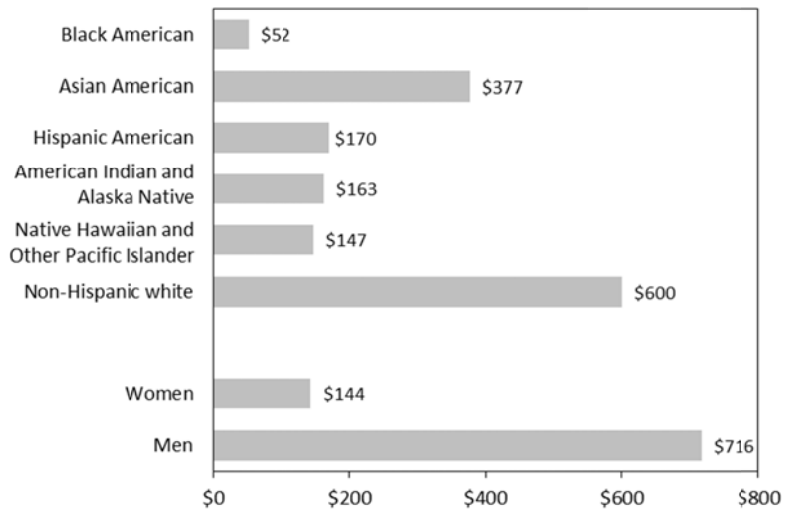


Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in Illinois earn as much as businesses owned by whites or business owned by men, respectively. Figure 3-12 shows mean annual receipts for Illinois business by the race/ethnicity and gender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

Figure 3-12.
Mean annual business
receipts (in thousands),
Illinois, 2012

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 and women in Illinois earn as much from the businesses that they own as non-Hispanic whites and men 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. In addition, women in Illinois earned less from their businesses than men earned from their businesses. BBC also conducted regression analyses to determine whether earnings disparities in Illinois exist even after statistically controlling for

various race- and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that, compared to being an owner of a non-Hispanic white American-owned business in Illinois, being the owner of a Black American-owned business was associated with substantially lower business owner earnings. In addition, compared to being a man in Illinois, being a woman was associated with substantially lower business owner earnings (for details, see Figure C-32 in Appendix C).

Figure 3-13.
Mean annual business owner earnings, Illinois, 2011-2015

Note:

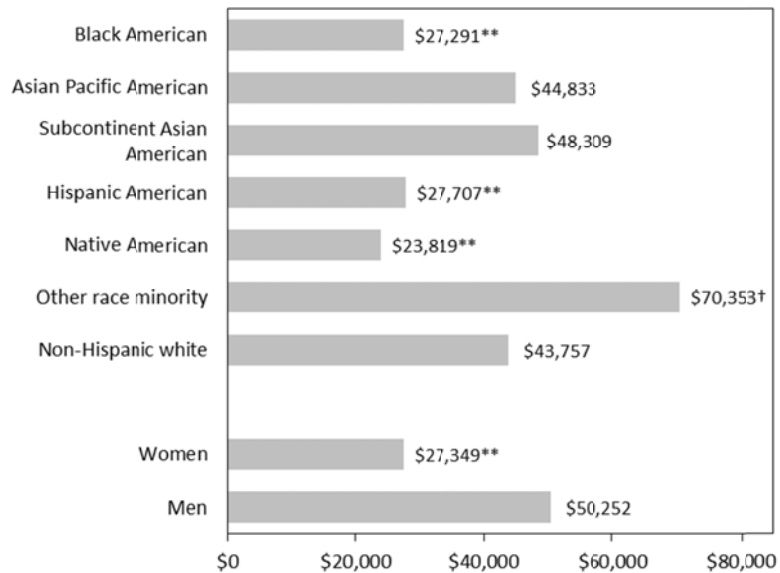
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars

** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level

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

Source:

BBC Research & Consulting from 2011-2015 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/>.



E. Summary

BBC's analyses of marketplace conditions indicate that minorities; women; and minority- and woman-owned businesses face substantial barriers nationwide and in Illinois. Existing research, as well as primary research that the study team conducted, indicate that race- and gender-based 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 race- and gender-based discrimination.

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in relevant Illinois construction and professional services industries and operating those businesses successfully. Any difficulties that minorities and women face in starting and operating businesses may reduce their availability for government agency 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 Illinois marketplace indicates that government agencies in the state may be passively participating in race- and gender-based discrimination that makes it more difficult for minority- and woman-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.

-
- ¹Haney-López, Ian. 2006. *White by Law: The Legal Construction of Race*. New York: NYU Press.
- ²Woodward, Comer Vann. 1955. *The Strange Career of Jim Crow*. Oxford: Oxford University Press.
- ³Prucha, Francis Paul. 1986. *The Great Father: The United States Government and the American Indians*. Lincoln: University of Nebraska Press.
- ⁴Lee, Erika. 2003. *At America's Gates: Chinese Immigration During the Exclusion Era, 1882-1943*. Chapel Hill, NC: University of North Carolina Press.
- ⁵Goldin, Claudia. 2006. "The Quiet Revolution That Transformed Women's Employment, Education, and Family." *The American Economic Review* 96(2):1–21.
- ⁶Loewen, James. 2005. *Sundown Towns: A Hidden Dimension of American Racism*. New York, NY: The New Press.
- ⁷Krohe Jr., James. 2017. *Corn Kings and One-Horse Thieves: A Plain-Spoken History of Mid-Illinois*. Carbondale, IL: Southern Illinois University Press.
- ⁸Dobbin, Frank. 2009. *Inventing Equal Opportunity*. Princeton: Princeton University Press.
- ⁹Holzer, Harry and David Neumark. 2000. "Assessing Affirmative Action." *Journal of Economic Literature* 38(3):483–568
- ¹⁰Kalev, Alexandra, Frank Dobbin, and Erin Kelly. 2006. "Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies." *American Sociological Review* 71(4):589–617.
- ¹¹Kao, Grace and Jennifer S. Thompson. 2003. "Racial and Ethnic Stratification in Educational Achievement and Attainment." *Annual Review of Sociology* 29(1):417–42.
- ¹²DiPrete, Thomas A. and Claudia Buchmann. 2013. *The Rise of Women: The Growing Gender Gap in Education and What It Means for American Schools*. New York: Russell Sage Foundation.
- ¹³Travis, Jeremy, Bruce Western, and Steve Redburn. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. National Research Council. Washington D.C.: Division of Behavioral and Social Sciences and Education. Retrieved January 6, 2015 (http://www.nap.edu/booksearch.php?booksearch=1&record_id=18613&term=Black&chapter=33-69).
- ¹⁴Charles, Camille Zubrinsky. 2003. "The Dynamics of Racial Residential Segregation." *Annual Review of Sociology* 29:167–207.
- ¹⁵Bianchi, Suzanne M., Liana C. Sayer, Melissa A. Milkie, and John P. Robinson. 2012. "Housework: Who Did, Does or Will Do It, and How Much Does It Matter?" *Social Forces* 91(1):55–63.
- ¹⁶*Adarand VII*, 228 F.3d at 1167–76; *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"); *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, *appeal pending*.
- ¹⁷*Adarand VII*, 228 F.3d. at 1168–70; *Western States Paving*, 407 F.3d at 992; *see DynaLantic*, 885 F.Supp.2d 237; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 2015 WL 1396376, *appeal pending*; *Geyer Signal*, 2014 WL 130909297 at *14.
- ¹⁸*Adarand VII* at 1170–72; *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal*, 2014 WL 1309092 at *14.
- ¹⁹*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
- ²⁰*Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).
- ²¹*Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041.
- ²²Fairlie, Robert W. and Alicia M. Robb. 2007. "Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital." *Journal of Labor Economics* 25(2):289–323.
- ²³Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.
- ²⁴Fairlie, Robert W. and Alicia M. Robb. 2009. "Gender Differences in Business Performance: Evidence From the Characteristics of Business Owners Survey." *Small Business Economics* 33(4):375–95.
- ²⁵Hout, Michael and Harvey Rosen. 2000. "Self-Employment, Family Background, and Race." *Journal of Human Resources* 35(4):670–92.
- ²⁶Emmons, William R. and Bryan J. Noeth. 2015. *Why Didn't Higher Education Protect Hispanic and Black Wealth?* St. Louis, MO: Center for Household Financial Stability. Retrieved August 20, 2015 (https://www.stlouisfed.org/~media/Publications/In%20the%20Balance/Images/Issue_12/ITB_August_2015.pdf).
- ²⁷Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (<http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>).

-
- ²⁸ National Center for Education Statistics. 2010. *Status and Trends in the Education of Racial and Ethnic Minorities*. National Center for Education Statistics. Retrieved January 20, 2015 (<http://nces.ed.gov/pubs2010/2010015/tables.asp>).
- ²⁹ Kao, Grace and Jennifer S. Thompson. 2003. "Racial and Ethnic Stratification in Educational Achievement and Attainment." *Annual Review of Sociology* 29(1):417–42.
- ³⁰ U.S. Department of Education Office for Civil Rights. 2014a. *College and Career Readiness*. Washington D.C.: U.S. Department of Education. Retrieved January 3, 2015 (<http://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf>).
- ³¹ U.S. Department of Education Office for Civil Rights. 2014b. *School Discipline, Restraint, and Seclusion Highlights*. Washington D.C.: U.S. Department of Education. Retrieved January 3, 2015 (<http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>).
- ³² Bozkick, Robert and Erich Lauff. 2007. *Education Longitudinal Study of 2002 (ELS:2002): A First Look at the Initial Postsecondary Experiences of the High School Sophomore Class of 2002*. National Center for Education Statistics. Retrieved January 20, 2015 (<http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2008308>).
- ³³ Correll, Shelley J., Stephen Benard, and In Paik. 2007. "Getting a Job: Is There a Motherhood Penalty?" *American Journal of Sociology* 112(5):1297–1339.
- ³⁴ Pager, Devah, Bruce Western, and Bart Bonikowski. 2009. "Discrimination in a Low-Wage Labor Market A Field Experiment." *American Sociological Review* 74(5):777–99.
- ³⁵ Bertrand, Marianne and Sendhil Mullainathan. 2004. "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination." *American Economic Review* 94(4):991–1013.
- ³⁶ Scheider, Jessica and Elise Gould. 2016. "'Women's Work' and the Gender Pay Gap: How Discrimination, Societal Norms, and Other Forces affect Women's Occupational Choices." Washington D.C.: Economic Policy Institute. Retrieved July 25, 2016 (<http://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/>).
- ³⁷ Beck, E. M., Patrick M. Horan, and Charles M. Tolbert II. 1980. "Industrial Segmentation and Labor Market Discrimination." *Social Problems* 28(2):113–30.
- ³⁸ Catanzarite, Lisa. 2003. "Race-Gender Composition and Occupational Pay Degradation." *Social Problems* 50(1):14–37.
- ³⁹ Cohen, Philip N. and Matt L. Huffman. 2003. "Occupational Segregation and the Devaluation of Women's Work across U.S. Labor Markets." *Social Forces* 81(3):881–908.
- ⁴⁰ Huffman, Matt L. and Philip N. Cohen. 2004. "Racial Wage Inequality: Job Segregation and Devaluation across U.S. Labor Markets." *American Journal of Sociology* 109(4):902–36.
- ⁴¹ Travis, Jeremy, Bruce Western, and Steve Redburn. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. National Research Council. Washington D.C.: Division of Behavioral and Social Sciences and Education. Retrieved January 6, 2015 (http://www.nap.edu/booksearch.php?booksearch=1&record_id=18613&term=Black&chapter=33-69).
- ⁴² Sakala, Leah. 2014. *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*. Northampton, MA: Prison Policy Initiative. Retrieved July 26, 2015 (<http://www.prisonpolicy.org/reports/rates.html>).
- ⁴³ Pager, Devah. 2003. "The Mark of a Criminal Record." *American Journal of Sociology* 108(5):937–75.
- ⁴⁴ Western, Bruce and Becky Pettit. 2010. "Incarceration & Social Inequality." *Daedalus* 139(3):8–19.
- ⁴⁵ Wilson, George and Debra Branch McBrier. 2005. "Race and Loss of Privilege: African American/White Differences in the Determinants of Job Layoffs From Upper-Tier Occupations." *Sociological Forum* 20(2):301–21.
- ⁴⁶ Roscigno, Vincent J., Lisette M. Garcia, and Donna Bobbitt-Zeher. "Social Closure and Processes of Race/Sex Employment Discrimination." *The Annals of the American Academy of Political and Social Science* 609 (1): 16-48.
- ⁴⁷ Roscigno, Vincent J. Lisa M. Williams, and Reginald A. Byron. 2012. "Workplace Racial Discrimination and Middle Class Vulnerability." *American Behavioral Scientist* 56(5):696-710.
- ⁴⁸ Smith, Ryan A. 2002. "Race, Gender, and Authority in the Workplace: Theory and Research." *Annual Review of Sociology* 28:509–42.
- ⁴⁹ Wilson, George. 1997. "Pathways to Power: Racial Differences in the Determinants of Job Authority." *Social Problems* 44(1):38–54.
- ⁵⁰ Hout, Michael and Harvey Rosen. 2000. "Self-Employment, Family Background, and Race." *Journal of Human Resources* 35(4):670–92.

-
- ⁵¹ Fairlie, Robert W. and Alicia M. Robb. 2007. "Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital." *Journal of Labor Economics* 25(2):289–323.
- ⁵² Robb, Alicia and Robert Fairlie. 2007. "Access to Financial Capital among U.S. Businesses: The Case of African American Firms." *The Annals of the American Academy of Political and Social Science* 613(1):47–72.
- ⁵³ Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." *Review of Income & Wealth* 58(2):279–306.
- ⁵⁴ Bahn, Kate, Regina Willensky, and Annie McGrew. 2016. *A Progressive Agenda for Inclusive and Diverse Entrepreneurship*. Washington D.C.: Center for American Progress. Retrieved December 1, 2016 (<https://www.americanprogress.org/issues/economy/reports/2016/10/13/146019/a-progressive-agenda-for-inclusive-and-diverse-entrepreneurship/>).
- ⁵⁵ Cha, Youngjoo and Kim A. Weeden. 2014. "Overwork and the Slow Convergence in the Gender Gap in Wages." *American Sociological Review* 79(3):457–84.
- ⁵⁶ McCall, Leslie. 2001. "Sources of Racial Wage Inequality in Metropolitan Labor Markets: Racial, Ethnic, and Gender Differences." *American Sociological Review* 66(4):520–41.
- ⁵⁷ Tomaskovic-Devey, Donald. 1993b. "The Gender and Race Composition of Jobs and the Male/Female, White/Black Pay Gaps." *Social Forces* 72(1):45–76.
- ⁵⁸ Economic Policy Institute. 2012a. *African Americans*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (<http://stateofworkingamerica.org/files/book/factsheets/african-americans.pdf>).
- ⁵⁹ Economic Policy Institute. 2012b. *Latinos*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (<http://www.stateofworkingamerica.org/fact-sheets/latinos/>).
- ⁶⁰ Economic Policy Institute. 2012c. *Women*. Washington D.C.: Economic Policy Institute. Retrieved January 20, 2015 (<http://www.stateofworkingamerica.org/fact-sheets/women/>).
- ⁶¹ Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (<http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>).
- ⁶² Sullivan, Laura, Tatjana Meschede, Lars Dietrich, Thomas Shapiro, Amy Traub, Catherine Ruetschlin, and Tamara Draut. 2015. *The Racial Wealth Gap: Why Policy Matters*. New York: Demos. Retrieved August 28, 2015 (http://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf).
- ⁶³ Kaiser Health Foundation. 2015. "Poverty by Race/Ethnicity." Retrieved May 10, 2016 (<http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/>).
- ⁶⁴ Chang, Mariko Lin. 2010. *Shortchanged: Why Women Have Less Wealth and What Can Be Done About It*. Oxford: Oxford University Press.
- ⁶⁵ Berger, Allen N. and Gregory F. Udell. 1998. "The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle." *Journal of Banking & Finance* 22(6–8):613–73.
- ⁶⁶ Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." *Review of Income & Wealth* 58(2):279–306.
- ⁶⁷ U. S. Census Bureau. 2013a. "American Community Survey 2013 1 Year Estimates." Retrieved January 20, 2015 (<http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>).
- ⁶⁸ Turner, Margery Austen, Rob Santos, and Diane K. Levy, Doug Wissoker, Claudia Aranda, and Rob Pitingolo. 2013. *Housing Discrimination Against Racial and Ethnic Minorities 2012*. Washington, D.C.: U.S. Department of Housing and Urban Development. Retrieved January 2, 2015 (http://www.huduser.org/portal/publications/fairhsg/hsg_discrimination_2012.html).
- ⁶⁹ Roscigno, Vincent J., Diana L. Karafin, and Griff Tester. 2009. "The Complexities and Processes of Racial Housing Discrimination." *Social Problems* 56(1): 49–69.
- ⁷⁰ Kochhar, Rakesh and Richard Fry. 2014. "Wealth Inequality Has Widened along Racial, Ethnic Lines since End of Great Recession." *Pew Research Center*. Retrieved December 29, 2014 (<http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>).
- ⁷¹ Burd-Sharps, Sarah and Rebecca Rasch. 2015. *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*. Brooklyn, NY: Social Science Research Council. Retrieved June 23, 2015. (<http://www.ssrc.org/publications/view/129CDF74-1F11-E511-940A-005056AB4B80/>).
- ⁷² Charles, Camille Zubrinsky. 2003. "The Dynamics of Racial Residential Segregation." *Annual Review of Sociology* 29:167–207.

-
- ⁷³ Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. 2013. *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*. Waltham, MA: Institute on Assets and Social Policy. Retrieved January 2, 2015 (<http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>).
- ⁷⁴ Blanchard, Lloyd, Bo Zhao, and John Yinger. 2008. "Do Lenders Discriminate Against Minority and Woman Entrepreneurs?" *Journal of Urban Economics* 63(2):467-97.
- ⁷⁵ Cavalluzzo, Ken S., Linda C. Cavalluzzo, and John D. Wolken. 2002. "Competition, Small Business Financing, and Discrimination: Evidence from a New Survey." *The Journal of Business* 75(4):641-79.
- ⁷⁶ Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth, and Discrimination." *The Journal of Business* 78(6):2153-78.
- ⁷⁷ Gruenstein Bocian, Debbie, Wei Li, Carolina Reid, and Robert G. Quercia. 2011. *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*. Washington D.C.: Center for Responsible Lending. Retrieved January 21, 2015
- ⁷⁸ Mijid, Naranchimeg and Alexandra Bernasek. 2013. "Gender and the Credit Rationing of Small Businesses." *The Social Science Journal* 50(1):55-65.
- ⁷⁹ Ross, Stephen L. and John Yinger. 2002. *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*. Cambridge, MA: MIT Press.
- ⁸⁰ Ross, Stephen L., Margery Austin Turner, Erin Godfrey, and Robin R. Smith. 2008. "Mortgage Lending in Chicago and Los Angeles: A Paired Testing Study of the Pre-Application Process." *Journal of Urban Economics* 63(3):902-19.
- ⁸¹ Dymski, Gary, Jesus Hernandez, and Lisa Mohanty. 2013. "Race, Gender, Power, and the US Subprime Mortgage and Foreclosure Crisis: A Meso Analysis." *Feminist Economics* 19(3):124-51.
- ⁸² Fishbein, Allen J. and Patrick Woodall. 2006. *Women are Prime Targets Subprime: Women Are Disproportionately Represented in High-Cost Mortgage Market*. Washington D.C.: Consumer Federation of America. Retrieved January 5, 2015 (http://policylinkcontent.s3.amazonaws.com/WomenPrimeTargetsSubprimeLending_CFA_0.pdf).
- ⁸³ Williams, Richard, Reynold Nesiba, and Eileen Diaz McConnell. 2005. "The Changing Face of Inequality in Home Mortgage Lending." *Social Problems* 52(2):181-208.
- ⁸⁴ Wyly, Elvin and C. S. Ponder. 2011. "Gender, Age, and Race in Subprime America." *Housing Policy Debate* 21(4):529-64.
- ⁸⁵ Baker, Amy Castro. 2011. *Tearing Down the Wealth of Women*. New York: Women's Media Center. Retrieved January 5, 2015 (<http://www.womensmediacenter.com/feature/entry/tearing-down-the-wealth-of-women>).
- ⁸⁶ Baker, Amy Castro. 2014. "Eroding the Wealth of Women: Gender and the Subprime Foreclosure Crisis." *Social Service Review* 88(1):59-91.
- ⁸⁷ Rugh, Jacob S. and Douglas S. Massey. 2010. "Racial Segregation and the American Foreclosure Crisis." *American Sociological Review* 75(5):629-51.
- ⁸⁸ Burd-Sharps, Sarah and Rebecca Rasch. 2015. *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*. Brooklyn, NY: Social Science Research Council. Retrieved June 23, 2015. (<http://www.ssrc.org/publications/view/129CDF74-1F11-E511-940A-005056AB4B80/>).
- ⁸⁹ Bone, Sterling A., Glenn L. Christensen, and Jerome D. Williams. 2014. "Rejected, Shackled, and Alone: The Impact of Systematic Restricted Choice on Minority Consumers' Construction of Self." *Journal of Consumer Research* 41(2): 451-474.
- ⁹⁰ Blanchard, Lloyd, Bo Zhao, and John Yinger. 2008. "Do Lenders Discriminate Against Minority and Woman Entrepreneurs?" *Journal of Urban Economics* 63(2):467-97.
- ⁹¹ Blanchflower, David G., Phillip B. Levine, and David J. Zimmerman. 2003. "Discrimination in the Small Business Credit Market." *The Review of Economics and Statistics* 85(4):930-43.
- ⁹² Bates, Timothy and Alicia Robb. 2016. "Impacts of Owner Race and Geographic Context on Access to Small Business Financing." *Economic Development Quarterly* 30(2): 159-170.
- ⁹³ Mijid, Naranchimeg and Alexandra Bernasek. 2013. "Gender and the Credit Rationing of Small Businesses." *The Social Science Journal* 50(1):55-65.
- ⁹⁴ Treichel, Monica Zimmerman and Jonathan A. Scott. 2006. "Women-Owned Businesses and Access to Bank Credit: Evidence from Three Surveys Since 1987." *Venture Capital* 8(1):51-67.
- ⁹⁵ Coleman, Susan and Alicia Robb. 2009. "A Comparison of New Firm Financing by Gender: Evidence from the Kauffman Firm Survey Data." *Small Business Economics* 33(4):397-411.
- ⁹⁶ Robb, Alicia and Robert Fairlie. 2007. "Access to Financial Capital among U.S. Businesses: The Case of African American Firms." *The Annals of the American Academy of Political and Social Science* 613(1):47-72.

-
- ⁹⁷ Robb, Alicia, Susan Coleman, and Dane Stangler. 2014. *Sources of Economic Hope: Women's Entrepreneurship*. Kansas City, KS: Ewing Marion Kauffman Foundation. Retrieved November 3, 2016 (<http://www.kauffman.org/what-we-do/research/2014/11/sources-of-economic-hope-womens-entrepreneurship>).
- ⁹⁸ Robb, Alicia. 2013. *Access to Capital among Young Firms, Minority-owned Firms, Woman-owned Firms, and High-tech Firms*. Washington D.C.: Small Business Administration Office of Advocacy. Retrieved January 5, 2015 ([https://www.sba.gov/sites/default/files/files/rs403tot\(2\).pdf](https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf)).
- ⁹⁹ Public Information Office. 2015. Number of Minority- and Woman-Owned Firms Each Increases by More Than 2 Million Nationally. Washington D.C.: United States Census Bureau. Retrieved November 11, 2016 (<http://www.census.gov/newsroom/press-releases/2015/cb15-209.html>)
- ¹⁰⁰ Fairlie, Robert W. and Alicia M. Robb. 2009b. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." *Small Business Economics* 33(4):375–95.
- ¹⁰¹ Fairlie, Robert W. 2006. "Entrepreneurship among Disadvantaged Groups: Women, Minorities, and the Less Educated." Pp. 437–75 in *The Life Cycle of Entrepreneurial Ventures*, edited by Simon Parker. Springer Science & Business Media.
- ¹⁰² Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.
- ¹⁰³ Bahn, Kate, Regina Willensky, and Annie McGrew. 2016. *A Progressive Agenda for Inclusive and Diverse Entrepreneurship*. Washington D.C.: Center for American Progress. Retrieved December 1, 2016 (<https://www.americanprogress.org/issues/economy/reports/2016/10/13/146019/a-progressive-agenda-for-inclusive-and-diverse-entrepreneurship/>).
- ¹⁰⁴ Budig, Michelle J. 2006b. "Intersections on the Road to Self-Employment: Gender, Family and Occupational Class." *Social Forces* 84(4):2223–39.
- ¹⁰⁵ Lofstrom, Magnus and Timothy Bates. 2013. "African Americans' Pursuit of Self-Employment." *Small Business Economics* 40(1):73–86.
- ¹⁰⁶ Bahn, Kate, Regina Willensky, and Annie McGrew. 2016. *A Progressive Agenda for Inclusive and Diverse Entrepreneurship*. Washington D.C.: Center for American Progress. Retrieved December 1, 2016 (<https://www.americanprogress.org/issues/economy/reports/2016/10/13/146019/a-progressive-agenda-for-inclusive-and-diverse-entrepreneurship/>).
- ¹⁰⁷ Fairlie, Robert W. and Alicia M. Robb. 2008. *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, Mass.: MIT Press.
- ¹⁰⁸ Coleman, Susan and Alicia Robb. 2009. "A Comparison of New Firm Financing by Gender: Evidence from the Kauffman Firm Survey Data." *Small Business Economics* 33(4):397–411.
- ¹⁰⁹ Robb, Alicia M. and John Watson. 2012. "Gender Differences in Firm Performance: Evidence from New Ventures in the United States." *Journal of Business Venturing* 27(5):544–58.

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 Illinois Department of Transportation (IDOT) uses to award contracts; the contracts that the study team analyzed as part of the disparity study; and the process that the study team used to collect relevant prime contract and subcontract data. Chapter 4 is organized into seven parts:

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

A. Overview of Contracting Policies

IDOT is responsible for maintaining and regulating transportation and transportation-related infrastructure across the state of Illinois. IDOT's Bureau of Construction is responsible for managing construction-related projects and IDOT's Bureau of Design and Environment manages construction-related professional services projects. In general, all transportation-related construction services and professional services are procured in the same manner. The contracting policies that IDOT uses are governed by Illinois State Administrative Code Title 44: Part 6 and can be categorized into four general procurement categories:

- Competitive sealed bids;
- Competitive sealed proposals;
- Small or sole source contracts; and
- Emergency contracts.¹

Contractors wishing to bid on transportation-related construction or professional services contracts must be prequalified with IDOT in one or more work types relevant to the type of work that IDOT requires. As part of the prequalification process, contractors must provide information related to their work experience, availability of equipment, and the financial condition of their businesses. Businesses then receive a prequalification rating based on a combination of their financial and work ratings.

¹ Title 44 Illinois Administrative Code Section 650.

Competitive sealed bids. Most IDOT transportation-related construction projects are let according to state guidelines for competitive sealed bidding and require IDOT to issue an invitation for bids.² Invitations for bids must include instructions and information concerning bid submission requirements; the time and location for bid opening; contract terms and conditions; and instructions for obtaining work estimates and specifications.

Transportation Bulletin. IDOT advertises invitations for bids seven times per year via the agency's Transportation Bulletin. Once advertisements have been prepared, they are published on IDOT's website and emailed to subscribers of the agency's electronic subscription service. Although state code requires invitations for bids to be published to the Transportation Bulletin at least 14 days prior to the opening of bids, in an effort to encourage more competitive bidding, IDOT advertises Transportation Bulletins at least 21 days before bid opening dates. Along with the Transportation Bulletin, proposals and plans for each project are posted to IDOT's website.

Bid and award process. IDOT collects all bids in a locked bid box or electronically through the agency's EBids system. Bids are opened and made public at the time and location specified in the invitation for bids. During bid opening, the name and price of each bidder is read aloud or documented for public inspection after contract award. Once all bids are opened and recorded, IDOT's Awards Committee reviews each bid for responsiveness and makes an award to the lowest responsive and responsible bidder.

Competitive sealed proposals. Under state law, IDOT has the authority to procure transportation-related construction services and professional services by a competitive sealed proposals process when it determines that competitive sealed bidding is either not practicable or not advantageous to the agency.³ A determination to use a competitive sealed proposals process must be made in writing to IDOT's Chief Procurement Officer. The competitive sealed proposals process differs from that of competitive sealed bids process in two key ways. First, under the competitive sealed proposals process, IDOT may conduct comparative evaluations of proposals using evaluations factors set forth in the request for proposals. Second, under the competitive sealed proposals process, IDOT may also hold discussions with competing offerors and request best and final offers.

Small or sole source contracts. Under state code, IDOT reserves the right to procure construction services and construction-related professional services worth \$100,000 or less using a small contracts process. IDOT may procure contracts of that size without notice, competition, or the use of any other procurement processes.⁴ IDOT may also execute a sole source purchase when a single source is the only economically feasible source capable of providing the required service or material. IDOT lets very few projects using small or sole source procedures.

Emergency contracts. State code allows IDOT to execute a contract without the use of competitive purchasing procedures when a threat to public health or safety exists or when an

² Illinois Administrative Code Title 44 Subpart D.

³ Illinois Administrative Code Title 44 Subpart E.

⁴ Illinois Administrative Code Title 44 Section 6.100.

immediate purchase is needed to repair state property.⁵ IDOT is required to provide a written description of the emergency and reasons for selecting the specific contractor as part of the contract file. Notice of emergency contracts must be published to IDOT's Transportation Bulletin within five days of contract award. The term of an initial emergency contract cannot exceed 90 days, and the contract may only be extended if IDOT's Chief Procurement Officers determines that additional time is required to mitigate the emergency and a public hearing is held in accordance with state code.

B. Collection and Analysis of Contract Data

BBC Research & Consulting (BBC) collected data on transportation-related construction and professional services prime contracts and subcontracts that IDOT awarded during the study period. The study team collected data from IDOT's Bureau of Construction; Bureau of Design and Environment; and Bureau of Local Roads and Streets to serve as the basis for key disparity study analyses including the utilization, availability, and disparity analyses. The study team collected the most comprehensive set of data that was available on prime contracts and subcontracts that IDOT awarded during the study period (i.e., October 1, 2012 through September 30, 2016). BBC sought data that included information about prime contractors and subcontractors regardless of the race/ethnicity and gender of their owners or their statuses as Disadvantaged Business Enterprises (DBEs).

As part of its implementation of the Federal DBE Program, IDOT applied DBE contract goals to various individual construction and professional services contracts to meet its overall goal for DBE participation on federally-funded projects. IDOT also applied DBE contract goals to many of its state-funded projects. Combined, IDOT applied DBE goals to 92 percent of its transportation-related construction and professional services spend during the study period.

Prime contract data collection. IDOT provided the study team with electronic data on the transportation-related construction and professional services prime contracts that the agency awarded during the study period. BBC collected the following information about each relevant prime contract:

- Contract or procurement number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Paid-to-date amount;
- Location of work;
- Prime contractor name; and
- Prime contractor identification number.

⁵ Illinois Administrative Code Title 44 Section 6.120.

IDOT advised the study team on how to interpret the provided data including how to identify unique bid opportunities.

Subcontract data collection. IDOT also provided BBC with electronic data on subcontracts that the agency awarded during the study period that were associated with transportation-related prime contracts. BBC collected the following information about each relevant subcontract:

- Associated prime contract number;
- Award amount (including change orders and amendments);
- Paid-to-date amount;
- Description of work; and
- Subcontractor name.

BBC collected information for nearly \$2 billion worth of subcontracting that IDOT awarded during the study period.

Contracts included in study analyses. The study team collected information on 4,253 prime contracts and 13,173 associated subcontracts that IDOT awarded during the study period in the areas of transportation-related construction and professional services, accounting for more than \$8 billion. Figure 4-1 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 IDOT contracts included in the study

Note:

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

Source:

BBC Research & Consulting from IDOT contract data.

Contract Type	Number	Dollars (Millions)
Construction		
FHWA-funded	11,707	\$5,761
State-funded	4,931	1,615
Total construction	16,638	\$7,375
Professional services		
FHWA-funded	626	\$492
State-funded	162	181
Total professional services	788	\$674
Total contracts		
FHWA-funded	12,333	\$6,253
State-funded	5,093	\$1,796
Total	17,426	\$8,049

Prime contract and subcontract amounts. For each contract included in the study team’s analyses, BBC examined the dollars that IDOT awarded to each prime contractor and the dollars that the prime contractor awarded to any subcontractors.

- If a contract did not include any subcontracts, BBC attributed the entire amount paid during the study period to the prime contractor.

- If a contract included subcontracts, BBC calculated subcontract amounts as the total awarded to each subcontractor during the study period. BBC then calculated the prime contract amount as the total amount awarded during the study period less the sum of dollars awarded to all subcontractors.

C. Collection of Vendor Data

IDOT maintains a list of businesses that have worked with the agency on transportation-related contraction and professional services contracts as well as a list of prequalified vendors. IDOT uses those databases to notify qualified businesses about bid opportunities. The study team compiled the following information on businesses that participated in IDOT transportation-related construction and professional services contracts that the agency awarded during the study period:

- Business name;
- Addresses and phone numbers;
- Ownership status (i.e., whether each business was minority- or woman-owned);
- Ethnicity of ownership (if minority-owned);
- DBE certification status;
- Primary line of work;
- Business size;
- Year of establishment; and
- Additional contact information.

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

- IDOT contract data;
- IDOT vendor lists;
- Illinois Unified Certification Program (UCP) lists;
- State of Illinois Business Enterprise Program certification list;
- City of Chicago and Cook County certification lists;
- Other city and county minority- and woman-owned business lists;⁶
- 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;

⁶ The study team collected minority- and woman-owned business lists from the City of Rockford, the City of Peoria, and DuPage County.

- Business websites; and
- Reviews that IDOT conducted of study information.

D. Relevant Geographic Market Area

The study team used IDOT's contracting and vendor data to help determine the relevant geographic market area—the geographical area in which the agency spends the substantial majority of its contracting dollars—for the study. The study team's analysis showed that 88 percent of IDOT's transportation-related construction and professional services contracting dollars during the study period went to businesses with locations in Illinois, indicating that Illinois should be considered the relevant geographic market area for the study. BBC's analyses—including the availability analysis and analyses of marketplace conditions—focused on Illinois.

E. Relevant Types of Work

For each prime contract and subcontract, the study team determined the prime contractor's *subindustry* that best characterized the business's primary line of work (e.g., highway, street, and bridge construction). BBC identified subindustries based on IDOT contract data; telephone surveys that BBC conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. Figure 4-2 presents the dollars that the study team examined in the various transportation-related construction and professional services subindustries that BBC included in its analyses.

The study team combined related work areas that accounted for relatively small percentages of total contracting dollars into two "other" subindustries—"other construction services" and "other construction materials." For example, the contracting dollars that IDOT awarded to contractors for "glass and glazing" represented less than 1 percent of total IDOT contract dollars that BBC examined in the study. BBC combined "glass and glazing" with other construction services subindustries that also accounted for relatively small percentages of total contracting 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:

- Were classified in subindustries that included vertical construction (e.g., commercial building contractors) (\$41 million of associated contract dollars);
- Were classified in industries that were not directly related to transportation-related contracting (e.g., business consulting services) (\$40 million of associated contract dollars); or
- Could not be classified into a particular subindustry (\$22 million of associated contract dollars).

Combined, those contracts accounted for less than one percent of IDOT's transportation-related contracting spend.

**Figure 4-2.
IDOT contract dollars
by subindustry**

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

Source:
BBC Research & Consulting from IDOT contract data.

Industry	Total (in Millions)
Highway, street, and bridge construction	\$4,953
Engineering	566
Concrete work	477
Excavation, grading, drainage, drilling, and demolition	451
Electrical work, lighting, and signal systems	351
Painting, striping, and marking	260
Concrete and related products	150
Water, sewer, and utility lines	143
Fencing, guardrails, barriers, and signs	103
Environmental services	100
Steel building and structural erection	100
Other construction services	80
Landscaping	79
Flagging services	78
Trucking, hauling, and storage	41
Rebar and reinforcing steel	31
Testing and inspection	29
Surveying and mapmaking	10
Architectural and design services	10
Construction management	9
Railroad construction	7
Landscape architecture	7
Transportation planning services	6
Other construction materials	4
Dam and marine construction	3
Heavy construction equipment	1
Total	\$8,049

F. Collection of Bid and Proposal Data

BBC conducted a case study analysis of bids and proposals for a sample of contracts that IDOT awarded during the study period. IDOT provided documents related to bid, proposal, and other related information to the BBC study team for those contracts. BBC successfully collected and examined bid and proposal information for 3,149 construction and 300 professional services contracts that IDOT awarded during the study period. For details about the case study analysis, see Chapter 7.

G. Agency Review Process

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

CHAPTER 5.

Availability Analysis

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on the Illinois Department of Transportation's (IDOT's) transportation-related construction and professional services prime contracts and subcontracts.¹ Chapter 5 describes the availability analysis in seven parts:

- A. Purpose of the availability analysis;
- B. Potentially available businesses;
- C. Businesses in the availability database;
- D. Availability calculations;
- E. Availability results;
- F. Base figure for overall DBE goal; and
- G. Implications for DBE contract goals.

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for IDOT prime contracts and subcontracts to inform the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. In addition, BBC used availability analysis results as inputs in the disparity analysis. In the disparity analysis, BBC compared the percentage of IDOT contract dollars that went to minority- and woman-owned businesses during the study period (i.e., *participation* or *utilization*) to the percentage of dollars that one might expect those businesses to receive based on their availability for specific types and sizes of IDOT prime contracts and subcontracts (i.e., *availability*).² Comparisons between participation and availability allowed the study team to determine whether any minority- or woman-owned business groups were *underutilized* during the study period relative to their availability for IDOT work (for details, see Chapter 7).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work (i.e., subindustries) related to the types of transportation-related construction and professional services prime contracts and subcontracts that IDOT awarded during the study period. BBC began the availability analysis by identifying the specific subindustries in which IDOT spends the majority of its contracting

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 The study period for the disparity study was October 1, 2012 through September 30, 2016.

dollars (i.e., *relevant work types*) as well as the geographic areas in which the majority of the businesses with which IDOT spends those contracting dollars are located (i.e., *relevant geographic market area*).³

Once BBC identified IDOT's relevant subindustries and its relevant geographic market area, the study team 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. 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 relevant business population operating in Illinois. 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. BBC's approach allowed the study team to estimate the availability of minority-owned businesses and woman-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 Illinois businesses that are potentially available for IDOT construction and professional services prime contracts and subcontracts.⁴ BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of Illinois businesses—that is, not only those businesses that are minority- and woman-owned but *all* businesses—that perform work in relevant subindustries. BBC developed that phone book primarily based on information from Dun & Bradstreet (D&B) Marketplace.⁵ 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 IDOT awarded during the study period. BBC obtained listings on 16,358 Illinois businesses that do work in relevant subindustries. However, BBC did not have working phone numbers for 2,203 of those businesses. BBC attempted availability surveys with the remaining 14,155 business establishments.

Availability survey information. The BBC project team conducted telephone 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;
- Role as a contractor (i.e., prime contractor, subcontractor, or both);
- Interest in performing work for IDOT;

³ BBC identified the relevant geographic market area for the disparity study as the entire state of Illinois.

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

⁵ D&B Marketplace is accepted as the most comprehensive and unbiased source of business listings in the nation.

- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

Potentially available businesses. BBC considered businesses to be potentially available for IDOT prime contracts or subcontracts if they reported having a location in Illinois and reported possessing *all* of the following characteristics:

- Being a private business (as opposed to a nonprofit organization);
- Having performed work relevant to IDOT’s transportation-related construction or professional services contracts;
- Having bid on or performed construction or professional services work in either the public sector or private sector in Illinois in the past five years;
- Being able to perform work or serve customers in the geographical area in which the work took place; and
- Being interested in performing IDOT work.⁶

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

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

C. Businesses in the Availability Database

After conducting availability surveys with thousands of local businesses, BBC developed a database of information about businesses that are potentially available for IDOT’s transportation-related construction and professional services contracts. Information from the database allowed BBC to develop an accurate assessment of businesses that are ready, willing, and able to perform work for IDOT. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The information in Figure 5-1 reflects a simple *head count* of businesses with no analysis of their availability for specific IDOT contracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for IDOT work. The study team’s analysis included 705 businesses that are potentially available for specific construction and professional services contracts that IDOT awards. As shown in Figure 5-1, of those businesses, 31.8 percent were minority- or woman-owned.

⁶ That information was gathered separately for prime contract and subcontract work.

Figure 5-1.
Percentage of businesses in the availability database that were minority- or woman-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 %
Asian Pacific American-owned	3.1 %
Black American-owned	4.3
Hispanic American-owned	4.1
Native American-owned	0.4
Subcontinent Asian American-owned	3.1
Non-Hispanic white woman-owned	16.7 %
Total Minority- and Woman-owned	31.8 %

D. Availability Calculations

BBC analyzed information from the availability database to develop dollar-weighted estimates of the availability of minority- and woman-owned businesses for IDOT contracting work. Those estimates represent the percentage of IDOT’s transportation-related construction and professional services contracting dollars that minority- and woman-owned businesses would be expected to receive based on their availability for specific types and sizes of IDOT 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 IDOT 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, location of work, contract size, and contract date. 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), in that location, of that size, and that were in business in the year that IDOT awarded the contract element.

BBC identified the specific characteristics of each prime contract and subcontract that the study team examined as part of 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 that they:
 - Are interested in performing transportation-related construction or professional services work in that particular role for that specific type of work for IDOT;
 - Are able to serve customers in the geographical area in which the work took place;
 - Have bid on or performed work of that size in the past five years; and
 - Were in business in the year that IDOT awarded the contract element.
2. The study team then counted the number of minority-owned businesses, woman-owned businesses, and businesses owned by non-Hispanic white men 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 as part of the disparity study. BBC multiplied the percentage availability for each contract element by the dollars associated with the contract element, 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- and woman-owned businesses, both overall and separately for each racial/ethnic and gender group. Figure 5-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that IDOT awarded during the study period.

Improvements on a simple head count of businesses.

BBC used a custom census approach to calculating the availability of minority- and woman-owned businesses for IDOT work rather than using a simple head count of minority- and woman-owned businesses (e.g., simply calculating the percentage of all Illinois construction and professional services businesses that are minority- or woman-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. For example, the United States Department of Transportation (USDOT) gives the following example in “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program:”

If 90 percent of an agency’s contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction businesses that are [minority- or woman-owned] and the percentage of trucking businesses that are [minority- or woman-owned], and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall [minority- and woman-owned business] availability.⁷

**Figure 5-2.
Example of the availability calculation
for a IDOT subcontract**

On a contract that IDOT awarded in 2015, the prime contractor awarded a subcontract worth \$79,439 for highway and street construction. To determine the overall availability of minority- and woman-owned businesses for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2015;
- b. Indicated that they performed highway and street construction;
- c. Reported bidding on work of similar or greater size in the past;
- d. Reported being able to work or serve customers in IDOT District 5 (where the work was performed); and
- e. Reported qualifications and interest in working as a subcontractor on IDOT projects.

The study team found 28 businesses in the availability database that met those criteria. Of those businesses, 7 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 25 percent (i.e., $7/28 \times 100 = 25$).

⁷ Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>.

The BBC study team took type of work into account by examining 26 different subindustries related to transportation-related construction and professional services as part of estimating availability for IDOT prime contracts and subcontracts.

BBC’s approach accounts for interest in relevant prime contract and subcontract work. The study team collected information on whether businesses are interested in working as prime contractors, subcontractors, or both on IDOT construction and professional services work (in addition to considering several other factors related to IDOT prime contracts and subcontracts such as contract types, sizes, and locations):

- Businesses that reported being interested in working as prime contractors were counted as available for prime contracts;
- Businesses that reported being interested in working as subcontractors were counted as available for subcontracts; and
- Businesses that reported being interested in working as both prime contractors and subcontractors were counted as available for both prime contracts and subcontracts.

BBC’s approach accounts for the relative capacity of businesses. 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 (i.e., *relative capacity*) when determining whether to count that business as available for a particular 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 is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.*,⁸ *Western States Paving Company v. Washington State DOT*,⁹ *Rothe Development Corp. v. U.S. Department of Defense*,¹⁰ and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*¹¹).

BBC’s approach generates dollar-weighted results. BBC examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed more to overall availability estimates than those of relatively small contract elements. BBC’s approach is consistent with relevant case law and federal regulations including USDOT’s “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program,” which suggests a dollar-weighted approach to calculating availability.

E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for the 17,426 transportation-related construction and professional services prime contracts and subcontracts that IDOT awarded between October 1, 2012 and September 30, 2016.

⁸ *AGC, San Diego Chapter v. California DOT*, 2013 WL 1607239 (9th Cir. April 16, 2013).

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

¹⁰ *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

¹¹ *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

Overall results. Figure 5-3 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for IDOT contracts. Overall, the availability of minority- and woman-owned businesses for IDOT’s construction and professional services contracts is 19.9 percent. Non-Hispanic white woman-owned businesses (13.6%) and Hispanic American-owned businesses (2.9%) exhibited the highest availability percentages among all groups.

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

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 %
Asian Pacific American-owned	0.5 %
Black American-owned	1.5
Hispanic American-owned	2.9
Native American-owned	0.0
Subcontinent Asian American-owned	1.4
Non-Hispanic white woman-owned	13.6 %
Total Minority- and Woman-owned	19.9 %

Results by contract goal status. IDOT used DBE contract goals to award most of its contracts during the study period to encourage the participation of minority- and woman-owned businesses. IDOT’s use of DBE contract goals is a race- and gender-conscious measure. It is useful to examine availability analysis results separately for contracts that IDOT awards with the use of DBE contract goals (*goal contracts*) and contracts that IDOT awards without the use of goals (*no-goal contracts*). Figure 5-4 presents availability estimates separately for goal and no-goal contracts. As shown in Figure 5-4, the availability of minority- and woman-owned businesses considered together is lower for goal contracts (19.1%) than for no-goal contracts (29.4%).

Figure 5-4.
Availability estimates by contract goal status

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail, see Figures F-18 and F-19 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Goal status	
	Goal contracts	No-goal contracts
Asian Pacific American-owned	0.5 %	0.2 %
Black American-owned	1.5	1.8
Hispanic American-owned	2.5	7.7
Native American-owned	0.0	0.1
Subcontinent Asian American-owned	1.4	1.5
Non-Hispanic white woman-owned	13.2 %	18.1 %
Total Minority- and Woman-owned	19.1 %	29.4 %

Results by 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 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 IDOT prime contracts (15.2%) than for IDOT subcontracts (34.4%). Among other factors, that result could be due to the fact that 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.

Figure 5-5.
Availability estimates by contract role

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

Source:
BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contract	Subcontract
Asian Pacific American-owned	0.2 %	1.4 %
Black American-owned	1.5	1.5
Hispanic American-owned	1.5	7.6
Native American-owned	0.0	0.0
Subcontinent Asian American-owned	1.2	1.9
Non-Hispanic white woman-owned	10.9 %	22.1 %
Total Minority- and Woman-owned	15.2 %	34.4 %

Results by funding source. IDOT’s implementation of the Federal DBE Program applies specifically to the agency’s federally-funded contracts. As a result, it is instructive to examine availability analysis results separately for IDOT’s Federal Highway Administration (FHWA)-funded contracts and state-funded contracts. (The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.) Figure 5-6 presents those results. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is lower for IDOT’s FHWA-funded contracts (18.3%) than for its state-funded contracts (24.4%). Among other factors, that result could be due to the fact that, on average, IDOT’s FHWA-funded contracts are considerably larger than the agency’s state-funded contracts. Larger contracts are often less accessible to minority- and woman-owned businesses due to the relatively large percentage of those businesses that are small.

Figure 5-6.
Availability estimates by funding source

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-16 and F-17 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Funding source	
	FHWA-funded	State-funded
Asian Pacific American-owned	0.4 %	0.6 %
Black American-owned	0.9	3.3
Hispanic American-owned	2.6	3.9
Native American-owned	0.0	0.0
Subcontinent Asian American-owned	1.0	2.5
Non-Hispanic white woman-owned	13.4 %	14.1 %
Total Minority- and Woman-owned	18.3 %	24.4 %

Results by industry. IDOT’s transportation-related contracting is made up of both construction and professional services contracts. (However, the vast majority of IDOT’s transportation-related contracting is in construction.) BBC examined availability analysis results separately for IDOT’s transportation-related construction and professional services contracts. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together is lower for IDOT construction contracts (18.9%) than for IDOT professional services contracts (30.9%).

Figure 5-7.
Availability estimates by industry

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 and F-6 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Industry	
	Construction	Professional services
Asian Pacific American-owned	0.3 %	2.0 %
Black American-owned	0.6	11.3
Hispanic American-owned	3.0	2.3
Native American-owned	0.0	0.1
Subcontinent Asian American-owned	1.0	6.3
Non-Hispanic white woman-owned	14.0 %	8.9 %
Total Minority- and Woman-owned	18.9 %	30.9 %

F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in IDOT's FHWA-funded contracts. BBC calculated the base figure using the same availability database and approach described above except that calculations only included *potential* DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 Code of Federal Regulations Part 26—and only included FHWA-funded prime contracts and subcontracts. BBC's approach to calculating IDOT's base figure is consistent with:

- Court-reviewed methodologies in several states including Washington, California, Illinois, and Minnesota;
- Instructions in The Final Rule effective February 20, 2011 that outline revisions to the Federal DBE Program; and
- USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program."

Figure 5-8 presents BBC's base figure calculations by relevant racial/ethnic and gender group. Those results indicate that the availability of potential DBEs for IDOT's FHWA-funded transportation contracts is 17.6 percent. IDOT might consider 17.6 percent as the base figure for its overall goal for DBE participation, assuming that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the time period that the goal will cover are similar to the types of FHWA-funded contracts that the agency awarded during the study period.

Figure 5-8.
Base figure calculations

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-20 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Asian Pacific American-owned	0.4 %
Black American-owned	0.9
Hispanic American-owned	2.6
Native American-owned	0.0
Subcontinent Asian American-owned	1.0
Non-Hispanic white woman-owned	12.7 %
Total Minority- and Woman-owned	17.6 %

Differences from overall availability. The availability of potential DBEs for FHWA-funded contracts is lower than the overall availability of minority- and woman-owned businesses that is presented in Figure 5-3. BBC's calculation of the overall availability of minority- and woman-

owned businesses includes three groups of minority- and woman-owned businesses that the study team did not count as potential DBEs when calculating the base figure:

- Minority- and woman-owned businesses that graduated from the DBE Program (that were not recertified);
- Minority- and woman-owned businesses that are not currently DBE-certified but that applied for DBE certification and have been denied; and
- Minority- and woman-owned businesses that are not currently DBE-certified that reported annual revenues over the most recent three years that were so high as to deem them ineligible for DBE certification.

In addition, the study team's analyses for calculating the base figure for IDOT's overall DBE goal only included FHWA-funded prime contracts and subcontracts. The calculations for the overall availability of minority- and woman-owned businesses included both FHWA- and state-funded prime contracts and subcontracts.

Additional steps before IDOT determines its overall DBE goal. IDOT must consider whether to make a step-2 adjustment to the base figure as part of determining its overall DBE goal. Step-2 adjustments can be upward or downward, but there is no requirement for IDOT to make a step-2 adjustment as long as the agency can explain what factors it considered and why no adjustment was warranted. Chapter 8 discusses factors that IDOT might consider in deciding whether to make a step-2 adjustment to the base figure.

G. Implications for Any DBE Contract Goals

If IDOT determines that the use of DBE contract goals is appropriate in the future, it might use information from the availability analysis when setting any DBE contract goals. It might also use information from a current DBE directory, a current bidders list, or other sources that could provide information about the availability of minority- and woman-owned businesses to participate in particular contracts. The Federal DBE Program provides agencies that use DBE contract goals with some flexibility in how they set those goals. DBE goals on some contracts might be higher than the overall DBE goal. In contrast, DBE goals on other contracts might be lower than the overall DBE goal. In addition, there may be some FHWA-funded contracts for which setting DBE contract goals would not be appropriate.

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in transportation-related construction and professional services contracts that the Illinois Department of Transportation (IDOT) awarded between October 1, 2012 and September 30, 2016.¹ Chapter 6 is organized in two parts:

- A. Overview of utilization analysis; and
- B. Utilization analysis results.

A. Overview of Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in IDOT contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on IDOT prime contracts and subcontracts during the study period. For example, if 5 percent of IDOT prime contract and subcontract dollars went to woman-owned businesses on a particular set of contracts, utilization of woman-owned businesses for that set of contracts would be 5 percent.

The United States Department of Transportation (USDOT) requires IDOT to submit reports about the participation of DBEs in its Federal Highway Administration (FHWA)-funded transportation contracts twice each year (typically in June and December). BBC's analysis of the participation of minority- and woman-owned businesses in IDOT contracting went beyond what the agency currently reports to USDOT in two key ways:

- BBC counted the participation of all minority- and woman-owned businesses in its analysis, not only that of certified DBEs; and
- BBC examined participation of minority- and woman-owned businesses in both FHWA- and state-funded contracts, not only in FHWA-funded contracts.

B. Utilization Analysis Results

BBC measured the participation of all minority- and woman-owned businesses in the \$8.0 billion of transportation-related contracts that IDOT awarded during the study period. BBC included all minority- and woman-owned businesses in the analysis, regardless of whether they were certified as DBEs. The study team also measured participation separately for minority- and woman-owned businesses that were DBE certified.

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.

Overall results. Figure 6-1 presents the percentage of contracting dollars that minority- and woman-owned businesses considered together received on transportation-related construction and professional services contracts that IDOT 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 15.5 percent of the relevant contracting dollars that IDOT awarded during the study period. The majority of those contracting dollars—13.1 percent—went to certified DBEs. Non-Hispanic white woman-owned businesses (6.9%) and Hispanic American-owned businesses (5.2%) exhibited higher levels of participation on IDOT contracts than all other relevant groups.

Figure 6-1.
Overall utilization results

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.

	Utilization %
Minority- and Woman-owned	
Asian Pacific American-owned	0.5 %
Black American-owned	1.7
Hispanic American-owned	5.2
Native American-owned	0.2
Subcontinent Asian American-owned	1.0
Non-Hispanic white woman-owned	6.9
Total Minority- and Woman-owned	15.5 %
DBEs	
Asian Pacific American-owned	0.5 %
Black American-owned	1.7
Hispanic American-owned	5.2
Native American-owned	0.1
Subcontinent Asian American-owned	0.7
Non-Hispanic white woman-owned	4.9
Total DBE	13.1 %

Results by contract goal status. IDOT used DBE contract goals to award many contracts during the study period to encourage the participation of minority- and woman-owned businesses. It is instructive to compare the participation of minority- and woman-owned businesses between contracts that IDOT awarded with the use of DBE contract goals (*goal* contracts) and contracts that IDOT awarded without the use of DBE contract goals (*no-goal* contracts). Doing so provides useful information about outcomes for minority- and woman-owned businesses on contracts that IDOT awarded in a *race- and gender-neutral* environment and the efficacy of DBE contract goals in encouraging the participation of minority- and woman-owned businesses in IDOT’s transportation-related contracts.

Figure 6-2 presents utilization results separately for IDOT *goal* contracts and *no-goal* contracts. As shown in Figure 6-2, minority- and woman-owned businesses considered together showed higher participation in goal contracts (15.9%) than in no-goal contracts (11.5%). Those results might indicate the effectiveness of DBE contract goals in encouraging the participation of minority- and woman-owned businesses in IDOT’s transportation-related contracts. Note, however, that examining disparity analysis results provides a better assessment of the efficacy of DBE contract goals, because those results also take the availability of minority- and woman-owned businesses for goal and no-goal contracts into account.

Figure 6-2.
Utilization results by contract goal status

Note:
Numbers rounded to nearest tenth of 1 percent.
Numbers may not add to totals.
For more detail, see Figures F-18 and F-19 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Goal status	
	Goal contracts	No-goal contracts
Asian Pacific American-owned	0.5	0.2 %
Black American-owned	1.7	1.8
Hispanic American-owned	5.4	7.7
Native American-owned	0.2	0.1
Subcontinent Asian American-owned	1.0	1.5
Non-Hispanic white woman-owned	7.0	6.7
Total Minority- and Woman-owned	15.9	11.5 %

Results by contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it might be reasonable to expect higher participation of minority- and woman-owned business in subcontracts than in prime contracts. Figure 6-3 presents utilization results for minority- and woman-owned businesses separately for prime contracts and subcontracts. As shown in Figure 6-3, the participation of minority- and woman-owned businesses considered together was in fact much higher in IDOT subcontracts (47.9%) than in IDOT’s prime contracts (5.2%).

Figure 6-3.
Utilization results by contract role

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

Source:
BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Asian Pacific American-owned	0.3	1.2 %
Black American-owned	0.6	5.0
Hispanic American-owned	0.9	18.7
Native American-owned	0.0	0.6
Subcontinent Asian American-owned	0.8	1.4
Non-Hispanic white woman-owned	2.5	20.8
Total Minority- and Woman-owned	5.2	47.9 %

Results by funding source. IDOT’s implementation of the Federal DBE Program applies specifically to the agency’s federally-funded contracts. As a result, it is instructive to examine utilization analysis results separately for IDOT’s FHWA-funded contracts and state-funded contracts. (The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.) Figure 6-4 presents those results. As shown in Figure 6-4, the participation of minority- and woman-owned businesses considered together was lower for IDOT’s FHWA-funded contracts (15.0%) than for its state-funded contracts (16.9%).

Figure 6-4.
Utilization results by funding source

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

For more detail, see Figures F-16 and F-17 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Funding source	
	FHWA-funded	State-funded
Asian Pacific American-owned	0.4	0.7 %
Black American-owned	1.5	2.3
Hispanic American-owned	5.3	5.2
Native American-owned	0.1	0.2
Subcontinent Asian American-owned	0.5	2.4
Non-Hispanic white woman-owned	7.2	6.1 %
Total Minority- and Woman-owned	15.0	16.9 %

Results by industry. IDOT’s transportation-related contracting is made up of both construction and professional services contracts. (However, 97 percent of IDOT’s transportation-related contracting was in construction.) BBC examined utilization analysis results separately for IDOT’s transportation-related construction and professional services contracts. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was lower for IDOT’s construction contracts (14.3%) than for professional services contracts (29.4%).

Figure 6-5.
Availability estimates by industry

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 and F-6 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Industry	
	Construction	Professional services
Asian Pacific American-owned	0.3	3.5 %
Black American-owned	1.3	5.9
Hispanic American-owned	5.3	4.4
Native American-owned	0.2	0.1
Subcontinent Asian American-owned	0.4	7.7
Non-Hispanic white woman-owned	6.8	8.0
Total Minority- and Woman-owned	14.3	29.4 %

Concentration of dollars. BBC analyzed whether the dollars that each relevant racial/ethnic and gender group received on IDOT’s transportation-related contracts were spread across a relatively large number of different 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.

Figure 6-6 presents those results. Overall, 462 different minority- and woman-owned businesses participated in IDOT’s transportation-related contracts during the study period. Eighty-eight of those businesses, or 19 percent of all utilized minority- or 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.
Concentration of dollars that went to minority- and woman-owned businesses

Business group	Utilized businesses	Number of businesses accounting for 75% of dollars	% of businesses accounting for 75% of dollars
Asian Pacific American-owned	20	2	10.0%
Black American-owned	70	12	17.1%
Hispanic American-owned	110	28	25.5%
Native American-owned	6	1	16.7%
Subcontinent Asian American-owned	28	5	17.9%
Non-Hispanic white woman-owned	225	39	17.3%
Total Minority- and Woman-owned	462	88	19.0%

Note: The sum of utilized businesses by group is not equal to total utilized minority- and woman-owned businesses, because four minority-owned businesses that received work during the study period were of unknown race/ethnicity.

Source: BBC Research & Consulting availability analysis.

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses in contracts that the Illinois Department of Transportation (IDOT) awarded between October 1, 2012 and September 30, 2016 (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 transportation-related construction and professional services contracts. Chapter 7 presents the disparity analysis in four parts:

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

A. Overview of Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation of minority- and woman-owned businesses in IDOT prime contracts and subcontracts with the percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability for that work. BBC expressed 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 racial/ethnic and gender groups and different 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 was largely in line with availability. A disparity index of less than 100 indicates a *disparity* between participation and availability—that is, minority- and woman-owned businesses were *underutilized* relative to their availability. Finally, a disparity index of less than 80 indicates a *substantial disparity* between participation and availability—that is, minority- and woman-owned businesses were substantially underutilized relative to their availability.²

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 Many courts have deemed disparity indices below 80 as being “substantial” and have accepted them as evidence of adverse conditions for minority-owned businesses and woman-owned businesses (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

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 IDOT contracts that BBC examined as part of the study—that is, transportation-related construction and professional services prime contracts and subcontracts that IDOT awarded during the study period. Appendix F includes analogous tables for different subsets of contracts, including:

- Contracts that IDOT awarded with and without the use of contract goals;
- Federally- and state-funded contracts;
- Construction and professional services contracts; and
- Prime contracts and subcontracts.

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 results tables in Appendix F. As presented in Figure 7-1, the disparity analysis results tables show results about each relevant racial/ethnic and gender group (as well as about all businesses) 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 Disadvantaged Business Enterprises (DBEs);
- Row (3) presents results for all woman-owned businesses, regardless of whether they were certified as DBEs;
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as DBEs;
- Rows (5) through (10) present results for businesses of each individual racial/ethnic group, regardless of whether they were certified as DBEs.
- The bottom half of Figure 7-1 presents utilization results for businesses that were certified as DBEs.

(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.

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 firms	17,426	\$8,049,012	\$8,049,012				
(2) All minority and woman-owned	7,369	\$1,250,271	\$1,250,271	15.5	19.9	-4.3	78.2
(3) White woman-owned	4,120	\$558,672	\$558,672	6.9	13.6	-6.6	51.1
(4) Minority-owned	3,249	\$691,600	\$691,600	8.6	6.3	2.3	136.5
(5) Asian Pacific American-owned	200	\$41,902	\$41,960	0.5	0.5	0.1	114.5
(6) Black American-owned	431	\$135,760	\$135,948	1.7	1.5	0.2	113.9
(7) Hispanic American-owned	2,255	\$421,601	\$422,184	5.2	2.9	2.3	178.5
(8) Native American-owned	206	\$12,103	\$12,120	0.2	0.0	0.1	200+
(9) Subcontinent Asian American-owned	142	\$79,279	\$79,389	1.0	1.4	-0.4	70.2
(10) Unknown minority-owned	15	\$955					
(11) DBE-certified	6,453	\$1,057,319	\$1,057,319	13.1			
(12) White woman-owned DBE	3,319	\$396,527	\$396,790	4.9			
(13) Minority-owned DBE	3,133	\$660,092	\$660,530	8.2			
(14) Asian Pacific American-owned DBE	185	\$40,265	\$40,292	0.5			
(15) Black American-owned DBE	419	\$134,601	\$134,690	1.7			
(16) Hispanic American-owned DBE	2,210	\$417,324	\$417,601	5.2			
(17) Native American-owned DBE	189	\$11,262	\$11,270	0.1			
(18) Subcontinent Asian American-owned DBE	130	\$56,640	\$56,678	0.7			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

* Unknown minority-owned businesses and unknown MBEs were allocated to minority and DBE 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 10 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 results table includes the same columns and rows. The top half of each table presents utilization results for all minority- and woman-owned businesses, regardless of whether they were certified as DBEs.

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 17,426 contract elements. The value presented in column (a) for each individual racial/ethnic and gender group represents the number of contract elements in which businesses of that particular group participated (e.g., as shown in row (3) of column (a), non-Hispanic white woman-owned businesses participated in 4,120 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-1, BBC examined approximately \$8.0 billion 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 racial/ethnic and gender group represents the dollars that the businesses of that particular group received on the set of contract elements (e.g., as shown in row (3) of column (b), non-Hispanic white woman-owned businesses received approximately \$559 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that BBC identified as minority-owned, or as DBEs, but for which specific race/ethnicity information was not available. The dollar totals include both prime contract and subcontract dollars.
- Column (d) presents the participation of each racial/ethnic and gender group as a percentage of total dollars associated with the set of 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 non-Hispanic white woman-owned businesses, the study team divided \$559 million by \$8.0 billion and multiplied by 100 for a result of 6.9%, as shown in row (3) of column (d)).

Availability results. Column (e) of Figure 7-1 presents the availability of each relevant racial/ethnic and gender group for all contract elements that the study team analyzed as part of the contract set. Availability estimates, which are represented as a percentage 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 (3) of column (e), the availability of non-Hispanic white woman-owned businesses is 13.6%).

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 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 (3) of column (f) of Figure 7-1, the participation of non-Hispanic white woman-owned businesses in IDOT contracts was 6.6 percentage points lower than their availability.

Disparity indices. It is sometimes difficult to interpret absolute percentage differences between participation and availability. Therefore, 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 relevant racial/ethnic and gender group. For example, as reported in row (3) of column (g), the disparity index for woman-owned businesses was 51, indicating that woman-owned businesses actually received approximately \$0.51 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that IDOT awarded during the study period. A disparity index of 51 is considered a substantial disparity.

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.
- When participation for a particular group for a particular set of contracts was greater than 0 percent but availability was 0 percent, BBC reported a disparity index of “200+.”

B. Disparity Analysis Results

BBC measured disparities between the participation and availability of minority- and woman-owned businesses for various sets of contracts that IDOT awarded during the study period. The study team measured disparities for minority- and woman-owned businesses considered together and separately for each relevant racial/ethnic and gender group.

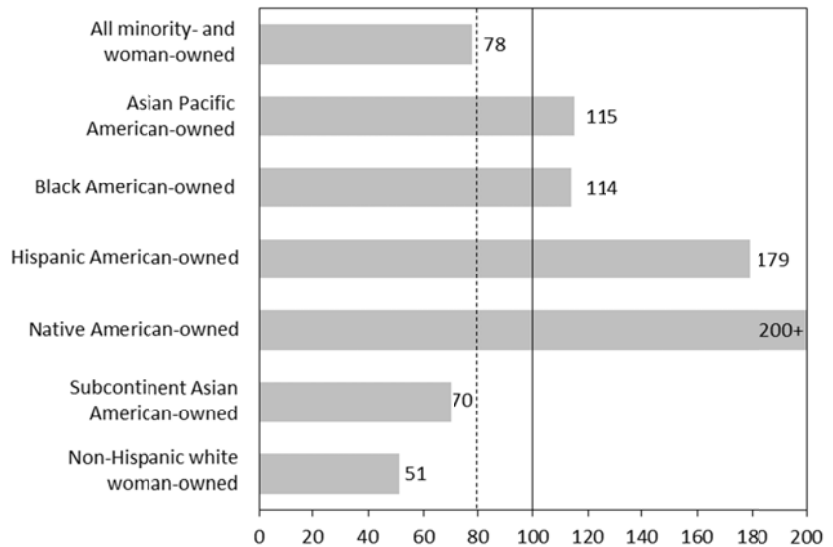
Overall results. Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts that IDOT awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability. There is also a line drawn at a disparity index level of 80, because 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 IDOT 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 78 indicates that minority- and woman-owned businesses received approximately \$0.78 for every dollar that they might be expected to receive based on their availability for transportation-related prime contracts and subcontracts that IDOT awarded during the study period. Disparity analysis results by individual group indicated that Subcontinent Asian American-owned businesses (disparity index of 70) and non-Hispanic white woman-owned businesses (disparity index of 51) exhibited substantial disparities.

Figure 7-2.
Disparity indices by group

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

Source:
BBC Research & Consulting disparity
analysis.



IDOT used DBE contract goals to award most of the transportation-related contracts that it awarded during the study period. The disparity analysis results shown in Figure 7-2 are largely reflective of the use of those measures. A crucial question is whether any disparities exist between the participation and availability of minority- and woman-owned businesses on contracts that IDOT awarded without the use of such goals.

Results by goals status. IDOT used DBE contract goals to award most of its contracts during the study period to encourage the participation of minority- and woman-owned businesses. IDOT’s use of DBE contract goals is a race- and gender-conscious measure. It is useful to examine disparity analysis results separately for contracts that IDOT awarded with the use of DBE contract goals (*goal contracts*) and contracts that IDOT awards without the use of goals (*no-goal contracts*). Assessing whether any disparities exist for no-goal contracts provides useful information about outcomes for minority- and woman-owned businesses on contracts that IDOT awarded in a *race and gender-neutral environment* and whether there is evidence that certain groups face any discrimination or barriers as part of the agency’s contracting.^{3, 4, 5}

Figure 7-3 presents disparity analysis results separately for goal and no-goal contracts. As shown in Figure 7-3, minority- and woman-owned businesses considered together showed a disparity that was close to the threshold of being considered substantial on goal contracts (disparity index of 83). Moreover, they showed a substantial disparity on no-goal contracts (disparity index of 39). Disparity analysis results by individual group indicated that:

- Subcontinent Asian American-owned businesses (disparity index of 75) and non-Hispanic white woman-owned businesses (disparity index of 53) exhibited substantial disparities on goal contracts; and

³ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, 1192, 1196 (9th Cir. 2013).

⁴ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 985, 987-88 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003).

⁵ *H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, 615 F.3d 233,246 (4th Cir. 2010).

- All groups except Asian Pacific American-owned businesses (disparity index of 108) exhibited substantial disparities on no-goal contracts.

Taken together, the results presented in Figure 7-3 show that IDOT’s use of DBE contract goals is somewhat effective in encouraging the participation of minority- and woman-owned businesses in its contracts. Moreover, those results indicate that when IDOT does not use race- and gender-conscious measures, nearly all relevant business groups suffer from substantial underutilization in IDOT’s transportation-related contracting.

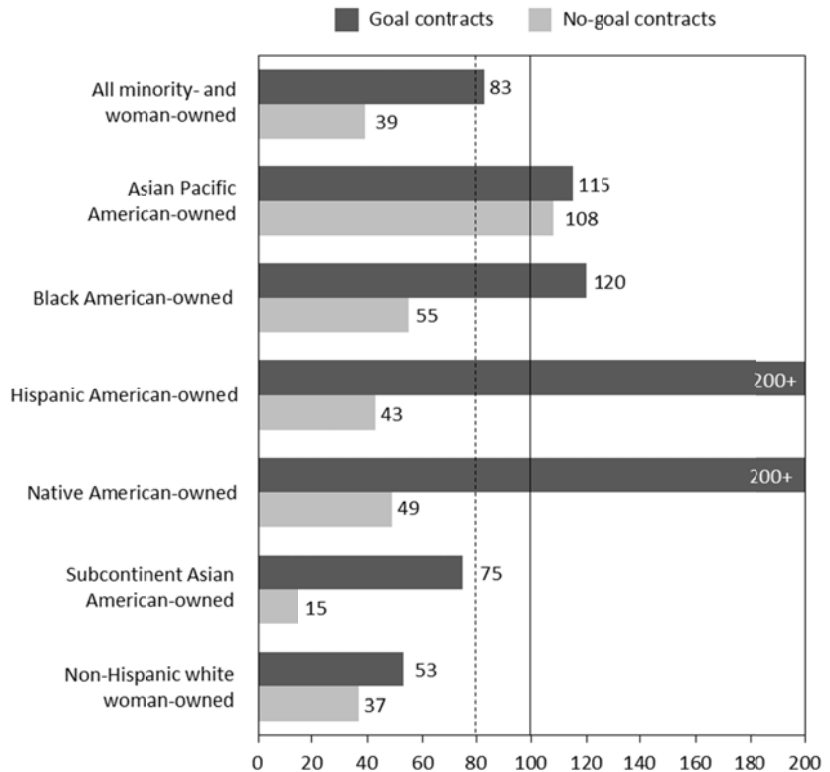
Figure 7-3.
Disparity indices for goal and no-goal contracts

Note:

For more detail, see Figures F-18 and F-19 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



Results by contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. In addition, IDOT’s use of DBE contract goals is a subcontracting program, so the use of those goals does not directly affect the participation of minority- and woman-owned businesses in prime contracts. Thus, it is useful to examine disparity analysis results separately for prime contracts and subcontracts to provide additional information about outcomes for minority- and woman-owned businesses on contracts that IDOT awarded during the study period. Thus, it is also useful to examine disparity analysis results separately for prime contracts and subcontracts to provide additional information about outcomes for minority- and woman-owned businesses on contracts that IDOT awarded in a race- and gender-neutral environment. Figure 7-4 presents those results. As shown in Figure 7-4, whereas minority- and woman-owned businesses considered together did not show a disparity for subcontracts (disparity index of 139), they showed a substantial disparity for prime contracts (disparity index of 34).

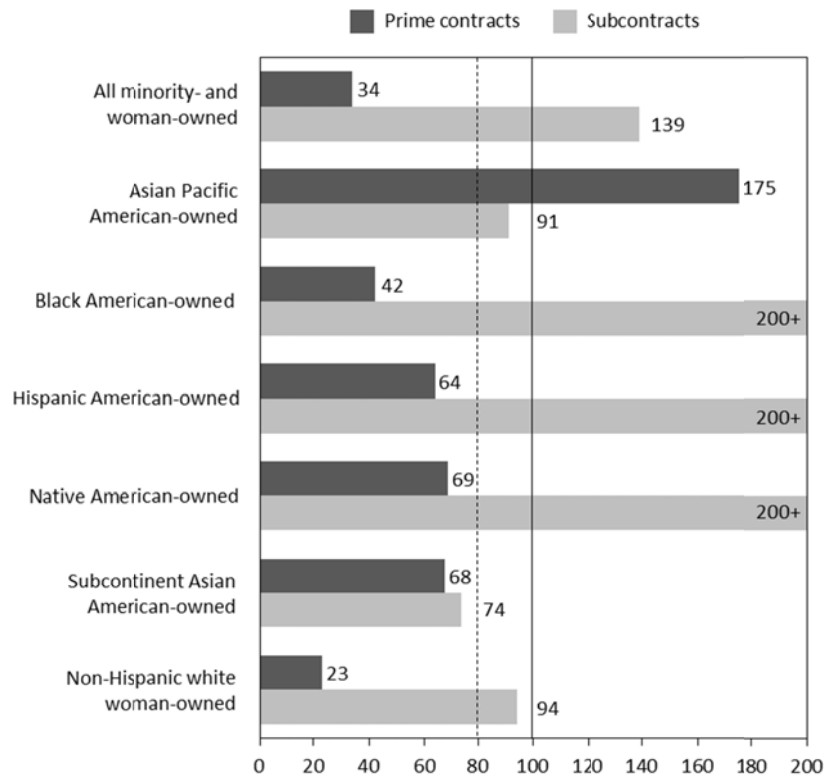
Figure 7-4.
Disparity indices for prime contracts and subcontracts

Note:

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

Source:

BBC Research & Consulting disparity analysis.



Disparity analysis results by individual group indicated that:

- All groups except Asian Pacific American-owned businesses (disparity index of 91) exhibited substantial disparities on prime contracts; and
- Subcontinent Asian American-owned businesses (disparity index of 74) exhibited a substantial disparity on subcontracts.

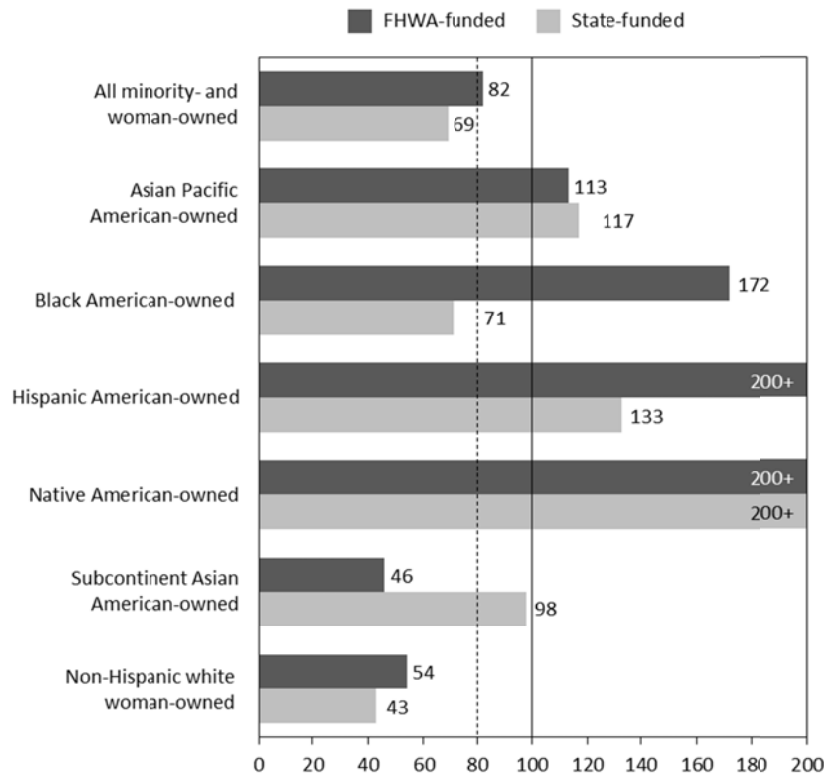
Results by funding source. IDOT’s implementation of the Federal DBE Program applies specifically to the agency’s Federal Highway Administration (FHWA)-funded contracts. As a result, it is useful to examine disparity analysis results separately for IDOT’s FHWA-funded contracts and state-funded contracts. (The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.) Figure 7-5 presents those results. Minority- and woman-owned businesses considered together showed a disparity that was close to the threshold of being considered substantial on FHWA-funded contracts (disparity index of 82). They also showed a substantial disparity on state-funded contracts (disparity index of 69). Disparity analysis results by group indicated that:

- Subcontinent Asian American-owned businesses (disparity index of 46) and non-Hispanic white woman-owned businesses (disparity index of 54) exhibited substantial disparities on FHWA-funded contracts; and
- Black American-owned businesses (disparity index of 71) and non-Hispanic white woman-owned businesses (disparity index of 43) exhibited substantial disparities on state-funded contracts.

Figure 7-5.
Disparity indices for
FHWA- and state-funded
contracts

Note:
 For more detail, see Figures F-16 and F-17
 in Appendix F.

Source:
 BBC Research & Consulting disparity
 analysis.



Results by industry. IDOT’s transportation-related contracting is made up of both construction and professional services contracts. (However, the vast majority of IDOT’s transportation-related contracting is in construction.) BBC examined disparity analysis results separately for IDOT’s transportation-related construction and professional services contracts. As shown in 7-6, whereas minority- and woman-owned businesses did not show a substantial disparity on professional services contracts (disparity index of 95), they did show a substantial disparity on construction contracts (disparity index of 76). Disparity analysis results by individual group indicated that:

- Subcontinent Asian American-owned businesses (disparity index of 39) and non-Hispanic white woman-owned businesses (disparity index of 49) exhibited substantial disparities on construction contracts. In addition, Asian Pacific American-owned businesses exhibited a disparity index that was close to the threshold of being considered substantial (disparity index of 81); and
- Only Black American-owned businesses (disparity index of 52) exhibited a substantial disparity on professional services contracts.

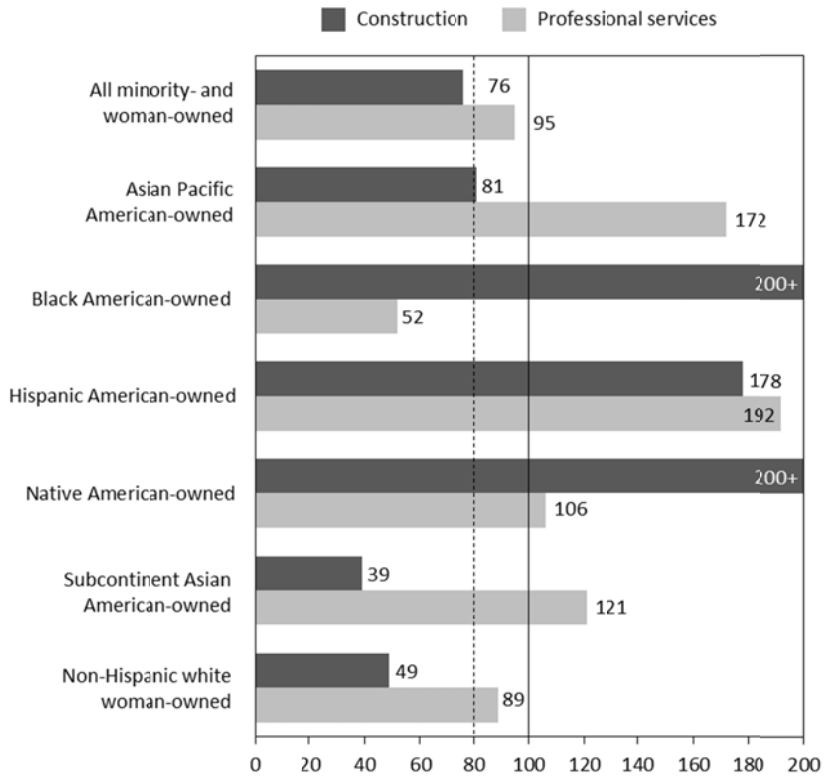
C. Statistical Significance of Disparity Analysis Results

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*.

Figure 7-6.
Disparity indices for
construction and
professional services
contracts

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

Source:
 BBC Research & Consulting disparity
 analysis.



Monte Carlo analysis. BBC used an algorithm 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 7-7 provides additional information about how the study team used a Monte Carlo method to test the statistical significance of disparity analysis results.

Results. BBC used Monte Carlo analysis to test whether the disparities that the study team observed on all contracts considered together, prime contracts, and no-goals contracts were statistically significant. BBC identified substantial disparities for minority- and woman-owned businesses considered together and for certain racial/ethnic and gender groups considered separately on those contract sets. Examining whether disparities are statistically significant is particularly instructive for no-goal contracts and prime contracts, because they provide information about outcomes for minority- and woman-owned businesses in the absence of IDOT’s use of race- and gender-conscious measures.

Figure 7-8 presents results from the Monte Carlo analysis as they relate to the statistical significance of disparities that the study team observed on all contracts considered together, prime contracts, and no-goal contracts. We tested statistical significance for all minority- and woman-owned businesses considered together and separately for non-Hispanic white woman-owned businesses and for all minority-owned businesses considered together.

Figure 7-7.
Monte Carlo Analysis

BBC began the Monte Carlo analysis by examining individual contract elements. 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 that contract element and used Monte Carlo simulations to randomly choose a business from the pool of available businesses to win the contract element. Thus, for example, the odds of a non-Hispanic white woman-owned business receiving that contract element were equal to the number of non-Hispanic white woman-owned businesses available for the contract element divided by the total number of businesses available for the contract element.

The Monte Carlo simulation repeated the above process for all other elements in a particular set of contracts. 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 by group for that set of contract elements. The entire Monte Carlo simulation was then repeated 1 million times for each set of contracts. The combined output from all 1 million simulations represented a probability distribution of the overall participation of minority-owned businesses and woman-owned businesses if contracts were awarded randomly based 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 that 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.

The results from the Monte Carlo analysis revealed that:

- The substantial disparity that minority- and woman-owned businesses considered together exhibited on all contracts was statistically significant at the 95 percent confidence level. The substantial disparity that non-Hispanic white woman-owned businesses exhibited was also statistically significant.
- The substantial disparity that minority- and woman-owned businesses considered together exhibited on prime contracts was statistically significant at the 95 percent confidence level. In addition, the substantial disparities that non-Hispanic white woman-owned businesses and all minority-owned businesses exhibited on prime contracts were statistically significant.
- The substantial disparity that minority- and woman-owned businesses considered together exhibited on no-goal contracts was statistically significant at the 95 percent confidence level. In addition, the substantial disparities that non-Hispanic white woman-owned businesses and all minority-owned businesses exhibited on no-goal contracts were statistically significant.

Figure 7-8.
Monte Carlo simulation results for disparity analysis results

Contract set and business group	Disparity Index	Probability of disparity being due to chance	Statistically significant?
All contracts			
All minority- and woman-owned	78	<0.1 %	Yes
All minority-owned	137	N/A	N/A
Non-Hispanic white woman-owned	51	<0.1 %	Yes
Prime contracts			
All minority- and woman-owned	34	<0.1 %	Yes
All minority-owned	62	<0.1 %	Yes
Non-Hispanic white woman-owned	23	<0.1 %	Yes
No-goal contracts			
All minority- and woman-owned	39	<0.1 %	Yes
All minority-owned	42	<0.1 %	Yes
Non-Hispanic white woman-owned	37	<0.1 %	Yes

Notes: Numbers rounded to nearest tenth of 1 percent.
 Numbers may not add to totals due to rounding.

Source: BBC Research & Consulting disparity analysis.

D. Case Study Analysis

BBC completed a case study analysis to assess whether characteristics of IDOT’s bid and proposal evaluation processes help to explain any of the disparities that the study team observed for prime contracts. BBC analyzed bid and proposal information on contracts that IDOT awarded during the study period.

Construction. BBC examined bid information for 3,149 construction contracts that IDOT awarded during the study period. In total, IDOT received 10,943 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 1,320 of the 10,943 bids (12%) that the study team examined:

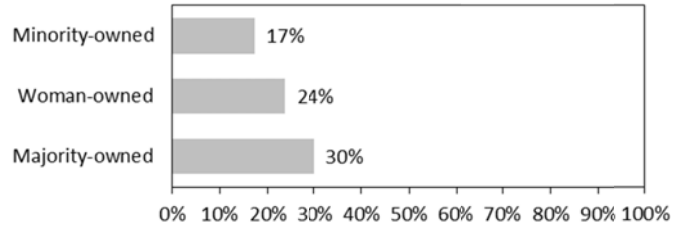
- Six percent of all bids (676 bids) came from minority-owned businesses (46 different businesses); and
- Six percent of all bids (644 bids) came from woman-owned businesses (49 different businesses).

Success of bids. BBC also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 7-9, 17 percent of the bids that minority-owned businesses submitted resulted in contract awards, which was lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards (30%). Of the bids that woman-owned businesses submitted, 24 percent resulted in contract awards, also lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

Figure 7-9.
Percentage of bids on construction contracts that resulted in contract awards

Note:
 Based on analysis of 10,943 bids on 3,149 contracts.

Source:
 BBC Research & Consulting from entity contracting data.



Professional services. BBC examined proposal information for 300 professional services contracts that IDOT awarded during the study period. In total, IDOT received 4,428 proposals for those contracts.

Number of proposals from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 1,698 of the 4,428 proposals (16%) that the study team examined:

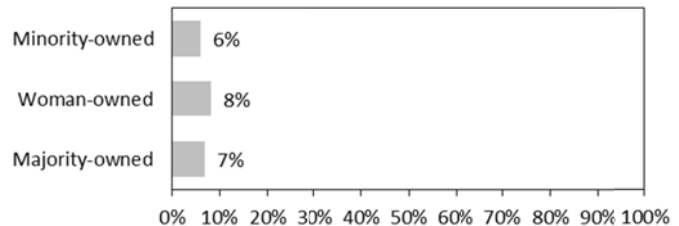
- Twelve percent of all proposals (1,271 proposals) came from minority-owned businesses (77 different businesses); and
- Four percent of all proposals (427 proposals) came from woman-owned businesses (31 different businesses).

Success of bids. BBC also examined the percentage of proposals that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 7-10, 6 percent of the proposals that minority-owned businesses submitted resulted in contract awards, which was similar to the percent of proposals that majority-owned businesses submitted that resulted in contract awards (7%). Of the proposals that white woman-owned businesses submitted, 8 percent resulted in contract awards, also similar to the percent of proposals that majority-owned businesses submitted that resulted in contract awards.

Figure 7-10.
Percentage of bids on professional services contracts that resulted in contract awards

Note:
 Based on analysis of 4,428 bids on 300 contracts.

Source:
 BBC Research & Consulting from entity contracting data.



CHAPTER 8.

Overall DBE Goal

CHAPTER 8.

Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the Illinois Department of Transportation (IDOT) is required to set an overall goal for DBE participation in its Federal Highway Administration (FHWA)-funded contracts.¹ Agencies that implement the Federal DBE Program must develop overall DBE goals every three years. However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its FHWA-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures to enable it to meet the goal in the next year.

IDOT must prepare and submit a Goal and Methodology document to FHWA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. IDOT last developed an overall DBE goal for FHWA-funded contracts for federal fiscal years (FFYs) 2014 through 2016.² The agency established an overall DBE goal of 22.77 percent for that time period. IDOT indicated to FHWA that it planned to meet the goal through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

IDOT is required to develop a new goal for FFYs 2019 through 2021. Chapter 8 provides information that IDOT might consider as part of setting its new overall DBE goal. Chapter 8 is organized in two parts that are based on the two-step process that 49 Code of Federal Regulations (CFR) Part 26.45 outlines for agencies to set their overall DBE goals:

- A. Establishing a base figure; and
- B. Considering a step-2 adjustment.

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall goal for DBE participation in IDOT's FHWA-funded transportation contracts. For the purposes of establishing a base figure, the availability analysis was limited to the availability of *potential DBEs*—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26.65—for FHWA-funded prime contracts and subcontracts that IDOT awarded during the study period. Figure 8-1 presents the availability of potential DBEs for the FHWA-funded construction and professional services prime contracts and subcontracts that IDOT awarded during the study period. As show in Figure 8-1, potential DBEs might be expected to receive 17.6 percent of IDOT's FHWA-funded prime

¹ BBC considered any contract with at least \$1 of FHWA funding as an "FHWA-funded contract" and includes the total value of the contract in its pool of total FHWA-funded contracting dollars.

² For FFY 2017, IDOT submitted an interim Goal and Methodology document to FHWA that maintained the goal of 22.77%.

contract and subcontract dollars based on their availability for that work. IDOT might consider 17.6 percent as the base figure for its overall DBE goal if the agency anticipates that the types, sizes, and locations of FHWA-funded contracts that it will award in the future will be similar to the FHWA-funded contracts that it awarded during the study period.

Figure 8-1.
Availability components of the base figure

a. Business group	Base figure component		
	b. Construction	c. Professional Services	d. Total
Asian Pacific American-owned	0.4 %	1.7 %	0.4 %
Black American-owned	0.6	8.9	0.9
Hispanic American-owned	2.6	1.8	2.6
Native American-owned	0.0	0.0	0.0
Subcontinent Asian American-owned	0.9	4.5	1.0
Non-Hispanic white woman-owned	12.9	10.6	12.7
Total potential DBEs	17.3 %	24.8 %	17.6 %
Industry weight	97 %	3 %	

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

Source: BBC Research & Consulting availability analysis.

The base figure calculations reflect a weight of 0.97 for construction contracts and 0.03 for professional services contracts based on the volume of FHWA-funded contract dollars that IDOT awarded during the study period. If IDOT expects that the distributions of FHWA-funded construction and professional services contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components.

B. Considering a Step-2 Adjustment

The Federal DBE Program requires IDOT to consider a potential step-2 adjustment to its base figure as part of determining its overall DBE goal. IDOT is not required to make a step-2 adjustment as long as it considers appropriate factors and explains its decision in its Goal and Methodology document. The Federal DBE Program outlines several factors that an agency must consider when assessing whether to make a step-2 adjustment to its base figure:

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years;
2. Information related to employment, self-employment, education, training, and unions;
3. Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
4. Other relevant data.³

³ 49 CFR Section 26.45.

BBC Research & Consulting (BBC) completed an analysis of each of the above step-2 factors. Much of the information that BBC examined was not easily quantifiable but is still relevant to IDOT as it determines whether to make a step-2 adjustment.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. The United States Department of Transportation’s (USDOT’s) “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation in their USDOT-funded contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE 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.⁴

Figure 8-2 presents past DBE participation based on IDOT’s Uniform Reports of DBE Awards or Commitments and Payments as reported to FHWA. According to IDOT’s Uniform Reports, median DBE participation in IDOT’s FHWA-funded contracts from FFYs 2012 through 2016 was 14.6 percent.

Figure 8-2.
Past certified DBE participation in FHWA-funded contracts, FFYs 2012-2016

Source:
Commitments/Awards reported on IDOT’s Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE Attainment	Annual DBE Goal	Difference
2012	15.89 %	22.77 %	-6.9 %
2013	14.36	22.77	-8.4
2014	14.60	22.77	-8.2
2015	15.53	22.77	-7.2
2016	13.77	22.77	-9.0

The information about past DBE participation supports a downward adjustment to IDOT’s base figure. If IDOT were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 17.6 percent base figure and the 14.6 percent median past DBE participation, yielding a potential overall DBE goal of 16.1 percent. BBC’s analysis of DBE participation in IDOT’s FHWA-funded contracts indicates DBE participation (12.6%) that is also lower than the base figure. If IDOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 17.6 percent base figure and the 12.6 percent DBE participation, yielding a potential overall DBE goal of 15.1 percent.

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; and minority- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented

⁴ Section III (A)(5)(c) in USDOT’s “Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program.”
<http://www.osdbu.dot.gov/DBEProgram/tips.cfm>

in Appendices C and E. BBC's analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the Illinois contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FHWA-funded contracts that IDOT awards, which supports an upward adjustment to IDOT's base figure.

3. Any disparities in the ability of DBEs to get 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 Illinois do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices C and D). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the Illinois contracting marketplace. Any barriers that minority- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for IDOT's FHWA-funded prime contracts and subcontracts. Thus, information from the disparity study about financing, bonding, and insurance also supports an upward step-2 adjustment to IDOT's base figure.

4. Other factors. The Federal DBE Program suggests that federal fund recipients also examine "other factors" when determining whether to make step-2 adjustments to their base figures.⁵

Success of businesses. There is quantitative evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men 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- and woman-owned businesses, as presented in Appendix D. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local contracting industry. Thus, information about the success of businesses also supports an upward step-2 adjustment to IDOT's base figure.

Evidence from disparity studies conducted within the jurisdiction. USDOT suggests that federal fund recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make adjustments to their base figures. There have been several other disparity studies conducted for state agencies in Illinois in recent years (e.g., for the State of Illinois and Illinois Tollway). However, those agencies' contracts differ substantially in terms of size and type from the FHWA-funded contracts that IDOT awarded during the study period. In addition, the methodology that was used for those disparity studies is substantially more limited than the methodology that BBC used to conduct IDOT's disparity study. Therefore, the results from other disparity studies are of limited use to IDOT in determining whether to make an adjustment to its base figure.

⁵ 49 CFR Section 26.45.

Summary. Taken together, the quantitative and qualitative evidence that the study team collected as part of the disparity study may support a step-2 adjustment to the base figure as IDOT considers setting its overall DBE goal. As noted in USDOT’s “Tips for Goal-Setting:”

If the evidence suggests that an adjustment is warranted, it is critically important to ensure that there is a rational relationship between the data you are using to make the adjustment and the actual numerical adjustment made.⁶

Based on information from the disparity study, there are reasons why IDOT might consider an upward adjustment to its base figure:

- IDOT might adjust its base figure upward to account for barriers that minorities and women face in human capital and owning businesses in the local contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”⁷
- IDOT might also adjust its base figure in light of evidence of barriers that affect minorities; women; and minority- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men.

There are also reasons why IDOT might consider a downward adjustment to its base figure. IDOT’s utilization reports for FFYs 2012 through 2016 indicated median annual DBE participation of 14.6 percent for those years, which is lower than its base figure. USDOT’s “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. BBC’s analysis of DBE participation in IDOT’s FHWA-funded contracts also indicates DBE participation (12.6%) that is lower than the base figure. If IDOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 17.6 base figure and the 14.6 percent (or 12.6 percent) past DBE participation.

USDOT regulations clearly state that an agency such as IDOT is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment— either upward or downward—to its base figure. However, *Tips for Goal-Setting* states that an agency such as IDOT is not required to make an adjustment as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

⁶ USDOT. “Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program.” <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

⁷ 49 CFR Section 26.45 (b).

CHAPTER 9.

Program Measures

CHAPTER 9.

Program Measures

The Illinois Department of Transportation (IDOT) uses a combination of *race- and gender-neutral measures* and *race- and gender-conscious measures* to encourage the participation of minority- and woman-owned businesses in its contracting as part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an agency’s contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified DBEs. 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 agency’s contracting (e.g., using DBE goals on individual contracts).

As part of the Federal DBE Program, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts every three years.¹ Although an agency is required to set the goal every three years, the overall DBE goal is an annual goal in that the agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable the agency to meet the goal in the next year. As part of setting its overall DBE goal, an agency must also determine whether it can meet its goal solely through race- and gender-neutral measures or whether race- and gender-conscious measures are also needed. The United States Department of Transportation (USDOT) offers guidance concerning how a transportation agency should project the portion of its overall DBE goal that it will meet through race- and gender-neutral and race- and gender-conscious measures including the following:

- USDOT Questions and Answers about 49 CFR Part 26;²
- USDOT’s “Tips for Goal-Setting,”³ and
- Federal Highway Administration (FHWA)’s Overall DBE Goal template. Figure 9-1 presents an excerpt from that template.

Based on 49 Code of Federal Regulations (CFR) Part 26 and the resources above, general areas of questions that transportation agencies might ask related to making any projections include:

¹ <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

² <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged>

³ <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

- A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?
- B. What has been the agency’s past experience in meeting its overall DBE goal?
- C. What has DBE participation been when the agency did not use race- or gender-conscious measures?⁴
- D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

Chapter 9 is organized around each of those general areas of questions.

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?

As presented in Chapter 3 as well as in Appendices C and D, BBC Research & Consulting (BBC) examined conditions in the Illinois marketplace related to human capital, financial capital, business ownership, and business success. There is substantial quantitative evidence of barriers for minority- and woman-owned businesses overall and for specific groups related to those business inputs and outcomes. Qualitative information also indicated evidence of barriers and discrimination affecting the local marketplace. However, some minority and woman business owners that the study team interviewed as part of the disparity study did not think that their businesses had been affected by any race- or gender-based discrimination. IDOT should review the information about marketplace conditions presented in this report as well as other information it may have when considering the extent to which it can meet its overall DBE goal through race- and gender-neutral measures.

B. What has been the agency’s past experience in meeting its overall DBE goal?

Figure 9-2 presents the participation of certified DBEs in IDOT’s FHWA-funded transportation contracts in recent years, as presented in IDOT reports to USDOT. Based on information about

Figure 9-1. Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State’s race-neutral/race-conscious division and why it is the State’s best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient’s race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient’s market, the race-neutral measures it employs and information on contracting in the recipient’s contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient’s contracts that do not have contract goals; past prime contractors’ achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state’s programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women’s businesses participate in programs without goals.

⁴ To assess that question, USDOT guidance suggests evaluating: (a) DBE participation in the agency’s prime contracts when race- or gender-conscious measures were not used; (b) DBE participation in the agency’s subcontracts when race- or gender-conscious measures were not used; DBE participation in other state/ local or private sector organizations’ contracting when race- or gender-conscious measures were not used.

awards and commitments to DBE-certified businesses, IDOT has not met its overall DBE goal in recent years. In federal fiscal years (FFYs) 2012 through 2016, DBE awards and commitments on FHWA-funded contracts was below IDOT’s overall DBE goal by an average of 7.9 percentage points. IDOT applied race- and gender-conscious DBE contract goals to many FHWA-funded transportation contracts during those years.

Figure 9-2.
Past certified DBE participation on FHWA-
funded contracts, FFY 2012-2016

Source:
 Commitments/Awards reported on IDOT’s Uniform Reports of DBE
 Awards/Commitments and Payments.

FFY	DBE Attainment	Annual DBE Goal	Difference
2012	15.89 %	22.77 %	-6.9 %
2013	14.36	22.77	-8.4
2014	14.60	22.77	-8.2
2015	15.53	22.77	-7.2
2016	13.77	22.77	-9.0

C. What has DBE participation been when the agency did not use race- or gender-conscious measures?

IDOT applied race- and gender-conscious DBE contract goals to many FHWA-funded transportation contracts during the study period (October 1, 2012 through September 30, 2016). IDOT also applied DBE contract goals to many of its state-funded contracts during that same time period. However, during the study period, the agency did not use race- or gender-conscious program measures to award more than \$600 million of transported-related contracts during the study period. DBE participation in those contracts was 8.4 percent.

D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

When determining the extent to which IDOT could meet its overall DBE goal through the use of race- and gender- neutral measures, the agency should review the neutral measures that it and other local organizations already have in place. IDOT should also review measures that it has planned, or could consider, for future implementation. BBC reviewed race- and gender-neutral measures that IDOT currently uses to encourage the participation of minority- and woman-owned businesses in its contracting. In addition, BBC reviewed race- and gender-neutral measures that other agencies in Illinois use.

IDOT’s race- and gender-neutral measures. IDOT uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many minority- and woman-owned businesses—in its contracting. IDOT uses the following types of race- and gender-neutral measures as part of its efforts to comply with the Federal DBE Program:

- Advocacy and outreach efforts;
- Business development programs;
- Mentor-protégé program; and
- Financial assistance.

Advocacy and outreach efforts. IDOT participates in various advocacy and outreach efforts including hosting networking events and using communications that target the contracting community.

Communications. IDOT communicates with DBEs through e-mail, its website, its integrated DBE database, and its vendor prequalification lists. IDOT uses its databases of vendors as well as its website to announce contracting opportunities, special events, and new program initiatives.

Today's Challenge Tomorrow's Reward (TCTR) Conference. IDOT hosts its annual TCTR Conference to provide information about IDOT programs, initiatives, and upcoming projects to the contracting community. On average, the conference attracts approximately 350 participants each year and provides opportunities for contractors to network amongst themselves as well as with trade associations; state and federal government representatives; and IDOT staff.

Webinars. IDOT hosts regular webinars on a variety of topics relevant to the contracting community, small businesses, and DBEs. The webinars are designed to not only provide information about IDOT projects and initiatives but to also solicit feedback from the contracting community.

District meetings. Individual IDOT districts also host their own networking meetings and pre-bid events to provide information about upcoming projects and allow prime and subcontractors to meet and make potential business connections.

Business development programs. IDOT administers a number of business development programs designed to provide small businesses and DBEs with technical skills and training to increase DBEs' competitiveness in the transportation contracting industry.

Foundation for Growth. IDOT implements the Foundation for Growth Business Development Program to provide a structured process for DBEs to receive firm-specific training and guidance to help them grow and become more competitive in the transportation contracting industry. The program provides DBEs with full business analyses, tailored training, and other opportunities to help them diversify their lines of work. Businesses join the program for one or two years based on the stage in which their business is when they join. In order to apply for the program, DBEs must submit a needs assessment.

Supportive Services Program. IDOT's Supportive Services Program provides technical and management assistance to qualifying businesses in all areas of business development including cash flow and financing; business planning; website development and marketing; estimating and bidding; and prequalification requirements. The program is executed through a partnership with a network of consultants who provide management and technical advice. The Supportive Services Program is provided free of charge to IDOT-certified DBEs, businesses seeking IDOT DBE certification, state-certified DBEs who have been awarded IDOT contracts, and prime contractors doing business with IDOT.

Highway Construction Careers Training Program (HCCTP). In partnership with the Illinois Community College Board, IDOT created the HCCTP. Through HCCTP, IDOT partners with community colleges throughout the agency's nine districts to provide technical training. The

program includes an eight to ten week course—held two to three times per academic year—that provides in-depth training in highway construction-related skills such as job readiness, Occupational Safety and Health Administration certification, and math for construction trades. IDOT encourages the participation of minorities, women, and disadvantaged individuals in the program and provides financial incentives for prime contractors to hire HCCTP graduates on certain IDOT contracts.

Small Business Enterprise (SBE) compliance workshops. IDOT’s Bureau of Small Business Enterprises offers workshops to DBEs and trade associations on various compliance issues. The workshops are designed to assist prime and subcontractors successfully comply with the DBE program and adhere to and understand Commercially Useful Function Reviews to ensure maximum goal credit on IDOT projects.

Mentor-protégé program. IDOT administers a mentor-protégé program for construction and consultant engineering services. The program is intended to help businesses increase their expertise and experience in a variety of work categories and improve their ability to perform more complex work. As part of the program, mentor-protégé partners develop a plan that outlines their goals and expectations; establish monitoring and reporting practices; define the duration of the relationship; and identify services and resources that the mentor will provide the protégé. As part of the relationship, the mentor must provide the protégé with a commercially useful function in the performance of an IDOT contract.

Financial assistance. In 2013, the State of Illinois adopted Public Act 98-0117 which created the IDOT Disadvantaged Business Enterprise Working Capital Revolving Fund Loan Program (DBE Loan Program). The DBE Loan Program provides assistance to DBEs that are ready, willing, and able to participate in the agency’s construction contracts. The program helps DBEs with project financing costs through the availability of low-interest lines of credit. In order to qualify for a loan, DBEs must submit an application to IDOT’s Bureau of Small Business Enterprises for pre-approval. Upon award of contracts, DBEs then submit notices of award to the Bureau of Small Business Enterprises, and their loans are in-turn submitted to the Loan Selection Committee for review and approval. Fund control agents work directly with recipient DBEs to develop a loan repayment plan and monitor progress towards repayment. As part of the loan program, DBEs also receive credit restoration training, project scheduling assistance, and other supportive services to ensure successful participation in the program.

Other agencies’ program measures. In addition to the race- and gender-neutral measures that IDOT currently uses, there are a number of race- and gender-neutral program measures that other agencies in Illinois use to encourage the participation of minority- and woman-owned businesses. Figure 9-3 provides examples of those measures.

Figure 9-3.
Examples of race- and gender-neutral programs that other agencies in Illinois use

Program type	Examples in the local marketplace
<p>Business Development</p>	<p>Illinois Department of Central Management Services (CMS) provides a free brochure of valuable information on how to sell products and services, register as a Vendor, how to look up other Vendors, Vendor Payment programs, and much more. CMS hosts events on a monthly basis for small business owners to network and attend workshops. Most of the events are free.</p>
	<p>Peoria Illinois U.S. Export Assistance Center provides counseling and advice to small- and medium-sized businesses located in Illinois to help businesses expand internationally. The organization provides resources online via webinar or PDF brochures that consist of information on markets abroad, international partner contacts, and advocacy services. From 2013 to 2014 they assisted with 1,343 exports generating \$879 million. The organization also provides assistance on obtaining grants and contracts.</p>
	<p>The Department of Labor’s Office of Small and Disadvantaged Business Utilization (OSDBU) is an advocacy and advisory office responsible for promoting the use of small, disadvantaged, minority-owned, woman-owned, veteran-owned, service-disabled veteran-owned, and HUBZone small businesses within the U.S. Department of Commerce’s (DOC) acquisition process. The goal of OSDBU is to connect small businesses with federal and state information by following the Small Business Procurement requirements. The OSDBU provides online trainings and a small business resource center available to all small business owners.</p>
	<p>The City of Peoria Economic Development created Grow Peoria with state and local incentives to increase investment and employment in the area. The organization provides business assistance with enterprise zoning, tax increment financing, revolving loan fund, minority business development programs, local business assistance programs, and other government assistance programs. The City of Peoria Economic Development also hosts events on a monthly basis for business owners at no charge. The industries they try to target include specialized manufacturing, healthcare, and innovation and technology.</p>
	<p>The Polsky Small Business Growth Program focuses on supporting small business owners by helping grow and achieve the next level of success. The Polsky Small Business Growth Program gets funding from JPMorgan Chase and is part of the nationwide Ascend 2020 program, which partners with top universities and institutions to provide business assistance and opportunities for minority-owned, woman-owned, and veteran-owned businesses in major metropolitan areas including Atlanta; Chicago; Los Angeles; San Francisco; Seattle; and Washington, D.C. The Polsky Center will partner with outside organizations like Accion, LISC, CASE, and the Chicago Urban League to find ways to provide additional financing and coaching. Polsky host events for small businesses like information sessions, networking events, workshops, and forums. Some events are free but others can cost up to \$75.</p>
	<p>Chicago Anchors for a Strong Economy (CASE)—a division of World Business Chicago—is a network of Chicagoland anchor institutions, small businesses, and community partners committed to collectively impacting neighborhood economic development through local purchasing, hiring, and investments. Anchor institutions consist of universities, cultural institutions, hospitals, governments, and businesses. CASE helps with procurement, workforce development, business development, and neighborhood development.</p>
	<p>Northwest Illinois Development Alliance (NIDA) is a resource for entrepreneurial start-ups and small businesses. NIDA is a nonprofit economic development corporation developed to retain, expand, and diversify businesses in the City of Freeport, Stephenson County, and northwest Illinois. NIDA works with businesses in industries like advanced manufacturing; healthcare products and services; value-added agri-business; and warehousing and logistics. NIDA works with both the public and private sector to maximize the effectiveness of economic development and costs.</p>
<p>The Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs provide qualified small businesses with opportunities to propose innovative projects that meet specific federal needs. Those programs offer more than \$2 billion dollars annually to support the research and development of technology by small businesses across the nation. Federal agencies set aside a portion of their extramural R&D budget to be awarded to small businesses. Entrepreneurs can get anywhere from \$150,000 to \$1 million in capital to determine a technology’s feasibility and develop a prototype. SBIR and STTR offer free guidance with submitting proposals; training two times a year about the SBIR and STTR program; and workshops about SBIR funding. This program is offered to East Central Illinois entrepreneurs.</p>	

Figure 9-3. (continued)

Examples of race- and gender-neutral programs that other agencies in Illinois use

Program type	Examples in the local marketplace
<p>Capital, bonding, and insurance</p>	<p>RetireMax Insurance provides with insurance assistance to small and home-based businesses located in Illinois. RetireMax learns about businesses and industries so its risk-management experts can assess the risk that businesses may face and implement a prevention and risk-management solution. RetireMax provides free online resources provided by the Insurance Information Institute, U.S. Small Business Administration, and Insure U–Small Business to help business owners better understand insurance needs.</p>
	<p>Accion Chicago is a nonprofit that helps communities grow by investing in people who build businesses and generate jobs in their neighborhoods. Accion provides customized capital solutions and one-on-one coaching to underserved entrepreneurs in Illinois and Northwest Indiana. Small business Loans range from \$500 to \$100,000 with terms of six to 72 months. Accion offers four programs that assist different individuals with financial needs: Tory Burch Foundation Capital Program, Accion Edge, Small Business Loan Program, and Seed Chicago.</p>
	<p>Growth Corp is a nonprofit organization empowered by the U.S. Small Business Administration to organize the 504 lending program for small businesses throughout the entire state of Illinois. The 504 Loan Program provides small business owners with financing to acquire land, buildings, machinery, or equipment. Financing is available up to 90 percent of the project cost with low fixed-interest rates.</p>
	<p>There are a host of companies that provide insurance for small business protection including General Liability Insurance, Professional Liability Insurance, Business Liability Insurance, Workers’ Compensation Insurance, and Employment Practices Liability Insurance. Those types of coverage are available to all business owners in Illinois at affordable rates. Some of the companies include Insure on, The Hartford, Nationwide, Allstate, Hiscox, E-Insurance, State Farm, Business Insurance USA, Net quote, and Illinois Trusted Choice.</p>
	<p>The State of Illinois has partnered with multiple companies throughout the state that offer loan programs. The loan programs are available to all small and new businesses, offering loans from 10 percent to 50 percent of the total value of the project with affordable interest rates. The State’s partners include Community Service Block Grant Loan Program, Illinois Capital Access Program, Illinois State Treasures Office, Enterprise Zone Participation Loan Program, The Illinois Finance Authority, Minority, Women and Disabled Participation Loan Program, Participation Loan Program, Revolving Line of Credit Program, and Rural Micro-Business Participation Loan Program. Each partnership has different qualifications and requirements.</p>
	<p>Illinois Surety Bonds guarantee that specific tasks are fulfilled by bringing together the principal, obligee, and surety in a mutual and legally binding contract. Surety Bonds helps business owners with streamlining, simplifying, and applying for the correct Bond. Surety Bonds has a program for individuals with bad credit called Bad Credit Bonding Program through which the organization has approved 99 percent of applicants no matter their financial situation. Surety Bond provides learning material online at no charge. Those materials include webinars, written resources, and cost calculators. Some of the popular Surety Bonds include license and permit; construction; commercial; and court bonds.</p>

Figure 9-3. (continued)
Examples of race- and gender-neutral programs that other agencies in Illinois use

Program type	Examples in the local marketplace
<p>Mentor-Protégé Programs</p>	<p>Service Corps of Retired Executives (SCORE) is a nonprofit association located throughout Illinois offering free education, counseling, and many other resources for starting a Small Business. The program is offered to all U.S. citizens with free mentoring and low-cost trainings. The organization also conducts a variety of workshops online and in-person that address many of the essential techniques necessary for establishing and managing a successful business. SCORE is located throughout the United States.</p> <p>The SBA 8(a) Business Development Mentor-Protégé Program pairs subcontractors with prime contractors to assist small businesses with management, financial, and technical issues. The program also helps small businesses explore joint ventures and subcontracting opportunities for federally-funded contracts.</p> <p>The Duman Entrepreneurship Center provides assistance to early stage, startup, and small businesses located in the Chicagoland area. The center provides support with training, education, mentoring, and access to capital. Duman also offers entrepreneurship loans of up to \$15,000 with low-interest rates repayable over a three-year term to eligible small businesses that cannot take advantage of traditional lending channels. Duman offers a six-week startup accelerator program that helps businesses complete a business plan, one-on-one small business coaching, networking, marketing, legal and operational training and access to working capital. The accelerator program has an administrative fee of \$100 for participating applicants. The organizations partners with Business Affairs and Consumer Protection to host weekly workshops at no charge.</p> <p>Illinois Tollway implements several business programs including the Federal Disadvantaged Business Enterprise Program, the Business Enterprise Program, the Veterans Business Program, a mentor-protégé program, technical assistance programs, a small business set-aside program, the Highway Construction Careers Training Program, the Earned Credit Program, and the Equal Employment Opportunity Program. The Illinois Tollway also provides myriad resources online at no charge for businesses in construction; engineering; and goods and services.</p>
<p>Technical Assistance</p>	<p>Illinois Procurement Technical Assistance Centers (PTACs) provides services for small businesses that would like to pursue government contracting. Some of the services that PTACs provide include targeting government agencies, assistance with certifications, assistance with the System for Award Management, and review of Bid Packages. There are four PTACs throughout Illinois. Some locations provide webinars, and all locations provide face-to-face assistance.</p> <p>Central Illinois Angels (CIA) is a nonprofit, membership-based investment organization composed of business leaders and professionals in Central Illinois. CIA facilitates the introduction of entrepreneurs to potential investors through presentations and other mechanisms. CIA has partnered with organizations like the Bradley Technology Commercialization Center, the Greater Peoria Economic Development Council, the Peoria Area Chamber of Commerce, the Angel Resource Institute, the Angel Capital Association, the Kauffman Foundation, the Illinois Technology Association, and the Wisconsin Angel Network. CIA works with its partners to help small businesses with networking opportunities, educational events, investment opportunities, promotional opportunities, and to improve business.</p> <p>The Small Business Administration (SBA) of Illinois provides resources for business advice; educational publications; and financial and training programs. The SBA of Illinois hosts a variety of events such as starting a business in Illinois, technology Tuesday series, marketing, 8(a) orientation, and government contracting. Events are held on a monthly basis either in person or online for free or for a nominal fee. The SBA also offers specialized programs for women, minorities, veterans, international trade, and rural development.</p>

Figure 9-3. (continued)

Examples of race- and gender-neutral programs that other agencies in Illinois use

Program type	Examples in the local marketplace
<p>Technical Assistance (cont.)</p>	<p>The Illinois Department of Commerce & Economic Opportunity (DCEO) provides forms, guides, and online instructions for how to start a business in Illinois. DCEO works with businesses to build a network of financial support. That network consists of Advancing the Development of Minority Entrepreneurship, Advantage Illinois, the Illinois Finance Authority, and the Illinois State Treasures Office. All resources are provided at no charge and available to all Illinois residents looking to start a business.</p> <p>Small Business Tax Workshops and Webinars are conducted by the Internal Revenue Service, the Illinois Department of Revenue, the Illinois Department of Employment Security, the Social Security Administration, and the Small Business Administration. The workshops are designed to help businesses learn what they need to know about federal taxes and their business; filing and paying taxes electronically; setting a retirement plan for business owners and employees; tax deposits; and how to manage payroll. All workshops and webinars are held monthly and available to new and existing small business owners at no charge.</p> <p>The Operation HOPE Small Business Empowerment Program is designed for entrepreneurs from low-wealth neighborhoods. The program provides small business loans, business services, trainings, information, and resources. The workshops and trainings consist of a 12-week entrepreneurial training program; a small business development and access to capital workshop; and a credit and money management workshop. The assistance and services offered as part of the program are credit counseling; accounting; marketing; business plan development; business financial statements; and computer and internet access.</p> <p>Illinois Small Business Development Centers (SBDC) offers a variety of services pertaining to management assistance, development of business plans, accessing and development of marketing plans, accessing business financing programs; financial analysis and planning; and business education/training opportunities. SBDC has 19 locations throughout the state of Illinois. Some programs have a small fee ranging from \$10 to \$30.</p>

CHAPTER 10.

Program Implementation

CHAPTER 10.

Program Implementation

Chapter 10 reviews information relevant to the Illinois Department of Transportation's (IDOT's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for Federal Highway Administration (FHWA)-funded contracts. In addition, Chapter 10 presents considerations that the agency should make as it works to refine its compliance with the DBE Program. Chapter 10 is presented in two parts:

- A. Elements of the Federal DBE Program; and
- B. Additional Considerations.

A. Elements of the Federal DBE Program

Regulations presented in 49 Code of Federal regulations (CFR) Part 26 and associated documents offer agencies guidance related to implementing the Federal DBE Program. Key requirements of the program are described below in the order that they are presented in 49 CFR Part 26.¹

Reporting to DOT – 49 CFR Part 26.11 (b). IDOT must periodically report DBE participation in its FHWA-funded contracts to the United States Department of Transportation (USDOT). IDOT tracks DBE and non-DBE participation in its federally-funded contracts at the time of award based on subcontractor commitment amounts. Based on that information, IDOT prepares Uniform Reports of DBE Awards or Commitments and Payments, which it reports to USDOT. IDOT should also consider collecting information about payments to subcontractors throughout the course of its projects. IDOT could consider requiring prime contractors to submit subcontractor payment data as part of the invoicing process and as a condition of receiving payment.

Bidders list – 49 CFR Part 26.11 (c). As part of its implementation of the Federal DBE Program, IDOT must develop a bidders list of businesses that are available for its contracts. The bidders list must include the following information about each available business:

- Firm name;
- Address;
- DBE status;
- Age of firm; and
- Annual gross receipts.

IDOT should ensure that its bidders list is current and includes all relevant information for businesses bidding or proposing on the agency's FHWA-funded prime contracts and subcontracts.

¹ Because only certain portions of the Federal DBE Program are discussed in Chapter 10, IDOT should refer to the complete federal regulations when considering its implementation of the program.

Information from availability surveys. As part of the availability analysis, the study team collected information about local businesses that are potentially available for different types of IDOT prime contracts and subcontracts. IDOT should consider using that information to augment its current bidders list.

Maintaining comprehensive vendor data. In order to effectively track the participation of minority- and woman-owned businesses in its contracts, IDOT should consider continuing to improve the information that it collects on the ownership status of businesses that participate in its contracts, including both prime contractors and subcontractors. In addition to collecting information about DBE certification status, IDOT should consider collecting information on the race/ethnicity and gender of business owners regardless of DBE status. As appropriate, IDOT can use business information that the study team collected as part of the disparity study to augment its vendor data.

Prompt payment – 49 CFR Part 26.29. IDOT follows prompt payment requirements that are specified in Illinois state law, which requires IDOT to pay prime contractors within 60 days of the agency approving an invoice.² Prime contractors are required to pay subcontractors no later than 15 days after receiving payment from IDOT. However, prompt payment policies are not extended to suppliers on highway construction projects. Qualitative information collected as part of in-depth interviews and public meetings that the study team conducted indicated that many businesses are dissatisfied with the timeliness of payment on IDOT contracts. IDOT should review its enforcement of prompt payment policies to ensure that both prime contractors and subcontractors are paid promptly. IDOT should consider decreasing the time in which the agency pays prime contractors and the time in which prime contractors must pay subcontractors. IDOT should also consider extending prompt payment policies to suppliers on highway construction projects.

DBE directory – 49 CFR Part 26.31. IDOT offers a directory on its website of all certified DBEs, searchable by business name, industry code, industry type, and geographical location. Qualitative information that the study team collected through in-depth interviews and public meetings indicated that many business owners and managers are aware of the directory but that additional efforts to help identify DBE subcontractors would be helpful. IDOT currently publicizes bid and solicitation information on its website via the agency's Transportation Bulletin. IDOT should consider linking that information to information about qualified DBEs in the DBE directory, so that when prime contractors become aware of contracts in which they might be interested, they may also be notified of qualified DBEs who might be interested in participating in those contracts as subcontractors.

² Prompt Payment Act, 30 ILCS 540

Overconcentration – 49 CFR Part 26.33. Agencies implementing the Federal DBE Program are required to report and take corrective measures if they find that DBEs are so overconcentrated in certain work areas as to unduly burden non-DBEs working in those areas. Such measures may include:

- Developing ways to assist DBEs to move into nontraditional areas of work;
- Varying the use of DBE contract goals; and
- Working with contractors to find and use DBEs in other industry areas.

BBC investigated potential overconcentration in IDOT contracts. There were ten specific subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars for contracts awarded between October 1, 2012 and September 30, 2016 based on contract data that the study team received from IDOT:

- Testing and inspection (100%);
- Landscape architecture (98%);
- Surveying and mapmaking (84%);
- Structural steel erection (78%);
- Trucking, hauling, and storage (77%);
- Environmental services (71%);
- Landscaping (66%);
- Concrete work (61%);
- Engineering (60%); and
- Flagging services (57%).

Because the above figures are based only on subcontract dollars, they do not include work that prime contractors self-performed in those areas. If the study team had included self-performed work in those analyses, the percentages for which DBEs accounted would likely have decreased. In addition, the above figures are based on both FHWA- and state-funded contracts and would likely differ if limited to only FHWA-funded contracts. IDOT should consider reviewing similar information and continuing to monitor the above types of work for potential overconcentration in the future.

Business development programs – 49 CFR Part 26.35 and mentor-protégé programs – 49 CFR Appendix D to Part 26. Business Development Programs (BDPs) are programs that are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the Federal DBE Program. IDOT offers a number of BDPs for potential and current DBEs including:

- The Supportive Services Program, which offers technical and management assistance to certified DBEs;

- The Highway Construction Careers Training Program, through which IDOT partners with the Community College Board to provide technological training targeted towards women, minorities, and disadvantaged individuals working in construction and construction-related professional services fields;
- The Foundations for Growth Business Development Program, which provides a structured process for DBEs to receive firm-specific training and guidance; and
- The mentor-protégé program, which is offered to construction and consultant engineering services businesses.

IDOT should continue to communicate with certified DBEs to ensure that its BDPs provide specialized assistance that is tailored to the needs of developing businesses in the Illinois marketplace and throughout IDOT’s individual districts. Qualitative information that the study team collected through in-depth interviews and public meetings indicated that many business owners did not perceive the mentor-protégé program to be effective, particularly for construction businesses. IDOT might explore additional ways to incentivize prime contractors to participate in the program in meaningful ways and to encourage continued relationships among mentors and protégés even after they exit the program.

Responsibilities for monitoring the performance of program participants – 49 CFR Part 26.37 and 49 CFR Part 26.55. The Final Rule effective February 28, 2011, revised requirements for monitoring the work that prime contractors commit to DBE subcontractors at contract award (or through contract modifications) and enforcing that those DBEs actually perform that work. USDOT describes the requirements in 49 CFR Part 26.37(b). The Final Rule states that prime contractors can only terminate DBEs for “good cause” and with written consent from the awarding agency. In addition, 49 CFR Part 26.55 requires agencies to only count the participation of DBEs that are performing commercially useful functions (CUFs) on contracts toward meeting DBE contract goals and overall DBE goals. IDOT implements several monitoring and enforcement mechanisms including:

- Reviews of DBE participation both prior to contract award and after project closeout; and
- CUF reviews, which require IDOT’s Contract Compliance Officers to monitor DBE performance for compliance with CUF requirements.

IDOT should consider reviewing the requirements set forth in 49 CFR Part 26.37(b), 49 CFR Part 26.55, and in The Final Rule to ensure that its monitoring and enforcement mechanisms are appropriately implemented and consistent with federal regulations and best practices.

Fostering small business participation – 49 CFR Part 26.39. When implementing the Federal DBE Program, IDOT must include measures to structure contracting requirements to facilitate competition by small businesses, “taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.”³ The Final Rule effective February 28, 2011 added a requirement for agencies

³ 49 CFR Part 26.39(a).

to foster small business participation in their contracting. It required agencies to submit a small business participation plan to USDOT in early 2012. USDOT identifies the following potential strategies for fostering small business participation:

- Establishing a race- and gender-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million);
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures comprising small businesses—including DBEs—to compete for and perform prime contracts; and
- Unbundling large contracts to allow small businesses more opportunities to bid for smaller contracts.

IDOT does not currently implement a comprehensive small business program but does use small business set-asides for some state-funded contracts worth less than \$100,000. IDOT has also begun to make concerted efforts to unbundle relatively large contracts into smaller elements and identify small businesses with the capacity to perform on its contracts. Qualitative data that the study team collected through in-depth interviews and public meetings indicated that many businesses supported the use of small business set-asides and unbundling large contracts. IDOT might consider ways in which it can expand its use of set-asides on FHWA-funded contracts. IDOT should also continue to make efforts to unbundle large contracts into smaller contracts. Those efforts might increase small business participation in IDOT contracts. IDOT might also consider other ways to increase small business participation such as asking prime contracts to submit small business participation plans or waiving prequalification requirements for contracts worth less than a certain threshold.

Chapter 9 of the report outlines many of IDOT's current and planned *race- and gender-neutral* program measures and provides examples of measures that other organizations in Illinois have implemented. IDOT should review that information and consider implementing measures that the agency deems to be effective. IDOT should also review legal and budgetary issues in considering different measures.

Prohibition of DBE quotas and set-asides for DBEs unless in limited and extreme circumstances – 49 CFR Part 26.43. DBE quotas are prohibited under the Federal DBE Program, and DBE set-asides can only be used in extreme circumstances. IDOT does not use DBE quotas or set-asides as part of its implementation of the Federal DBE Program.

Setting overall DBE goals – 49 CFR Part 26.45. In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit their overall DBE goals. As discussed in Chapter 1, agencies such as IDOT now need to develop and submit their overall DBE goals every three years. Chapter 8 uses data and results from the disparity study to provide IDOT with information that could be useful in developing its next overall DBE goal.

Analysis of reasons for not meeting overall DBE goal – 49 CFR Part 26.47(c). Another addition to the Federal DBE Program made under The Final Rule effective February 28, 2011

requires agencies to take the following actions if their DBE participation for a particular fiscal year is less than their overall DBE goal for that year:

- Analyze the reasons for the difference in detail; and
- Establish specific steps and milestones to address the difference and enable the agency to meet the goal in the next fiscal year.

Based on information about awards and commitments to certified DBEs, IDOT has not met its DBE goal in recent years. In federal fiscal years 2012 through 2016, IDOT's attainment of DBE participation on FHWA-funded contracts was below its overall DBE goal by an average of 7.9 percentage points.

Need for separate accounting for participation of potential DBEs. In accordance with guidance in the Federal DBE Program, BBC's analysis of the overall DBE goal in the disparity study includes DBEs that are currently certified and minority- and woman-owned businesses that could *potentially* be DBE-certified based on revenue standards (i.e., *potential DBEs*).⁴ Agencies can explore whether one reason why they have not met their overall DBE goals is because they are not counting the participation of potential DBEs. USDOT might then expect an agency to explore ways to further encourage potential DBEs to become DBE-certified as one way of closing the gap between reported DBE participation and its overall DBE goal. In order to have the information to explore that possibility, IDOT should consider:

- Developing a system to collect information on the race/ethnicity and gender of the owners of all businesses—not just certified DBEs—participating as prime contractors or subcontractors in FHWA-funded contracts;
- Developing internal reports for the participation of all minority- and woman-owned businesses in FHWA-funded contracts; and
- Continuing to track participation of certified DBEs on FHWA-funded contracts per USDOT reporting requirements.

Other steps to evaluate how IDOT might better meet its overall DBE goal. Analyzing the participation of potential DBEs is one step among many that IDOT might consider taking when examining any differences between DBE participation and its overall DBE goal. IDOT must also establish specific steps and milestones to correct any problems it identifies to enable it to better meet its overall DBE goal in the future.⁵

Maximum feasible portion of goal met through neutral program measures – 49 CFR Part 26.51(a). As presented in Chapter 9, IDOT must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. IDOT must

⁴ Note that minority- and woman-owned businesses that could be DBE-certified but that are not currently certified are counted as part of calculating the overall DBE goal. However, the participation of those businesses is not counted as part of IDOT's DBE participation reports.

⁵ 49 CFR Part 26.47(c)(2).

project the portion of its overall DBE goal that could be achieved through such measures. The agency should consider the information presented in Chapter 9 when making such projections.

Use of DBE contract goals – 49 CFR Part 26.51(d). The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral measures. Based on information from the disparity study and other available information, IDOT should assess whether the continued use of DBE contract goals is necessary in the future to meet any portion of its overall DBE goal. USDOT guidelines on the use of DBE contract goals, which are presented in 49 CFR Part 26.51(e), include the following guidance:

- DBE contract goals may only be used on contracts that have subcontracting possibilities;
- Agencies are not required to set DBE contract goals on every FHWA-funded contract;
- During the period covered by the overall DBE goal, an agency must set DBE contract goals so that they will cumulatively result in meeting the portion of the overall DBE goal that the agency projects being unable to meet through race- and gender-neutral measures;
- An agency’s DBE contract goals must provide for participation by all DBE groups eligible to participate in *race- and gender-conscious* measures and must not be subdivided into group-specific goals; and
- An agency must maintain and report data on DBE participation separately for contracts that include and do not include DBE contract goals.

If IDOT determines that it needs to continue using DBE contract goals on FHWA-funded contracts, then it should also evaluate which DBE groups should be considered eligible for those goals. If IDOT decides to consider only certain DBE groups (e.g., groups that IDOT determines to be *underutilized* DBEs) as eligible to participate in DBE contract goals, it must submit a waiver request to FHWA.

Some individuals participating in in-depth interviews and public meetings made comments related to the use of race- and gender-conscious measures such as DBE contract goals:

- Several minority- and woman-owned businesses commented that race- and gender-conscious measures help their businesses get their “foot in the door” with prime contractors. Some minority- and woman-owned businesses indicated that the DBE program was the biggest factor helping their businesses compete in otherwise “tough” fields.
- Some interviewees suggested that race- and gender-conscious measures were a disadvantage to other small businesses in the marketplace, particularly those owned by non-Hispanic white men. Many interviewees also indicated that they are aware of several fraudulent businesses that are taking advantage of such measures.

IDOT should consider those comments if it determines that it is appropriate to use DBE contract goals on FHWA-funded contracts in the future.

Flexible use of any race- and gender-conscious measures – 49 CFR Part 26.51(f).

State and local agencies must exercise flexibility in any use of race- and gender-conscious

measures such as DBE contract goals. For example, if IDOT determines that DBE participation exceeds its overall DBE goal for a fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal in a fiscal year, then it must make appropriate modifications in the use of race- and gender-neutral and race- and gender-conscious measures to allow it to meet its overall DBE goal in the following year. If IDOT observes increased DBE participation (relative to availability) on contracts to which race- and gender-conscious measures do not apply, the agency might consider changing its projection of how much of its overall DBE goal it can achieve through the use of race- and gender-neutral measures in the future.

Good faith efforts procedures – 49 CFR Part 26.53. USDOT has provided guidance for agencies to review good faith efforts including materials in Appendix A of 49 CFR Part 26. IDOT’s current implementation of the Federal DBE Program outlines the good faith efforts process that it uses for DBE contract goals. The Final Rule effective February 28, 2011 updated requirements for good faith efforts when agencies use DBE contract goals. IDOT requires contractors to submit good faith efforts documentation and written confirmation in the event that bidders’ efforts to include sufficient DBE participation were unsuccessful. Factors that IDOT considers in evaluating good faith efforts include:

- A bidder’s solicitation process including whether solicitations were advertised with sufficient time to allow DBEs to respond;
- Whether a bidder has selected portions of work to be performed by DBEs or has broken out portions of work into more feasible units in order to increase the likelihood that that the DBE goal will be achieved;
- Whether a bidder provided interested DBEs with adequate information about project plans, specifications, and requirements in a timely manner;
- Whether a bidder has negotiated in good faith with interested DBEs in an effort to facilitate DBE participation;
- Whether a bidder made efforts to assist interested DBEs in obtaining required bonding, lines of credit, or insurance;
- Whether a bidder made efforts to assist interested DBEs in obtaining required equipment, supplies, or materials; and
- Effectively using the services of community groups representing minorities and women; contractor groups; and other business assistance resources to identify interested DBEs.

IDOT does not consider perfunctory efforts as good faith efforts. Determining the sufficiency of bidders’ good faith efforts is at IDOT’s discretion and using quantitative formulas is not required. Several individuals participating in in-depth interviews and public meetings made comments related to good faith efforts:

- Many participants indicated that IDOT’s current use of race- and gender-conscious measures does not encourage prime contractors to make anything more than perfunctory good faith efforts in order to comply with the program.

- Several businesses indicated that the use of good faith efforts was rather subjective and there was a lack of consistent use of the program. Participants indicated that what was acceptable as good faith efforts differed among IDOT staff.

IDOT might review such concerns further when evaluating ways to improve its current implementation of the Federal DBE Program. IDOT should also review 49 CFR Part 26.53, The Final Rule, and relevant case law to ensure that its good faith efforts procedures are consistent with federal regulations.

Counting DBE participation – 49 CFR Part 26.55. 49 CFR Part 26.55 describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. 49 CFR Part 26.11 presents guidance related to submitting Uniform Reports of DBE Awards or Commitments and Payments. IDOT currently tracks participation for certified DBEs but not for uncertified minority- and woman-owned businesses. As discussed above, in addition to tracking the participation of certified DBEs, IDOT should consider developing procedures to consistently track participation of all minority- and woman-owned businesses and potential DBEs in the contracts that it awards. Those efforts will help IDOT better track the effectiveness of its efforts to encourage DBE participation. If applicable, IDOT should also consider collecting important information regarding any shortfalls in annual DBE participation including preparing participation reports for all minority- and woman-owned businesses (not just those that are DBE-certified). IDOT should consider collecting and using the following information:

- Databases that BBC developed as part of the disparity study;
- Contractor/consultant registration documents from businesses working with IDOT as prime contractors or subcontractors including information about the race/ethnicity and gender of their owners;
- Prime contractor and subcontractor participation on agency contracts;
- Reports on the participation of certified DBEs in FHWA-funded contracts as required by the Federal DBE Program;
- Subcontractor participation data (for all tiers and suppliers) for all businesses regardless of race/ethnicity, gender, or certification status;
- Invoices for prime contractors and subcontractors;
- Descriptions of the areas of contracts on which subcontractors worked; and
- Subcontractors' contact information and committed dollar amounts from prime contractors at the time of contract award.

IDOT should consider maintaining the above information for some minimum amount of time (e.g., five years). The agency should also consider establishing a training process for all staff that is responsible for managing and entering contract and vendor data. Training should convey data entry rules and standards and ensure consistency in the data entry process.

DBE certification – 49 CFR Part 26 Subpart D. IDOT is one of five agencies responsible for DBE certification in Illinois. IDOT’s certification process is designed to comply with 49 CFR Part 26, Subpart D. As IDOT continues to work with certified DBEs, the agency should consider ensuring that it continues to certify all groups that the Federal DBE Program presumes to be socially and economically disadvantaged in a manner that is consistent with federal regulations.

Many business owners and managers participating in in-depth interviews and public meetings commented on the DBE certification process. Some business owners felt that the certification process was reasonable and relatively easy. However, other business owners were highly critical of the certification process. A number of business owners reported that the process was difficult to understand and very time consuming. Appendix D provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process. IDOT appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. However, the agency might research other ways to make the certification process easier for potential DBEs.

Monitoring changes to the Federal DBE Program. Federal regulations related to the Federal DBE Program change periodically, such as with the DBE Program Implementation Modifications Final Rule issued on October 2, 2014 and the Final Rule issued on February 28, 2011. IDOT should continue to monitor such developments and ensure that the agency’s implementation of the Federal DBE Program is in compliance with federal regulations. Other transportation agencies’ implementations of the Federal DBE Program are under review in federal district courts. IDOT should also continue to monitor court decisions in those and other relevant cases (for details, see Appendix B).

B. Additional Considerations

Based on disparity study results and the study team’s review of IDOT’s contracting practices and program measures, BBC provides additional considerations that IDOT should make as it works to refine its implementation of the Federal DBE Program. In making those considerations, IDOT should also assess whether additional resources or changes in state law or internal policy may be required.

Networking and outreach. IDOT hosts and participates in many networking and outreach events that include information about pre-qualification requirements; the DBE certification process; doing business with the agency; and available bid opportunities. IDOT should consider continuing those efforts but might also consider broadening its efforts. Business that participated in in-depth interviews and public meetings suggested that IDOT might partner with more local trade organizations and other public agencies such as the Illinois Black Chamber of Commerce; the United States Minority Contractors Association; the Hispanic American Construction Industry Association; Women Construction Owners & Executives; and various cities and townships. IDOT might also consider creating a consortium of local organizations and public agencies that would jointly host quarterly outreach and networking events and training sessions for businesses seeking public sector contracts. Some in-depth interview participants also recommended that IDOT provide outreach and networking opportunities during non-business hours and during weekends.

Subcontract data. IDOT maintains comprehensive data on subcontracts that are associated with the prime contracts that it awards. IDOT also collects subcontract payment information at the time of project closeout, which is often many months after a project is finished. IDOT could consider augmenting the subcontract data that it maintains by collecting subcontractor payment information throughout the course of a project. IDOT should consider requiring prime contractors to submit subcontractor payment data as part of the invoicing process and as a condition of receiving payment. Collecting subcontractor payment information will help ensure that IDOT monitors the participation of minority- and woman-owned businesses as accurately as possible.

City of Chicago data. IDOT provides a substantial amount of pass-through FHWA funding to the City of Chicago (the City). IDOT should consider collecting comprehensive information about IDOT-funded City projects including information about prime contracts as well as all associated subcontracts. Given the large volume of contracting dollars that IDOT passes through to the City, collecting comprehensive prime contract and subcontractor information on those contracts will help ensure that IDOT monitors the participation of minority- and woman-owned businesses as accurately as possible.

Unbundling Large Contracts. As part of in-depth interviews and public meetings, several minority- and woman-owned businesses reported that the size of government contracts often serves as a barrier to their success (for details, see Appendix D). In addition, IDOT has committed to unbundling large contracts to further encourage the participation of small businesses—including many minority- and woman-owned businesses. IDOT should consider expanding efforts to unbundle relatively large contracts into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation. However, IDOT should consider whether additional staff oversight is required to monitor the progress of unbundled projects.

Prime contract opportunities. Disparity analysis results indicated substantial disparities for most racial/ethnic and gender groups on the prime contracts that IDOT awarded during the study period. IDOT might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. Illinois state code already allows state agencies to set aside a fair portion of construction, supply, and service contracts for small businesses.⁶ To implement small business contracting programs, IDOT would need to develop a small business certification program or work with a state agency—such as the State of Illinois Chief Procurement Office—that already registers small businesses. It might use the same economic eligibility criteria that already exist in Illinois state code.

Subcontract opportunities. Subcontracts represent accessible opportunities for minority- and woman-owned businesses to become involved in public contracting. However, subcontracting accounted for a relatively small percentage of the total contracting dollars that IDOT awarded during the study period. IDOT could consider implementing a program that

⁶ 30 ILCS 500/45-45.

requires prime contractors to include certain levels of subcontracting as part of their bids and proposals. For each contract to which the program applies, IDOT would set a minimum subcontracting percentage based on the type of work involved, the size of the project, and other factors. Prime contractors bidding on the contract would be required to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be responsive. If IDOT were to implement such a program, the agency should include flexibility provisions such as a good faith efforts process.

Complaints and grievance procedures. A number of in-depth interview and public meeting participants indicated that IDOT does not have clear complaint and grievance procedures through which subcontractors can file complaints against prime contractors. In addition, a number of interview participants indicated that they fear retribution for filing complaints against prime contractors. IDOT should review its complaints and grievance processes to ensure that they are clear, anonymous, and actionable. Such a process could help IDOT with contract compliance and help the agency identify additional barriers that small businesses and minority- and woman-owned businesses face.

DBE contract goals. IDOT uses DBE contract goals on most of the contracts that it awards. Prime contractors can meet those goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. Disparity analysis results indicated that most racial/ethnic and gender groups did not show disparities on contracts that IDOT awarded with the use of DBE contract goals during the study period. In contrast, most racial/ethnic and gender groups showed substantial disparities on contracts that IDOT awarded without the use of DBE contract goals. Based on those results, IDOT should consider continuing its use of DBE contract goals in the future. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).

APPENDIX A.

Definition of Terms

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the 2017 Illinois Department of Transportation Disparity Study report. The following definitions are only relevant in the context of this report.

49 Code of Federal Regulations (CFR) Part 26

49 CFR Part 26 are the federal regulations that set forth the Federal Disadvantaged Business Enterprise Program. The objectives of CFR Part 26 are to:

- (a) Ensure nondiscrimination in the award and administration of United States Department of Transportation-assisted contracts;
- (b) Create a level playing field on which Disadvantaged Business Enterprises can compete fairly for United States Department of Transportation-assisted contracts;
- (c) Ensure that the Federal Disadvantaged Business Enterprise Program is narrowly tailored in accordance with applicable law;
- (d) Ensure that only businesses that fully meet eligibility standards are permitted to participate as Disadvantaged Business Enterprises;
- (e) Help remove barriers to the participation of Disadvantaged Business Enterprises in United States Department of Transportation-assisted contracts;
- (f) Promote the use of Disadvantaged Business Enterprises in all types of federally-assisted contracts and procurements;
- (g) Assist in the development of businesses so that they can compete outside of the Federal Disadvantaged Business Enterprise Program; and
- (h) Provide appropriate flexibility to agencies implementing the Federal Disadvantaged Business Enterprise Program.

Anecdotal Information

Anecdotal information includes personal qualitative accounts and perceptions of specific incidents—including any incidents of discrimination—told from individual interviewees' or participants' perspectives.

Availability Analysis

An availability analysis assesses the percentage of dollars that one might expect a specific group of businesses to receive on contracts that a particular agency awards. The availability analysis in this report is based on various characteristics of potentially available businesses in Illinois and contract elements that the Illinois Department of Transportation awarded during the study period.

Business

A business is a for-profit company including all of its establishments or locations.

Business Listing

A business listing is a record in a database of business information. A record is considered a *listing* until the study team determines that the listing actually represents a business establishment with a working phone number.

Business Establishment

A business establishment is a place of business with an address and a working phone number. A single business, or firm, can have many business establishments, or locations.

Compelling Governmental Interest

As part of the strict scrutiny legal standard, an agency must demonstrate a compelling governmental interest in remedying past identified discrimination in order to implement race- or gender-conscious measures. An agency that uses race- or gender-conscious measures as part of a minority- or woman-owned business program—such as the Federal Disadvantaged Business Enterprise Program—has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. The agency must assess discrimination within its own relevant geographic market area.

Consultant

A consultant is a business performing a professional services contract.

Contract

A contract is a legally binding relationship between the seller of goods or services and a buyer. The study team often treats 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 performing a construction contract.

Control

Control means exercising management and executive authority of a business.

Custom Census

A custom census availability analysis is one in which researchers attempt extensive 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 agency actually awarded during the study period. A custom census availability approach

is accepted in the industry as the platinum standard 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 agency's contracts.

Disadvantaged Business Enterprise (DBE)

A DBE is a business that is owned and controlled by one or more individuals who are socially and economically disadvantaged according to the guidelines in 49 CFR Part 26 which pertains to the Federal DBE Program. DBEs must be certified as such through the Illinois Department of Transportation. The following groups are presumed to be socially and economically disadvantaged according to the Federal DBE Program:

- a) Asian Pacific Americans;
- b) Black Americans;
- c) Hispanic Americans;
- d) Native Americans;
- e) Subcontinent Asian Americans; and
- f) Women of any race or ethnicity.

A determination of economic disadvantage also includes assessing business' gross revenues (maximum revenue limits ranging from \$7million to \$24.1 million depending on subindustry) and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the economic requirements in 49 CFR Part 26.

Disparity

A disparity is a difference or gap between an actual outcome and some benchmark. In this report, the term "disparity" refers to a difference between the participation, or utilization, of a specific group of businesses in Illinois Department of Transportation contracting and the availability of those businesses for that work.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation, or utilization, of a specific group of businesses in Illinois Department of Transportation contracting and the availability of those businesses for that work.

Disparity Index

A disparity index is computed by dividing the actual participation, or utilization, of a specific group of businesses in Illinois Department of Transportation contracting by the availability of those businesses for that 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).

Enterprise

An enterprise is an economic unit that could be a for-profit business or business establishment; a nonprofit organization; or a public sector organization.

Federal DBE Program

The Federal DBE Program was established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. Regulations for the Federal DBE Program are set forth in 49 CFR Part 26. It is designed to increase the participation of minority- and woman-owned businesses in United States Department of Transportation-funded contracts.

Federally-funded Contract

A federally-funded contract is any contract or project funded in whole or in part with United States Department of Transportation financial assistance including loans. In this study, the study team uses the term “federally-funded contract” synonymously with “United States Department of Transportation-funded contract” or “Federal Highway Administration-funded contract.”

Federal Highway Administration (FHWA)

The FHWA is an agency of the United States Department of Transportation that works with state and local governments to construct, preserve, and improve the National Highway System; other roads eligible for federal aid; and certain roads on federal and tribal lands.

Firm

See “business.”

Illinois Department of Transportation (IDOT)

IDOT is responsible for the planning, construction, operation, and maintenance of the transportation system throughout Illinois including highways and bridges; airports; public transit; rail freight; and rail passenger systems. It also operates the Unified Certification Program and is responsible for DBE certification throughout Illinois.

Industry

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

Majority-owned Business

A majority-owned business is a for-profit business that is owned and controlled by non-Hispanic white men.

Minority

A minority is an individual who identifies with one of the racial/ethnic groups specified in the Federal DBE Program: Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, or Subcontinent Asian Americans.

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 racial/ethnic groups that the Federal DBE Program presumes to be disadvantaged: Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, or Subcontinent Asian Americans. A business does not have to be certified as a DBE to be considered a minority-owned business. The study team considers businesses owned by minority women as minority-owned businesses.

Narrow Tailoring

As part of the strict scrutiny legal standard, an agency must 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:

- 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.¹

Non-DBE

A non-DBE is a minority- or woman-owned business or a majority-owned business that is not certified as a DBE regardless of the race/ethnicity or gender of the owner.

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.

Participation

See "utilization."

¹ 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).

Potential DBE

A potential DBE is a minority- or woman-owned business that is DBE-certified or appears that it could be DBE-certified (regardless of actual DBE certification) based on revenue requirements specified as part of the Federal DBE Program.

Prime Consultant

A prime consultant is a professional services business that performed a professional services prime contract for an end user such as IDOT.

Prime Contract

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

Prime Contractor

A prime contractor is a construction business that performed a prime contract for an end user such as IDOT.

Project

A project refers to a construction or professional services endeavor that IDOT 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. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but not other businesses. Similarly, businesses owned by women might be eligible but not businesses owned by men. The use of DBE contract goals is one example of a race- and gender-conscious measure.

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses or small businesses attempting to do work with an agency regardless of the race/ethnicity or gender of ownership. 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 efforts that are open to all businesses regardless of the race/ethnicity or gender of the owners.

Relevant Geographic Market Area

The relevant geographic market area is the geographic area in which the businesses to which IDOT awards most of its contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to minority- and woman-owned business programs and disparity studies requires disparity study analyses to focus on the “relevant geographic market area.” The relevant geographic market area for IDOT is the state of Illinois.

State-funded Contract

A state-funded contract is any contract or project that is wholly funded with non-federal funds—that is, they do not include United States Department of Transportation or any other federal funds.

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 an agency '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 agency 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 agency '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. IDOT 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 2016-17 IDOT Disparity Study was July 1, 2011 through June 30, 2016.

Subconsultant

A subconsultant is a professional services business that performed services for a prime consultant as part of a larger professional services contract.

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 performed services for a prime contractor as part of a larger contract.

Subindustry

A subindustry is a specific classification for businesses providing related goods or services within a particular industry (e.g., “water, sewer, and utility lines” is a subindustry of *construction*).

United States Departments of Transportation (USDOT)

USDOT is a federal cabinet department of the United States government that oversees federal highway, air, railroad, maritime, and other transportation administration functions. FHWA is a USDOT agency.

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.

Vendor

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

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 as a DBE to be considered a woman-owned business. (The study team considered businesses owned by minority women as minority-owned businesses.)

APPENDIX B.

Legal Framework and Analysis

Table of Contents

APPENDIX B. LEGAL FRAMEWORK AND ANALYSIS.....	1
EXECUTIVE SUMMARY	1
A. Introduction	1
B. U.S. Supreme Court Cases	4
1. <i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989).....	4
2. <i>Adarand Constructors, Inc. v. Peña</i> (“Adarand I”), 515 U.S. 200 (1995).....	6
C. The Legal Framework Applied to the Federal DBE Program and State and Local Government MBE/WBE Programs	6
1. The Federal DBE Program	6
2. Strict scrutiny analysis.....	14
3. Intermediate scrutiny analysis	27
4. Pending Cases (at the time of this report)	28
SUMMARIES OF RECENT DECISIONS	31
D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs in the Seventh Circuit Court of Appeals.....	31
1. <i>Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority</i> , 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), <i>cert. denied</i> , 2017 WL 497345 (June 26, 2017).	31
2. <i>Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.</i> , 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), <i>affirmed</i> , 840 F.3d 932 (7th Cir. 2016).....	40
3. <i>Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.</i> , 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), <i>cert. denied</i> , <i>Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.</i> , 137 S. Ct. 31, 2016 WL 193809 (Oct. 3, 2016).	50
4. <i>Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT</i> , 2014 WL 552213 (C.D. Ill. 2014), <i>affirmed Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.</i> , 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).....	54
5. <i>Northern Contracting, Inc. v. Illinois</i> , 473 F.3d 715 (7th Cir. 2007)	58
6. <i>Northern Contracting, Inc. v. Illinois</i> , 2005 WL 2230195 (N.D. Ill., 2005), <i>affirmed</i> 473 F.3d 715 (7th Cir. 2007)	61
7. <i>Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT</i> , 2004 WL 422704 (N.D. Ill. March 3, 2004)	65
8. <i>Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.</i> , 460 F.3d 859 (7th Cir. 2006).....	68
9. <i>Builders Ass’n of Greater Chicago v. County of Cook, Chicago</i> , 256 F.3d 642 (7th Cir. 2001)	68
10. <i>Milwaukee County Pavers, Association v. Fiedler</i> , 922 F.2d 419 (7th Cir. 1991).	70
11. <i>The Builders Ass’n of Greater Chicago v. The City of Chicago</i> , 298 F. Supp.2d 725 (N.D. Ill. 2003)	72
12. <i>Indianapolis Minority Corrections Assoc., Inc. v. Wiley</i> , 1998 WL 1988826 (S.D. Ind. 1998).....	73
E. Recent Decisions Involving the Federal DBE Program and its Implementation in Other Jurisdictions	77
Recent Decisions in Federal Circuit Courts of Appeal.....	77

1. <i>Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.</i> , 713 F.3d 1187 (9th Cir. 2013)	77
2. <i>Braunstein v. Arizona DOT</i> , 683 F.3d 1177 (9th Cir. 2012)	84
3. <i>Western States Paving Co. v. Washington State DOT</i> , 407 F.3d 983 (9th Cir. 2005), <i>cert. denied</i> , 546 U.S. 1170 (2006).....	86
4. <i>Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads</i> , 345 F.3d 964 (8th Cir. 2003), <i>cert. denied</i> , 541 U.S. 1041 (2004)	90
5. <i>Adarand Constructors, Inc. v. Slater</i> , 228 F.3d 1147 (10th Cir. 2000) <i>cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta</i> , 532 U.S. 941, 534 U.S. 103 (2001) ..	93
6. <i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i> , 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, <i>dismissing in part, reversing in part and remanding</i> the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014).....	94
Recent District Court Decisions.....	100
7. <i>Geyer Signal, Inc. v. Minnesota, DOT</i> , 2014 WL 1309092 (D. Minn. March 31, 2014).....	100
8. <i>M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.</i> , 2013 WL 4774517 (D. Mont.) (September 4, 2013)	108
9. <i>Geod Corporation v. New Jersey Transit Corporation, et al.</i> , 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)	112
10. <i>Geod Corporation v. New Jersey Transit Corporation, et seq.</i> 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)	117
11. <i>South Florida Chapter of the Associated General Contractors v. Broward County, Florida</i> , 544 F. Supp.2d 1336 (S.D. Fla. 2008).....	120
12. <i>Western States Paving Co. v. Washington DOT, USDOT & FHWA</i> , 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion).....	123
13. <i>Sherbrooke Turf, Inc. v. Minnesota DOT</i> , 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), <i>affirmed</i> 345 F.3d 964 (8th Cir. 2003)	124
14. <i>Gross Seed Co. v. Nebraska Department of Roads</i> , Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), <i>affirmed</i> 345 F.3d 964 (8th Cir. 2003)	125
15. <i>Klaver Construction, Inc. v. Kansas DOT</i> , 211 F. Supp.2d 1296 (D. Kan. 2002)	126
F. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions.....	126
Recent Decisions in Federal Circuit Courts of Appeal.....	126
1. <i>H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al.</i> , 615 F.3d 233 (4th Cir. 2010)	126
2. <i>Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development</i> , 438 F.3d 195 (2d Cir. 2006)	136
3. <i>Virdi v. DeKalb County School District</i> , 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)	137
4. <i>Concrete Works of Colorado, Inc. v. City and County of Denver</i> , 321 F.3d 950 (10th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)	139
5. <i>In re City of Memphis</i> , 293 F.3d 345 (6th Cir. 2002).....	150
6. <i>Associated Gen. Contractors v. Drabik</i> , 214 F.3d 730 (6th Cir. 2000), <i>affirming</i> Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998).....	151
7. <i>W.H. Scott Constr. Co. v. City of Jackson</i> , 199 F.3d 206 (5th Cir. 1999).....	154
8. <i>Monterey Mechanical v. Wilson</i> , 125 F.3d 702 (9th Cir. 1997)	157

9. <i>Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County</i> , 122 F.3d 895 (11th Cir. 1997).....	158
10. <i>Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")</i> , 950 F.2d 1401 (9th Cir. 1991).....	168
11. <i>Coral Construction Co. v. King County</i> , 941 F.2d 910 (9th Cir. 1991).....	171
Recent District Court Decisions.....	174
12. <i>Kossmann Contracting Co., Inc. v. City of Houston</i> , 2016 WL 1104363 (S.D. Tex. March 22, 2016).....	174
13. <i>H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al.</i> , 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)	181
14. <i>Thomas v. City of Saint Paul</i> , 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).....	186
15. <i>Thompson Building Wrecking Co. v. Augusta, Georgia</i> , No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)	188
16. <i>Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County</i> , 333 F. Supp.2d 1305 (S.D. Fla. 2004)....	189
17. <i>Florida A.G.C. Council, Inc. v. State of Florida</i> , 303 F. Supp.2d 1307 (N.D. Fla. 2004).....	194
18. <i>Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore</i> , 218 F. Supp.2d 749 (D. Md. 2002)	195
19. <i>Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services</i> , 140 F.Supp.2d 1232 (W.D. OK. 2001)	196
20. <i>Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore</i> , 83 F. Supp.2d 613 (D. Md. 2000)	201
21. <i>Webster v. Fulton County</i> , 51 F. Supp.2d 1354 (N.D. Ga. 1999), a'ffid per curiam 218 F.3d 1267 (11th Cir. 2000)	207
22. <i>Associated Gen. Contractors v. Drabik</i> , 50 F. Supp.2d 741 (S.D. Ohio 1999)	210
23. <i>Phillips & Jordan, Inc. v. Watts</i> , 13 F. Supp.2d 1308 (N.D. Fla. 1998).....	212
G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs	213
1. <i>Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.</i> , 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), affirming on other grounds, <i>Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.</i> , 107 F.Supp. 3d 183 (D.D.C. 2015)	213
2. <i>Rothe Development Corp. v. U.S. Dept. of Defense, et al.</i> , 545 F.3d 1023 (Fed. Cir. 2008)	216
3. <i>Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration</i> , 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016).225	
4. <i>DynaLantic Corp. v. United States Dept. of Defense, et al.</i> , 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).....	229
5. <i>DynaLantic Corp. v. United States Dept. of Defense, et al.</i> , 503 F. Supp.2d 262 (D.D.C. 2007).....	237

APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (“MAP-21,” “SAFETEA” and “SAFETEA-LU”),¹ and the United States Department of Transportation (“USDOT” or “DOT”) regulations promulgated to implement TEA-21 known as the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,² which DBE Program was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act).³ The appendix also reviews recent cases involving local minority and women-owned business enterprise (“MBE/WBE”) programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Illinois Department of Transportation (“IDOT”).

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 and participation in the Federal DBE Program.

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 and the strict scrutiny analysis. In particular, this analysis reviews the Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Co. v. Illinois DOT*,⁶ *Northern Contracting, Inc. v. Illinois DOT*,⁷ and *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*⁸

¹ 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 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (“Federal DBE Program”).

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).

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and a state government agency's or recipient's implementation of the DBE program, including: *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*⁹ *Western States Paving Co. v. Washington State DOT*,¹⁰ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*¹¹, and *M.K. Weeden Construction v. Montana, Montana DOT, et al.*¹², *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹³ *Adarand Construction, Inc. v. Slater*¹⁴ ("*Adarand VII*"), *Geyer Signal, Inc. v. Minnesota DOT*,¹⁵ *Geod Corporation v. New Jersey Transit Corporation*,¹⁶ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹⁷ The analysis also reviews recent cases involving challenges to MBE/WBE programs.

The analyses of *Dunnet Bay, Midwest Fence, Northern Contracting, AGC, SDC v. Cal. DOT*, and these other recent cases are instructive to the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program and its implementation by recipients of federal financial assistance governed by 49 CFR Part 26. They also are applicable in terms of the preparation of a DBE Program by IDOT submitted in compliance with the Federal DBE regulations.

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.¹⁸ 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.¹⁹

The court in *Midwest Fence* held the Illinois DOT's DBE Program that implemented the Federal DBE Program was constitutional and satisfied the strict scrutiny test, which will be described below.²⁰ 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*.²¹

⁹ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 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.*, 713 F.3d 1187, (9th Cir. April 16, 2013)

¹⁰ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

¹¹ *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).

¹² *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹³ *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).

¹⁴ 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

¹⁵ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

¹⁶ 766 F. Supp.2d. 642 (D. N.J. 2010).

¹⁷ 544 F. Supp.2d 1336 (S.D. Fla. 2008).

¹⁸ *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).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Midwest Fence filed a Petition for a Writ of Certiorari with the United States Supreme Court, which was recently denied.²²

Also, recently 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.²³ The court held Dunnet Bay lacked standing to challenge the IDOT 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 IDOT exceeded its authority under federal law.²⁴

Therefore, the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,²⁵ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,²⁶ upheld the implementation of the Federal DBE Program by the Illinois DOT.²⁷ The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional. 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.²⁸

In *Western States Paving*, the Ninth Circuit upheld the validity of the Federal DBE Program, but the court held invalid Washington State DOT's DBE Program implementing the DBE Federal Program.²⁹ The court held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state's transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the court, stated "that [the Federal DBE Program's] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."³⁰ Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.³¹

Following the Ninth Circuit decision in *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.³² The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients

²² *Id.* See U.S. Supreme Court, Docket No. 16-975, 2017 WL 511931 (Feb. 2, 2017), *denied*, 2017 WL 497345 (June 26, 2017).

²³ 799 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).

²⁴ *Id.*

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

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

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

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

²⁹ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

³⁰ *Western States Paving*, 407 F.3d at 996; *see also*, Br. for the United States, at 28 (April 19, 2004).

³¹ DOT Guidance, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

³² Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter USDOT Guidance], available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm; *see also*, 49 CFR § 26.9; *see also*, 49 CFR Section 26.45.

should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.³³ The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.³⁴

The USDOT's Guidance is recognized by the federal regulations as "valid, and express the official positions and views of the Department of Transportation"³⁵ for states in the Ninth Circuit.

Subsequent to the decision in *Western States Paving*, the Ninth Circuit Court of Appeals in 2013 and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' implementation of the Federal DBE Program was constitutional.³⁶ The Ninth Circuit found that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.³⁷

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.³⁸ 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.

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.

³³ USDOT Guidance, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006)

³⁴ *Id.*

³⁵ *Id.*, 49 CFR § 26.9.

³⁶ *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F.3d 1187, (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, 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. April 16, 2013).

³⁷ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

³⁸ 488 U.S. 469 (1989).

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.”³⁹ 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.⁴⁰ 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.⁴¹

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.⁴² 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.”⁴³

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.”⁴⁴ “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.”⁴⁵

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 jurisdiction.”⁴⁶ 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.”⁴⁷

³⁹ 488 U.S. at 500, 510.

⁴⁰ 488 U.S. at 480, 505.

⁴¹ 488 U.S. at 507-510.

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

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

⁴⁴ 488 U.S. at 502.

⁴⁵ *Id.*

⁴⁶ 488 U.S. at 509.

⁴⁷ *Id.*

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.”⁴⁸ “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.”⁴⁹

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.”⁵⁰

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 *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 by recipients of federal funds.

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

The following provides an analysis for the legal framework focusing on recent key cases regarding the Federal DBE Program and state and local MBE/WBE programs, and their implications for a disparity study. The recent decisions involving the Federal DBE Program are instructive to the disparity study 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 recipients of federal financial assistance based on 49 CFR Part 26.

1. The Federal DBE Program

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.⁵¹ Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United

⁴⁸ 488 U.S. at 509.

⁴⁹ *Id.*

⁵⁰ 488 U.S. at 492.

⁵¹ *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*.

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”).⁵² In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁵³

The Federal DBE Program as amended changed certain requirements for 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 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.⁵⁴

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 program. 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 § 26.45.

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.⁵⁵ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient’s market.⁵⁶ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁵⁷ 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.⁵⁸ This process, based on the federal regulations, aims to establish a goal that reflects a

⁵² Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁵³ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁵⁴ 49 CFR § 26.51.

⁵⁵ 49 CFR § 26.45(a), (b), (c).

⁵⁶ *Id.*

⁵⁷ *Id.* at § 26.45(d).

⁵⁸ *Id.*

determination of the level of DBE participation one would expect absent the effects of discrimination.⁵⁹

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁶⁰

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁶¹ A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 CFR § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 CFR § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.⁶²

Federal aid recipients 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.

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;

⁵⁹ 49 CFR § 26.45(b)-(d).

⁶⁰ 49 CFR § 26.51.

⁶¹ 49 CFR § 26.51(b).

⁶² 49 CFR §§ 26.21-26.37.

(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.

(2) DEFINITIONS- In this subsection, the following definitions apply:

(A) SMALL BUSINESS CONCERN-

(i) IN GENERAL- The term 'small business concern' means a small business concern (as the term is used in section 3 of the Small Business Act (15 U.S.C. 632)).

(ii) EXCLUSIONS- The term 'small business concern' does not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals that have average annual gross receipts during the preceding three fiscal years in excess of \$23,980,000, as adjusted annually by the Secretary for inflation⁶³

Therefore, Congress in the FAST Act passed on December 3, 2015, has again 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.⁶⁴

US DOT Final Rule, 79 Fed. Reg. 59566 (October 2, 2014)

DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).⁶⁵

On September 6, 2012, the Department of Transportation published a Notice of Proposed Rulemaking (NPRM) entitled, "Disadvantaged Business Enterprise: Program Implementation Modifications" in the Federal Register.⁶⁶

The USDOT noted the DBE Program was reauthorized in the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Public Law 112-141 (enacted July 6, 2012), and that the Department believes this reauthorization is intended to maintain the status quo of the DBE Program.⁶⁷

⁶³ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁶⁴ *Id.*

⁶⁵ 79 F.R. 59566-59122 (October 2, 2014).

⁶⁶ 77 F.R. 54952-55024 (September 6, 2012).

⁶⁷ 77 F.R. 54952.

The Final Rule amending the Federal DBE Program at 49 C.F.R. Part 26 provided substantial changes and additions to the implementation and administration of the Federal DBE Program regulations in three primary areas:

- (1) The Rule revised the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the U.S. DOT statutory reauthorization, MAP-21;
- (2) The Rule revised the certification-related program provisions and standards; and
- (3) The Rule amended and modified several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions, transit vehicle manufacturers, counting for trucking companies, and program administration.⁶⁸

The revised forms included the U.S. DOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions included reporting requirements under MAP-21, adding a provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.⁶⁹

Several of the areas revised included:

- the size standard on statutory gross receipts increased for inflation;
- the ownership and control provisions including a new rule examining whether there are any agreements or practices that give a non-disadvantaged individual or firm a priority or superior right to a DBE's profits, and setting forth an assumption of control when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm;
- the certification procedures and grounds for decertification including the areas of prequalification, grounds for removal, summary suspension, and certification appeals;
- the overall goal setting obligations, including methodology and process, data sources to determine the relative availability of DBEs, and any step two adjustments by the recipient of federal funds to the base figure supported by evidence;
- the submission of good faith efforts as a matter of "responsiveness" or as a matter of "responsibility", including reduction in number of days as to when the information of good faith efforts must be submitted either at the time of bid or after bid opening;
- guidance on good faith efforts, including examples of the kinds of actions that recipients may consider when evaluating good faith efforts by bidders and offerors;
- provisions relating to the replacing of DBEs; and

⁶⁸ 79 F.R. 59566-59622 (October 2, 2014).

⁶⁹ *Id.*

- counting of DBE participation, including trucking services and expenditures with DBEs for materials and supplies and related matters.⁷⁰

In terms of forms and data collection, the 2014 Rule attempted to simplify the Uniform Certification Application; established a new U.S. DOT personal net worth form to be used by applicants; established a uniform report of DBE awards or commitments and payments; captured data on minority women-owned DBEs and actual payments to DBEs reporting; and provided for a new submission required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, and men.⁷¹

The 2014 Rule made certain changes in connection with program administration, including: adding to the definitions of “immediate family members” and “spouse” domestic partnerships and civil unions; the retention of all records documenting a DBE’s compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to comply with the DBE Program regulations in the administration of the contract, and specifying that failure to do so may result in termination of the contract or other remedies.⁷²

The Rule also provided changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.⁷³

USDOT Order 4220.1 (February 5, 2014).

USDOT Order 4220.1 is the USDOT’s Order on the Coordination and Oversight of the DBE Program. According to the USDOT, this Order clarified the leadership roles and responsibilities of the various offices and Operating Administrations within the USDOT responsible for supporting and overseeing the implementation of the Federal DBE Program. The Order further established a framework for coordination, overall policy development, and program oversight among these offices. The Order provided that the Departmental Office of Civil Rights will act as the lead office in the Office of Secretary for the DBE program. The Operating Administrations will continue to be the first points of contacts regarding, and primarily responsible for overseeing and enforcing, the day-to-day administration of the program by recipients.

The USDOT Order also established a framework for coordination, overall policy development, and program oversight among these offices. The Order provided that these offices will engage in systematic coordination regarding the administration and implementation of the DBE program by DOT recipients.

The Order sets forth specific programmatic responsibilities for the Departmental Office of Civil Rights, the rules and responsibilities of the General Counsel as Chief Legal officer of the USDOT, and the Office of Small and Disadvantaged Business Utilization within the Office of the Secretary. The Order clarified rules and responsibilities for the Operating Administrations in their overseeing of the day-to-day administration of the Federal DBE Program by recipients,

⁷⁰ 79 F.R. 59566-59622.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

providing training and technical assistance, maintaining current and up-to-date DBE websites and, taking appropriate actions to ensure program compliance.

The USDOT Order also established the DBE Oversight and Compliance Council that will facilitate collaboration, communication, and accountability among the DOT components responsible for the DBE program oversight, and assist in the formulation of policy regarding DBE program management and operation. The Order provided that the Office of the General Counsel established DBE Working Group, which generates rules changes and official DOT guidance, will continue to coordinate the development of formal and informal guidance and interpretations, and to ensure consistent and clear communications regarding the application and interpretation of DBE program requirements.

The USDOT Order 4220.1 may be found at: www.civilrights.dot.gov/disadvantaged-business-enterprise.

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.⁷⁴ In MAP-21, Congress specifically finds 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

⁷⁴ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”⁷⁵

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is “a compelling need for the continuation of the” Federal DBE Program.⁷⁶

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).

The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26. According to the United States DOT, the Rule increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, adjusted the personal net worth threshold for inflation to \$1.32 million dollars, provided for expedited interstate certification, added provisions to foster small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.⁷⁷

In particular, the 2011 Final Rule provided that a recipient’s DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.⁷⁸

In addition, the 2011 Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.⁷⁹ The recipient’s DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval.⁸⁰ The new 2011 Final Rule provided a list of “strategies” that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient’s overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.⁸¹ The 2011 Final Rule provided that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient’s DBE program.⁸²

The 2011 Final Rule also provided that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and

⁷⁵ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁶ *Id.*

⁷⁷ 76 F.R. 5083-5101.

⁷⁸ *See* 49 CFR § 26.37, 76 F.R. at 5097.

⁷⁹ 76 F.R. at 5097, January 28, 2011.

⁸⁰ *Id.*

⁸¹ *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

⁸² *Id.* at 5097, amending 49 CFR § 26.39(c).

Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.⁸³ The 2011 Final Rule set out what action the recipient must take in order to be regarded as implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.⁸⁴ The 2011 Final Rule provided a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.⁸⁵

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”⁸⁶

The United States DOT in the 2011 Final Rule stated that there is a continuing compelling need for the DBE program.⁸⁷ The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”⁸⁸ The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis...”, noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”⁸⁹ This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁹⁰

2. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁹¹ The implementation of the Federal DBE Program by recipients of federal funds are subject to and must follow the strict scrutiny analysis if they

⁸³ 76 F.R. at 5098, amending 49 CFR § 26.47(c).

⁸⁴ *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

⁸⁵ *Id.*, amending 49 CFR § 26.47(c)(5).

⁸⁶ 76 F.R. at 5092.

⁸⁷ 76 F.R. at 5095.

⁸⁸ 76 F.R. at 5095.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); *See Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe v. NCDOT*, 615 F.3d 233 (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.

utilize race- and ethnicity-based measures.⁹² 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.⁹³

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.⁹⁴ 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.⁹⁵ 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.⁹⁶

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁹⁷ The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).⁹⁸

⁹² *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *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; *see, also, H. B. Rowe*, 615.3d 233, 241-242 (4th Cir. 2010); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *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 I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*; *see, e.g., Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁹⁶ *See, e.g., Concrete Works I*, 36 F.3d at 1520.

⁹⁷ *N. 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; *See Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376.

⁹⁸ *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. *see, also*, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016

It is instructive to the study 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. Specifically, 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.”⁹⁹ 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).¹⁰⁰ 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.¹⁰¹
- **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.¹⁰²
- **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.¹⁰³
- **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.¹⁰⁴

WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.

⁹⁹ *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76); *Western States Paving*, 407 F.3d at 992-93.

¹⁰⁰ *See, e.g., Adarand VII*, 228 F.3d at 1167– 76; *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.

¹⁰¹ *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; *see Midwest Fence*, 840 F.3d 932, 950-951 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

¹⁰² *Adarand VII*. at 1170-72; *see DynaLantic*, 885 F.Supp.2d 237.

¹⁰³ *Id.* at 1172-74; *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁴ *Adarand VII*, 228 F.3d at 1174-75; *see H. B. Rowe*, 615 F.3d 233, 247-458 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

■ **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 businesses seeking to do business in federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.¹⁰⁵ 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.¹⁰⁶

Burden of proof. 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.¹⁰⁷ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.¹⁰⁸ The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”¹⁰⁹

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.¹¹⁰ It is well established that “remediating the effects of past or present racial discrimination” is a compelling interest.¹¹¹ In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”¹¹²

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”¹¹³ “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

¹⁰⁵ 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.

¹⁰⁶ *Id.* at § 1101(b)(1).

¹⁰⁷ See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (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. 1997); *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).

¹⁰⁸ *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁹ See, e.g., *Adarand VII*, 228 F.3d at 1166; *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.

¹¹⁰ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe 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.

¹¹¹ *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).

¹¹² *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹³ *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, 949-952 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe 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).

contractors actually engaged by the locality or the locality's prime contractors."¹¹⁴ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.¹¹⁵

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence.¹¹⁹ 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.¹²⁰ Conjecture and unsupported criticisms of the government's methodology are insufficient.¹²¹ 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.¹²²

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."¹²³ It has been 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.¹²⁴ 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

¹¹⁴ *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 e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010).

¹¹⁵ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 R.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010).

¹¹⁶ *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.

¹¹⁷ *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.

¹¹⁸ *Id.*; *Adarand VII*, 228 F.3d at 1166.

¹¹⁹ See, e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting, *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Midwest Fence*, 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.

¹²⁰ *Id.*; See, e.g., *Engineering Contractors*, 122 F.3d at 916; *Contractors Association of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

¹²¹ *Id.*; see, also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974.

¹²² *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233 at 242; see *Concrete Works*, 321 F.3d at 991; see, also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹²³ *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)).

¹²⁴ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-953 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958.

prime contractors.¹²⁵ It has been further held that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹²⁶

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.¹²⁷ “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹²⁸

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.¹²⁹ 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.¹³⁰ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹³¹

Other considerations regarding statistical evidence include:

■ **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹³² There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹³³ “An analysis is not

¹²⁵ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241.

¹²⁶ *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, 953; *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Kossman Contracting Co. Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹²⁷ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 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; see, also, *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹²⁸ *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, 953; *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).

¹²⁹ *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 948-953 (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); *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); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³⁰ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 949-952; *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; see, also, *Western States Paving*, 407 F.3d at 1001; *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).

¹³¹ *Western States Paving*, 407 F.3d at 1001.

¹³² 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. See, also *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).

¹³³ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3^d 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*

devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹³⁴

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹³⁵

- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹³⁶ 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.”¹³⁷

- **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.¹³⁸

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.¹³⁹ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹⁴⁰ 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.¹⁴¹

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;

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).

¹³⁴ *Id.*

¹³⁵ *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); *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.

¹³⁶ *See, e.g., 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); *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 Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹³⁷ *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); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-245; *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.

¹³⁸ *See, e.g., H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245; *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.

¹³⁹ *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; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹⁴⁰ *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; *Eng’g Contractors Ass’n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass’n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹⁴¹ *Concrete Works I*, 36 F.3d at 1520.

- 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.¹⁴²

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.¹⁴³

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 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;
- 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.¹⁴⁴

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.¹⁴⁵ The narrow tailoring requirement has several components.

¹⁴² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); e.g., *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).

¹⁴³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 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).

¹⁴⁴ 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; *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); see, also, *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁴⁵ *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.

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.¹⁴⁶ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁴⁷

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.¹⁴⁸

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."¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁵² Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁵³

The recent 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.¹⁵⁴ The court held the Illinois DOT DBE

¹⁴⁶ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁴⁷ *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.

¹⁴⁸ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁴⁹ 473 F.3d at 722.

¹⁵⁰ *Id.* at 722.

¹⁵¹ *Id.* at 723-24.

¹⁵² *Id.*

¹⁵³ *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).

¹⁵⁴ *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).

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.¹⁵⁵ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁵⁶ 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.¹⁵⁷

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, the federal courts, including the Seventh Circuit Court of Appeals, which evaluated state DOT DBE Programs and their implementation of the Federal DBE Program, have 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.¹⁵⁸

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.”¹⁵⁹ 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.”¹⁶⁰

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

¹⁵⁵ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁵⁶ *Id.*

¹⁵⁷ 840 F.3d 932 (7th Cir. 2016).

¹⁵⁸ 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; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; see, also, *Geyer Signal, Inc.*, 2014 WL 1309092; see generally, *H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245, 252-254; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

¹⁵⁹ *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).

¹⁶⁰ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *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.

program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”¹⁶¹

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁶² 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.”¹⁶³ 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 DBEs and implementing the Federal DBE Program, or in connection with determining appropriate remedial measures to achieve legislative objectives.

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.¹⁶⁴ And the courts have held 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.¹⁶⁵

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.”¹⁶⁶

The federal regulations and the courts require that recipients of federal financial assistance governed by 49 CFR Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies.¹⁶⁷ The courts have also found “the regulations require a state to ‘meet the maximum feasible portion of [its] overall goal by using race neutral means.’”¹⁶⁸

¹⁶¹ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“Drabik II”), 214 F.3d 730, 738 (6th Cir. 2000).

¹⁶² 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

¹⁶³ 551 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).

¹⁶⁴ *See, e.g., Midwest Fence*, 840 F.3d 932, 937-8, 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; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

¹⁶⁵ *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.

¹⁶⁶ *Croson*, 488 U.S. at 509-510.

¹⁶⁷ 49 CFR § 26.51(a) requires recipients of federal funds to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.” *See, e.g., Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972. *See, also, Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016).

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
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁶⁹

49 CFR § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-,

Additionally, in September of 2005, the United States Commission on Civil Rights (the “Commission”) issued its report entitled “Federal Procurement After *Adarand*” setting forth its findings pertaining to federal agencies’ compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at <http://www.usccr.gov>. The Commission found that 10 years after the Court’s *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination.

¹⁶⁸ See, e.g., *Northern Contracting*, 473 F.3d at 723 – 724; *Western States Paving*, 407 F.3d at 993 (citing 49 CFR § 26.51(a)).

¹⁶⁹ See 49 CFR § 26.51(b); see, e.g., *Croson*, 488 U.S. at 509-510; see, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); *Eng’g Contractors Ass’n*, 122 F.3d at 927-29.

ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁷⁰

In *AGC, SDC v. Caltrans*, the Ninth Circuit rejected the assertion that the state DOT’s DBE program was not narrowly tailored because it failed to evaluate race-neutral measures before implementing race conscious goals, and said the law imposes no such requirement.¹⁷¹ The court held states are not required to independently meet this aspect of narrow tailoring, and instead concluded *Western States Paving* focused on whether the federal statute sufficiently considered race-neutral alternatives.¹⁷² In *AGC, SDC v. Caltrans*, the court found that narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.”¹⁷³

¹⁷⁰ *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); see, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *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..

¹⁷¹ *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹⁷² *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹⁷³ *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

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.¹⁷⁴ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁷⁵ (2) good faith efforts provisions;¹⁷⁶ (3) waiver provisions;¹⁷⁷ (4) a rational basis for goals;¹⁷⁸ (5) graduation provisions;¹⁷⁹ (6) remedies only for groups for which there were findings of discrimination;¹⁸⁰ (7) sunset provisions;¹⁸¹ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁸²

3. Intermediate scrutiny analysis

Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.¹⁸³ The courts have interpreted this 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.¹⁸⁴

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.¹⁸⁵

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

¹⁷⁴ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁷⁵ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *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).

¹⁷⁶ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁷⁷ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *CAEP I*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

¹⁷⁸ *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973.

¹⁷⁹ *Id.*

¹⁸⁰ *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; see, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Sherbrooke Turf*, 201 WL 150284 (unpublished opinion), aff’d 345 F.3d 964.

¹⁸¹ See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559.

¹⁸² *Coral Constr.*, 941 F.2d at 925.

¹⁸³ See generally, *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); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

to accomplish the objective.¹⁸⁶ The measure of evidence required to satisfy 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.¹⁸⁷

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.¹⁸⁸ The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

The Eleventh Circuit has held that “[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.”¹⁸⁹

4. Pending Cases (at the time of this report)

Pending cases on appeal at the time of this report, which may potentially impact and be instructive to the study, include:

- ***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). *Petition for Panel Rehearing and Rehearing En Banc filed with the U.S. Court of Appeals for the Ninth Circuit* by Montana DOT, May 30, 2017, *denied* on June 27, 2017. (See Section E below).
- ***Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.***, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). *Petition for a Writ of Certiorari filed with the U.S. Supreme Court*, 2017 WL 511931 (Feb. 2, 2017), *denied*, 2017 WL 497345 (June 26, 2017). (See Section D below.)
- ***Rothe Development Inc. v. United States Department of Defense, United States Small Business Administration, et al.***, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds, Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D. D.C., 2015). *Petition for Rehearing En Banc*, filed on October 19, 2016, in the U.S. Court of Appeals, District of Columbia Circuit, was denied on January 13, 2017. *Petition for a Writ of Certiorari filed with the U.S. Supreme Court*, April 13, 2017, Docket No. 16-1239, *pending*. (See Section G below).

¹⁸⁶ 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); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

¹⁸⁷ *Coral Constr. Co.*, 941 F.2d at 931-932; See *Eng'g Contractors Ass'n*, 122 F.3d at 910.

¹⁸⁸ 256 F.3d 642, 644-45 (7th Cir. 2001).

¹⁸⁹ 122 F.3d at 929 (internal citations omitted.)

The U.S. Supreme Court also recently denied certiorari in *Dunnet Bay Construction Co. 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.*, 137 S. Ct. 31, 2016 WL 193809 (October 3, 2016), Docket No. 15-906 (See Section D below).

Although not involving the Federal DBE Program, it is instructive to the study to point out the recent decision in *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds*, *Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C., 2015).

Rothe filed this action against the U.S. Department of Defense and the U.S. Small Business Administration challenging the constitutionality of the Section 8(a) Program on its face. The *Rothe* case is nearly identical to the challenge brought in *DynaLantic Corp. v. U.S. Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). *DynaLantic's* court rejected the plaintiff's facial attack and held the Section 8(a) Program facially constitutional.

Plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in *DynaLantic*, and urged the court to strike down the race-conscious provisions of Section 8(a) on their face. The district court in *Rothe* agreed with the court's findings, holdings and reasoning in *DynaLantic*, and thus concluded that Section 8(a) is constitutional on its face.

The district court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government demonstrated a compelling interest for the racial classification, the need for remedial action is supported by strong and un rebutted evidence, and the Section 8(a) program is narrowly tailored.

Rothe appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal has just been decided as of the writing of this report. The majority of the three judge panel affirmed the district court's decision, but on other grounds.¹⁹⁰

The Court of Appeals in *Rothe* found that the challenge was only to the Section 8(a) statute, not the implementing regulations, and thus held the Section 8(a) statute was race-neutral.¹⁹¹ Therefore, the court held the rational basis test applied and not strict scrutiny.¹⁹² The court affirmed the grant of summary judgment to the government defendants applying the rational basis standard, and upheld the validity of Section 8(a) based on the limited challenge by Rothe to the statute and not the regulations.

The Court of Appeals held that Section 8(a) of the Small Business Act does not warrant strict scrutiny because it does not on its face classify individuals by race.¹⁹³ Section 8(a), the Court said, unlike the implementing regulations, 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.¹⁹⁴ See Section G below.

¹⁹⁰ 2016 WL 4719049 (September 9, 2016)

¹⁹¹ 2016 WL4719049, at *1-2.

¹⁹² *Id.*

¹⁹³ 2016 WL 4719049 at **1-2.

¹⁹⁴ *Id.*

Rothe filed on October 19, 2016, a Petition for Rehearing and Rehearing En Banc to the full Court of Appeals. The court denied the Petition on January 13, 2017.

Rothe filed a Petition for a Writ of Certiorari to the U.S. Supreme Court on April 13, 2017, which is pending at the time of this report. See Docket No. 16-1239.

This list of pending cases is not exhaustive, but are cases that will be followed during the study, which may impact recipients of federal funds implementing the Federal DBE Program.

Ongoing review. The above represents a summary of the legal framework pertinent to the study, the Federal DBE Program, and implementation of the Federal DBE Program and DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs. 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 the Federal DBE Program and State or Local Government MBE/WBE Programs 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 (June 26, 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 under-utilization 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 on February 2, 2017, which the Court *denied* on June 26, 2017.

2. *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.*

3. *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.*, 137 S. Ct. 31, 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 judgment 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 causal 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.

4. *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.

Appeal. Dunnet Bay Construction Company filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court decision. *See* above at E2. Dunnet Bay submitted a Petition for a Writ of Certiorari to the U.S. Supreme Court in January 2016, which was denied in October 2016.

5. *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.

Procedural background. 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.*

Availability study. 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 IDOTs “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.*

Compelling interest: state acting as agent of the federal government. 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.

Narrowly tailored test: state is insulated from constitutional attack absent exceeding its federal authority. 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.

IDOT did not exceed its grant of authority under the federal regulations. 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.*

6. *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.

7. 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/offeror 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 women 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.

8. *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.

9. *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.

10. *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.

11. *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).

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 the Federal DBE Program and its Implementation in Other Jurisdictions

There are several recent and pending 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. *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 contact 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.

A. 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 997-99).

1. 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.

2. 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.*

B. 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.

C. 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.

D. 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.*

2. *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.

3. *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.

4. *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*.).

5. *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.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the current 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 held 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.*

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.

6. *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)

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 did not provide 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.

Recent District Court Decisions

7. 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.

8. 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 if 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 *reasonable* 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.

2. *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*.

9. *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.

10. *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.

11. *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.

12. *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.

13. *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.*

14. *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.

15. *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.

F. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippett, 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 "remedying 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 Charlotte, 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. *Viridi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Viridi 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 *Viridi*, 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 Viridi, 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). Viridi 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 Viridi’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 Viridi’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 Viridi'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 Viridi to lose a contract that he would have otherwise received. *Id.* Thus, because Viridi 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 Viridi 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 Viridi. *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 one of the only recent decisions to uphold 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 *Crosby*, 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 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." *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 *Crosby* 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*, 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. *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 subpart 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.

11. *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

12. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 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.

13. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippett, 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. Tippett, 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. 1980, § 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.

14. *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.

15. *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.

16. *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.

17. 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.

18. *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.

19. *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 Intervenors 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 Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors 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 Intervenors 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 *Croson* 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.

20. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 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.

21. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *aff'd 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).

22. *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.

23. *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.

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), 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, 2016 WL 4719049 (D.C. Cir. Sept. 9, 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.

Appeal. Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit, which decision was affirmed on other grounds. *See* decision in *Rothe*, 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), above.

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 Analyses of Marketplace Conditions

APPENDIX C.

Quantitative Analysis of Marketplace Conditions

Figure C-1.
Percentage of all workers 25 and older with at least a four-year degree, Illinois and the United States, 2011-2015

Note:

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Illinois, respectively.

Source:

BBC Research & Consulting from 2011-2015 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/>.

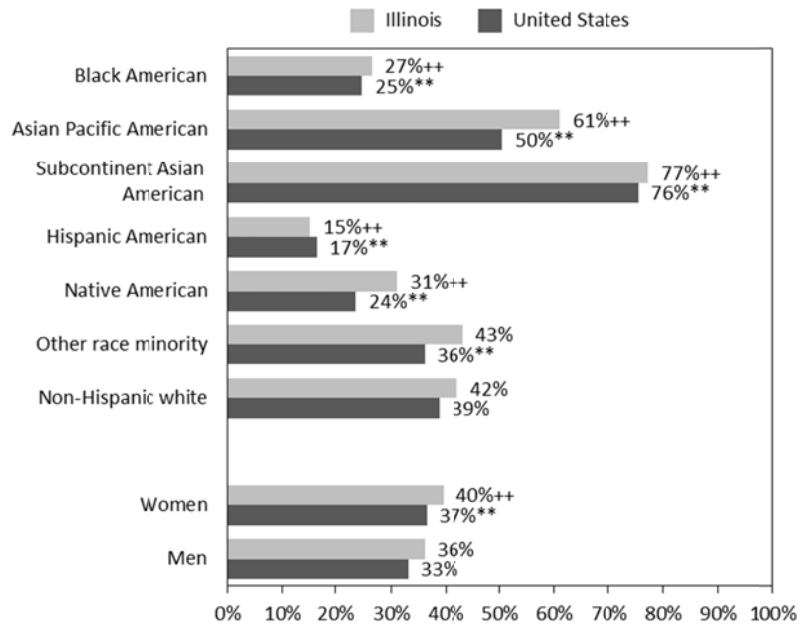
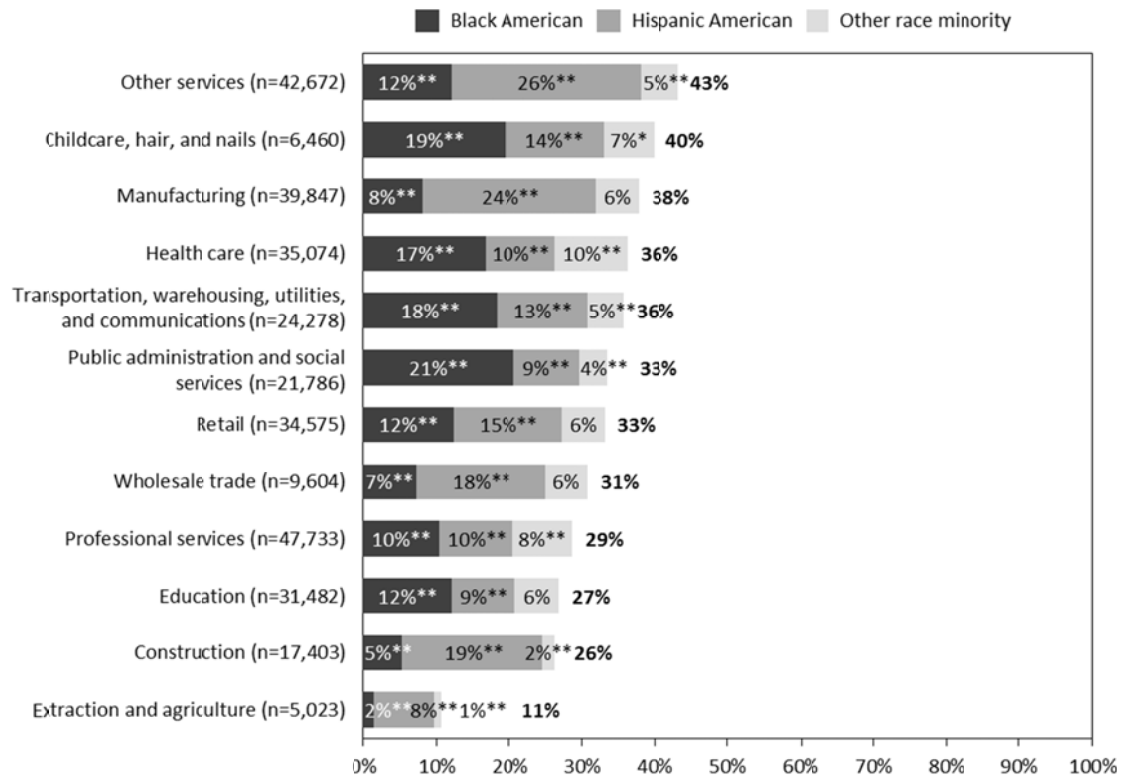


Figure C-1 indicates that, compared to non-Hispanic white Americans working in Illinois, smaller percentages of Black Americans, Hispanic Americans, and Native Americans have four-year college degrees. In contrast, a larger percentage of Asian Pacific Americans and Subcontinent Asian Americans have four-year college degrees. In addition, a larger percentage of women than men working in Illinois have four-year college degrees.

Figure C-2.
Percent representation of minorities in various industries in Illinois, 2011-2015



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all Illinois workers is 13% for Black Americans, 16% for Hispanic Americans, 6% for other race minorities, and 35% for all minorities considered together.

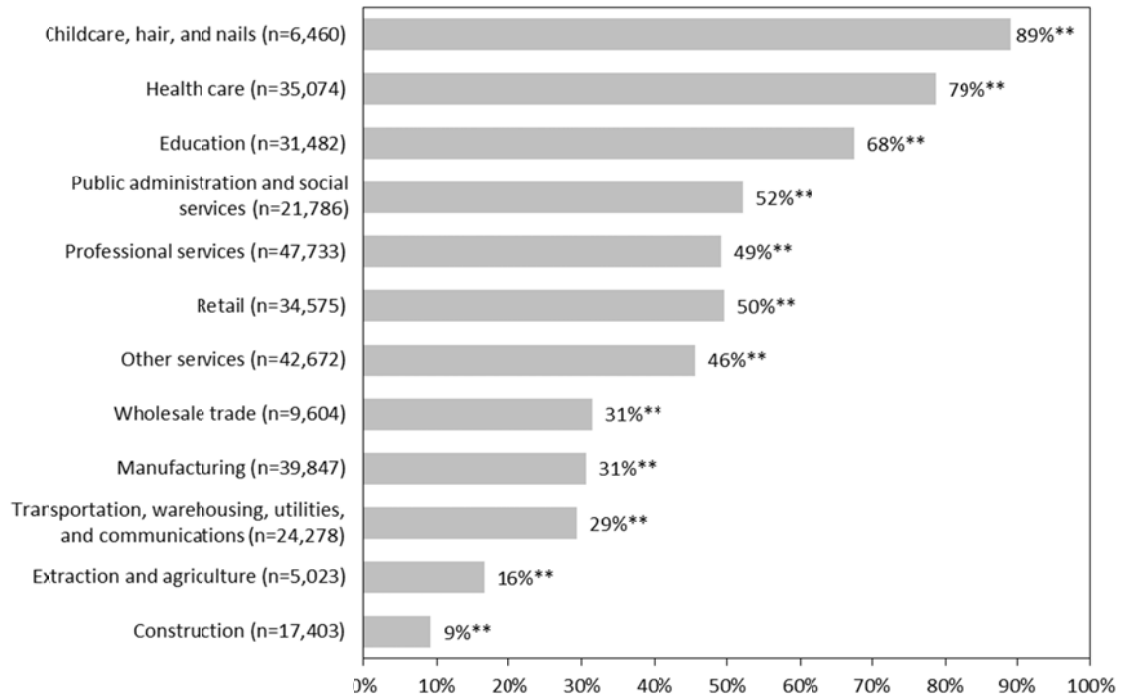
"Other race minority" includes Asian Pacific Americans, Subcontinent Asian Americans, Native Americans, and other races.

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 2011-2015 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 C-2 indicates that the Illinois industries with the highest representations of minority workers are other services; childcare, hair, and nails; and manufacturing. The Illinois industries with the lowest representations of minority workers are education; construction; and extraction and agriculture.

Figure C-3.
Percent representation of women in various industries in Illinois, 2011-2015



Note: *, ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of women among all Illinois 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 2011-2015 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 C-3 indicates that the Illinois industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The Illinois industries with the lowest representations of women workers are transportation, warehousing, utilities, and communications; extraction and agriculture; and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and all industries,
Illinois and the United States, 2000

Illinois	All Industries (n=306,852)	Construction (n=18,889)	Professional Services (n=2,164)
Race/ethnicity			
Black American	12.6 %	5.5 % **	4.6 % **
Asian Pacific American	2.6	0.6 **	4.6 **
Subcontinent Asian American	1.2	0.2 **	1.9
Hispanic American	10.5	12.0 **	5.5 **
Native American	0.4	0.7	0.2
Other race minority	0.4	0.6	0.5
Total minority	27.8 %	19.6 %	17.4 %
Non-Hispanic white	72.2 %	80.4 % **	82.6 % **
Total	100.0 %	100.0 %	100.0 %
Gender			
Women	46.7 %	10.1 % **	26.0 % **
Men	53.3	89.9 **	74.0 **
Total	100.0 %	100.0 %	100.0 %
United States	All Industries (n=6,832,970)	Construction (n=480,280)	Professional Services (n=58,221)
Race/ethnicity			
Black American	10.9 %	6.2 % **	4.2 % **
Asian Pacific American	3.4	1.2 **	4.6 **
Subcontinent Asian American	0.7	0.2 **	1.3 **
Hispanic American	10.7	15.0 **	5.5 **
Native American	1.2	1.6 **	0.8 **
Other race minority	0.4	0.4	0.4
Total minority	27.3 %	24.5 %	16.7 %
Non-Hispanic white	72.7 %	75.5 % **	83.3 % **
Total	100.0 %	100.0 %	100.0 %
Gender			
Women	46.5 %	9.9 % **	26.0 % **
Men	53.5	90.1 **	74.0 **
Total	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 90% and 95% confidence levels, respectively.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample 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 C-4 indicates that in 2000 there were smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and women working in the Illinois construction industry than in all industries considered together. There were smaller percentages of Black Americans, Hispanic Americans, and women working in the Illinois professional services industry than in all industries considered together. In contrast, there was a larger percentage of Asian Pacific Americans working in the Illinois professional services industry than in all industries considered together.

Figure C-5.
Demographic characteristics of workers in study-related industries and all industries,
Illinois and the United States, 2011-2015

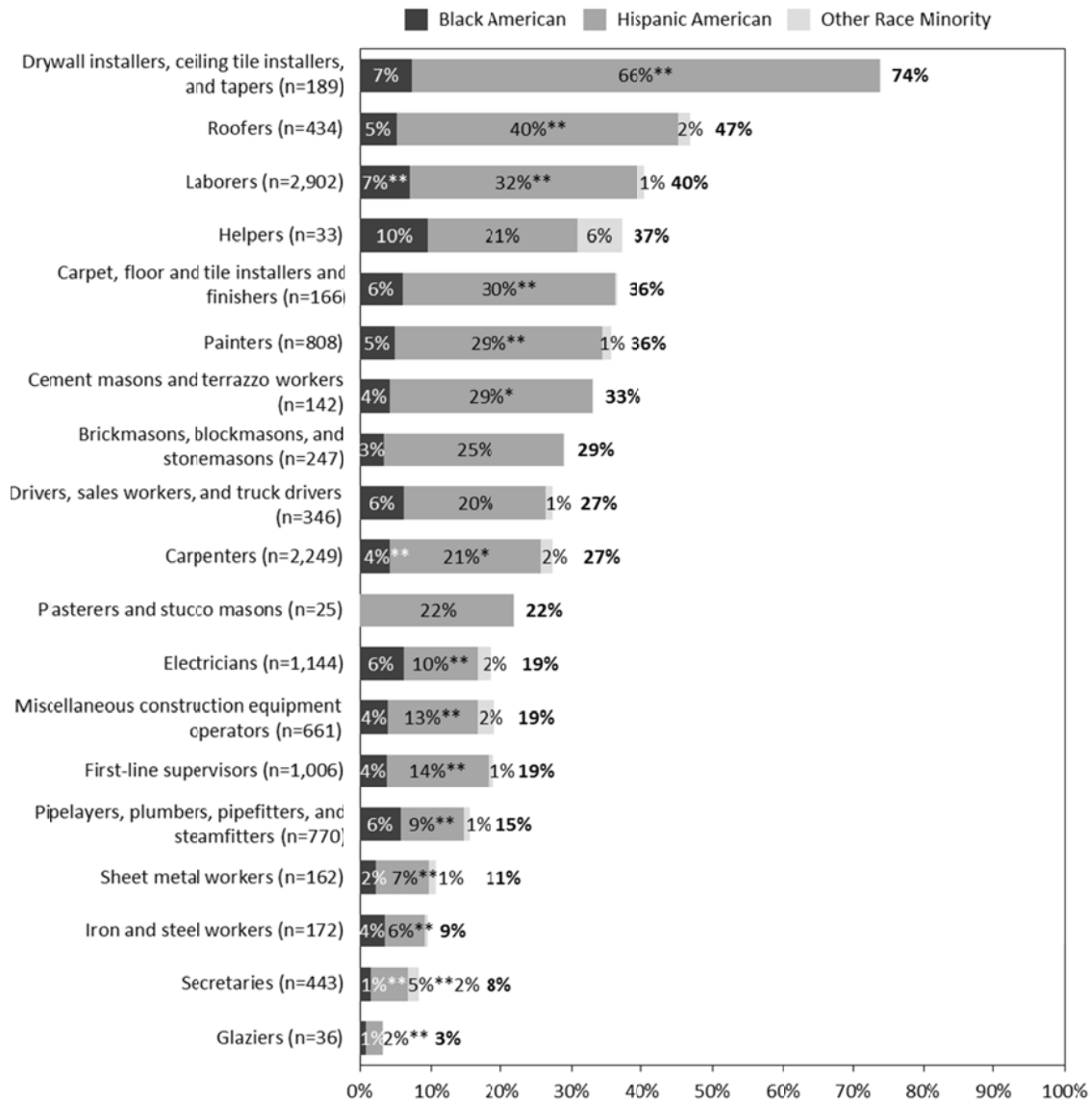
Illinois	All Industries (n=322,010)	Construction (n=17,403)	Professional Services (n=2,476)
Race/ethnicity			
Black American	12.9 %	5.4 % **	5.1 % **
Asian Pacific American	3.6	0.9 **	4.2
Subcontinent Asian American	2.0	0.3 **	2.9 *
Hispanic American	15.5	19.3 **	8.5 **
Native American	0.4	0.4	0.6
Other race minority	0.1	0.1	0.0
Total minority	34.5 %	26.3 %	21.3 %
Non-Hispanic white	65.5 %	73.7 % **	78.7 % **
Total	100.0 %	100.0 %	100.0 %
Gender			
Women	47.6 %	9.2 % **	24.8 % **
Men	52.4	90.8 **	75.2 **
Total	100.0 %	100.0 %	100.0 %
United States	All Industries (n=7,612,247)	Construction (n=461,366)	Professional Services (n=75,966)
Race/ethnicity			
Black American	12.2 %	6.0 % **	5.2 % **
Asian Pacific American	4.6	1.6 **	6.0 **
Subcontinent Asian American	1.3	0.3 **	1.9 **
Hispanic American	16.1	25.5 **	7.9 **
Native American	1.1	1.3 **	0.8 **
Other race minority	0.2	0.2	0.2
Total minority	35.6 %	34.9 %	22.0 %
Non-Hispanic white	64.4 %	65.1 % **	78.0 % **
Total	100.0 %	100.0 %	100.0 %
Gender			
Women	47.2 %	8.9 % **	25.4 % **
Men	52.8	91.1 **	74.6 **
Total	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 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2011-2015 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 C-5 indicates that there are smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and women working in the Illinois construction industry than in all industries considered together. In contrast, there is a larger percentage of Hispanic Americans working in the Illinois construction industry. There are smaller percentages of Black Americans, Hispanic Americans, and women working in the Illinois professional services industry than in all industries considered together. In contrast, there is a larger percentage of Subcontinent Asian Americans working in the Illinois professional services industry.

Figure C-6.
Percent representation of minorities in selected construction occupations in Illinois, 2011-2015



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 90% and 95% confidence level, respectively.

The representation of minorities among all Illinois construction workers is 5% for Black Americans, 19% for Hispanic Americans, 2% for other race minorities, and 26% for all minorities considered together.

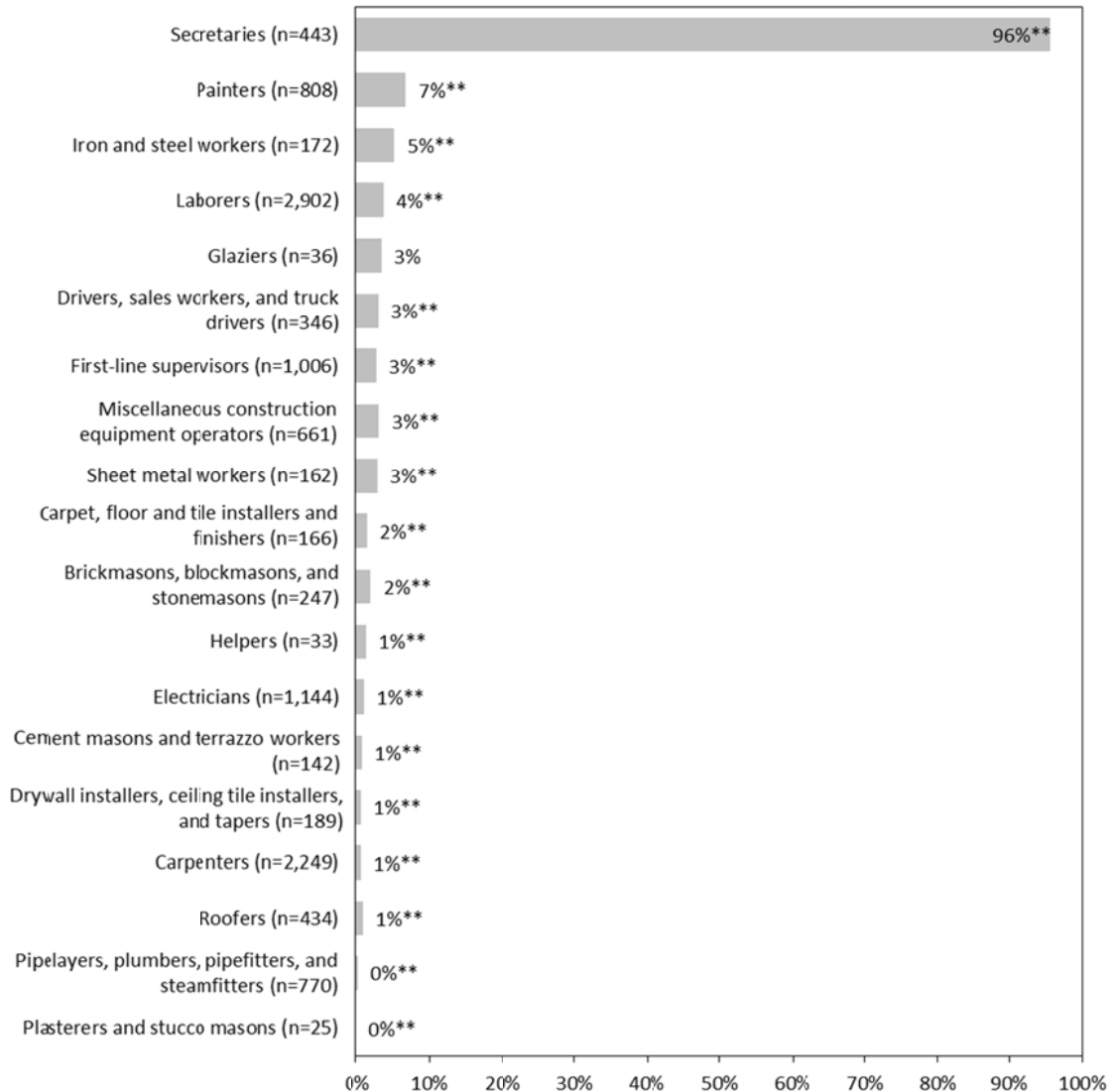
"Other race minority" includes Asian Pacific Americans, Subcontinent Asian Americans, Native Americans, and other races.

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 2011-2015 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that the Illinois construction occupations with the highest representations of minority workers are drywall installers; ceiling tile installers; and tapers; roofers; and laborers. The Illinois construction occupations with the lowest representations of minority workers are iron and steel workers; secretaries; and glaziers.

Figure C-7.
Percent representation of women in selected construction occupations in Illinois, 2011-2015



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 90% and 95% confidence level, respectively.

The representation of women among all Illinois construction workers is 9%.

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 2011-2015 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-7 indicates that the Illinois construction occupations with the highest representations of women workers are secretaries; painters; and iron and steel workers. The Illinois construction occupations with the lowest representations of women workers are roofers; pipelayers, plumbers, pipefitters, and steamfitters; and plasterers and stucco masons.

Figure C-8.
Percentage of workers who worked as a manager in each study-related industry, Illinois and the United States, 2011-2015

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes that statistical significance not reported due to small sample sizes.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Illinois	Construction	Professional Services
Race/ethnicity		
Black American	7.6 %	3.3 %
Asian Pacific American	9.3	6.0
Subcontinent Asian American	20.8	9.2
Hispanic American	1.9 **	1.0 *
Native American	6.6	0.0 †
Non-Hispanic white	7.9	3.8
Gender		
Women	7.6 %	2.4 % **
Men	6.7	4.3
All individuals	6.8 %	3.8 %
United States	Construction	Professional Services
Race/ethnicity		
Black American	4.4 % **	2.3 % **
Asian Pacific American	8.7	2.1 **
Subcontinent Asian American	13.1 **	4.9
Hispanic American	2.8 **	2.4 **
Native American	5.1 **	4.2
Non-Hispanic white	9.3	4.0
Gender		
Women	6.3 % **	1.8 % **
Men	7.4	4.4
All individuals	7.3 %	3.7 %

Figure C-8 indicates that, compared to non-Hispanic white Americans, a smaller percentage of Hispanic Americans work as managers in the Illinois construction industry. Compared to non-Hispanic white Americans, smaller percentages of Hispanic Americans work as managers in the Illinois professional services industry. In addition, compared to men, a smaller percentage of women work as managers in the Illinois professional services industry.

Figure C-9.
Mean annual wages,
Illinois and the United
States, 2011-2015

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) or from men (for women) at the 95% confidence level for Illinois and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2011-2015 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/>.

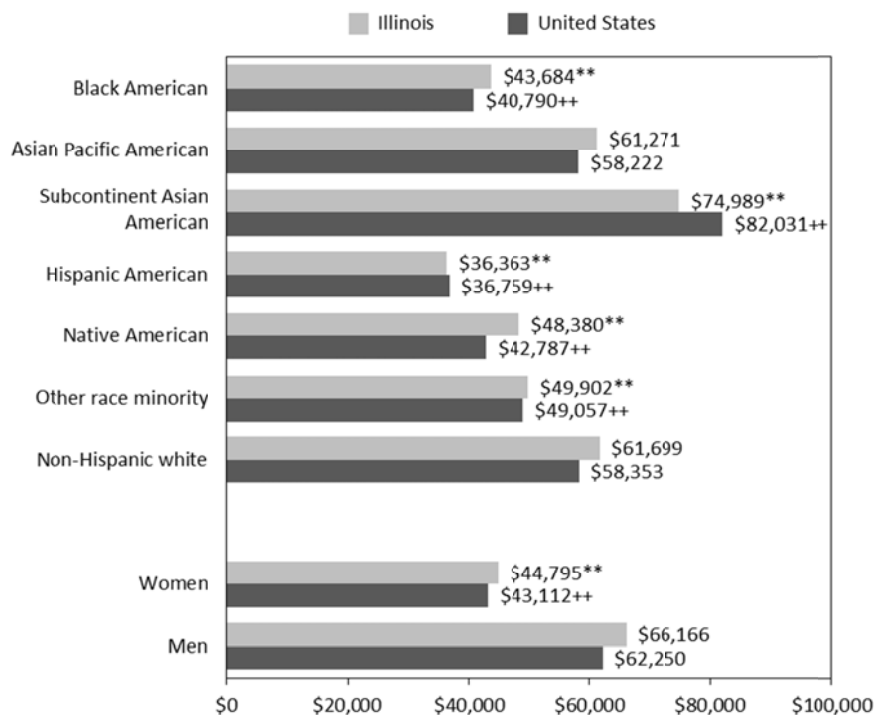


Figure C-9 indicates that, compared to non-Hispanic white Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities in Illinois exhibit lower mean annual wages. In addition, women in Illinois exhibit lower mean annual wages than men.

**Figure C-10.
Predictors of annual wages
(regression), Illinois, 2011-2015**

Note:

The regression includes 173,665 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, high school diploma for the education variables, manufacturing for industry variables.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Variable	Exponentiated Coefficient
Constant	6699.442 **
Black American	0.863 **
Asian Pacific American	0.927 **
Subcontinent Asian American	0.873 **
Hispanic American	0.911 **
Native American	0.904 **
Other race minority	0.871 *
Women	0.776 **
Less than high school education	0.877 **
Some college	1.194 **
Four-year degree	1.679 **
Advanced degree	2.344 **
Disabled	0.815 **
Military experience	0.987
Speaks English well	1.341 **
Age	1.063 **
Age-squared	0.999 **
Married	1.121 **
Children	1.010 **
Number of people over 65 in household	0.912 **
Public sector worker	1.147 **
Manager	1.308 **
Part time worker	0.355 **
Extraction and agriculture	0.832 **
Construction	1.028 **
Wholesale trade	0.998
Retail trade	0.777 **
Transportation, warehouse, & information	1.013
Professional services	1.099 **
Education	0.655 **
Health care	0.998
Other services	0.735 **
Public administration and social services	0.839 **

Figure C-10 indicates that, compared to being a non-Hispanic white American in Illinois, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority 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 \$0.86 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 in Illinois, even after accounting for various other personal characteristics.

**Figure C-11.
Predictors of annual wages
(regression), United States, 2011-2015**

Note:

The regression includes 3,998,383 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 95% confidence level.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables, and Northeast for region variables.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Variable	Exponentiated Coefficient
Constant	7677.789 **
Black American	0.860 **
Asian Pacific American	0.958 **
Subcontinent Asian American	0.963 **
Hispanic American	0.911 **
Native American	0.875 **
Other race minority	0.913 **
Women	0.783 **
Less than high school education	0.851 **
Some college	1.199 **
Four-year degree	1.668 **
Advanced degree	2.308 **
Disabled	0.793 **
Military experience	1.001
Speaks English well	1.344 **
Age	1.059 **
Age-squared	0.999 **
Married	1.116 **
Children	1.013 **
Number of people over 65 in household	0.906 **
Midwest	0.879 **
South	0.894 **
West	0.983 **
Public sector worker	1.114 **
Manager	1.308 **
Part time worker	0.364 **
Extraction and agriculture	0.948 **
Construction	0.921 **
Wholesale trade	0.965 **
Retail trade	0.751 **
Transportation, warehouse, & information	1.030 **
Professional services	1.056 **
Education	0.658 **
Health care	1.003
Other services	0.707 **
Public administration and social services	0.827 **

Figure C-11 indicates that, compared to being a non-Hispanic white American in the United States, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority 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 \$0.86 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, even after accounting for various other personal characteristics.

Figure C-12.
Home Ownership Rates,
Illinois and the United
States, 2011-2015

Note:

The sample universe is all households.

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for Illinois and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2011-2015 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/>.

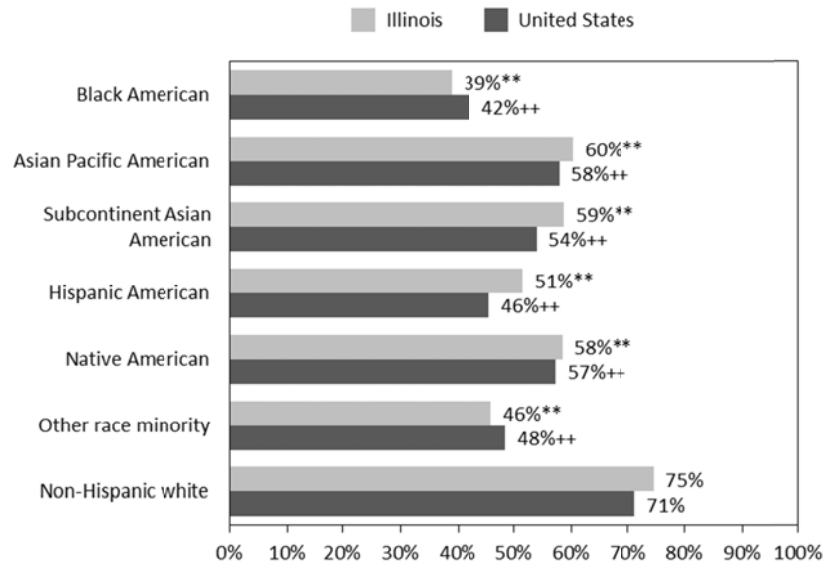


Figure C-12 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and other race minorities in Illinois own homes.

Figure C-13.
Median home values,
Illinois and the United
States, 2011-2015

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2011-2015 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/>.

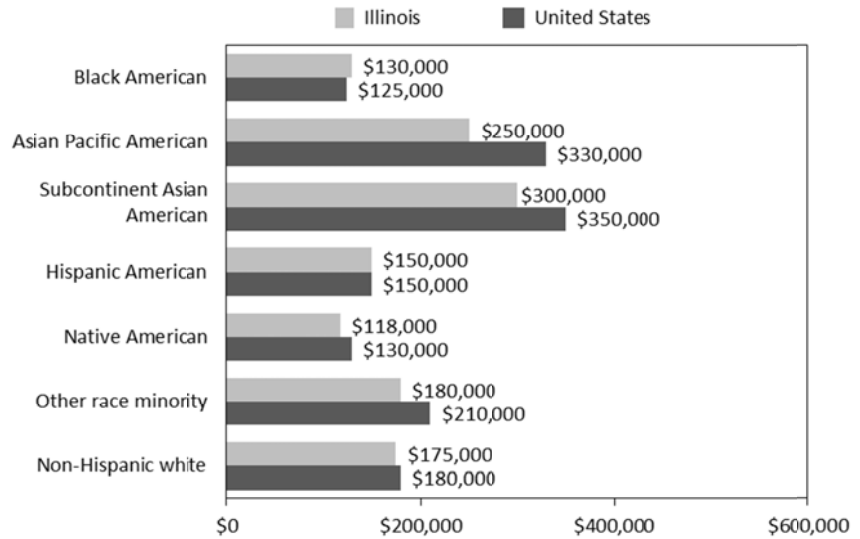


Figure C-13 indicates that Black American, Hispanic American, and Native American homeowners in Illinois own homes of lower median values than non-Hispanic white American homeowners. In contrast, Asian Pacific American and Subcontinent Asian American homeowners in Illinois own homes of higher median values than non-Hispanic white American homeowners.

Figure C-14.
Denial rates of
conventional purchase
loans for high-income
households, Illinois and
the United States, 2007
and 2015

Note:

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

Source:

FFIEC HMDA data 2007 and 2015. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool:
<http://www.consumerfinance.gov/hmda/explore>

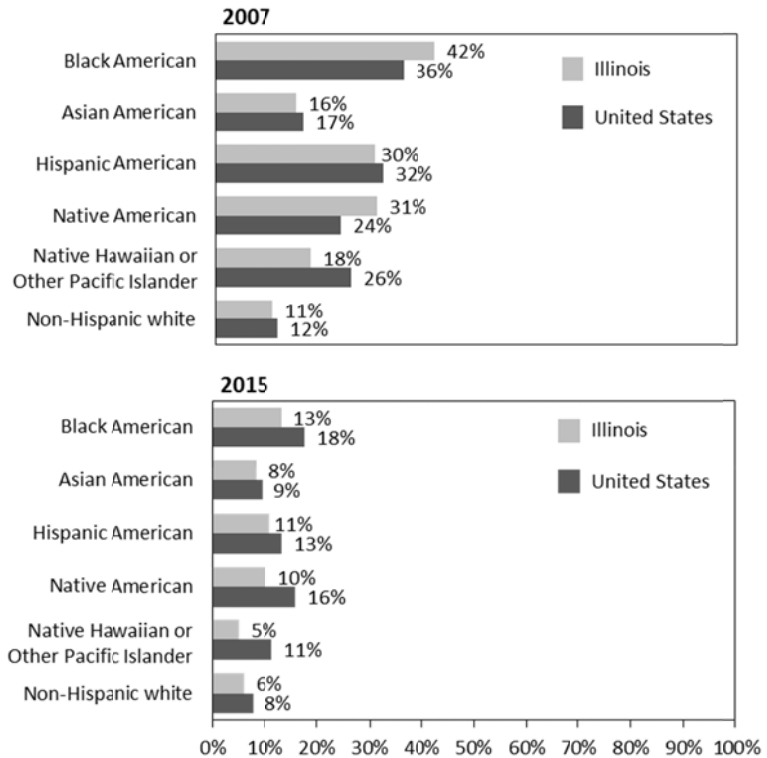


Figure C-14 indicates that in 2015 Black Americans, Asian Americans, Hispanic Americans, and Native Americans in Illinois were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.

Figure C-15.
Percent of conventional
home purchase loans that
were subprime, Illinois and
the United States, 2007
and 2015

Source:

FFIEC HMDA data 2007 and 2015. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>

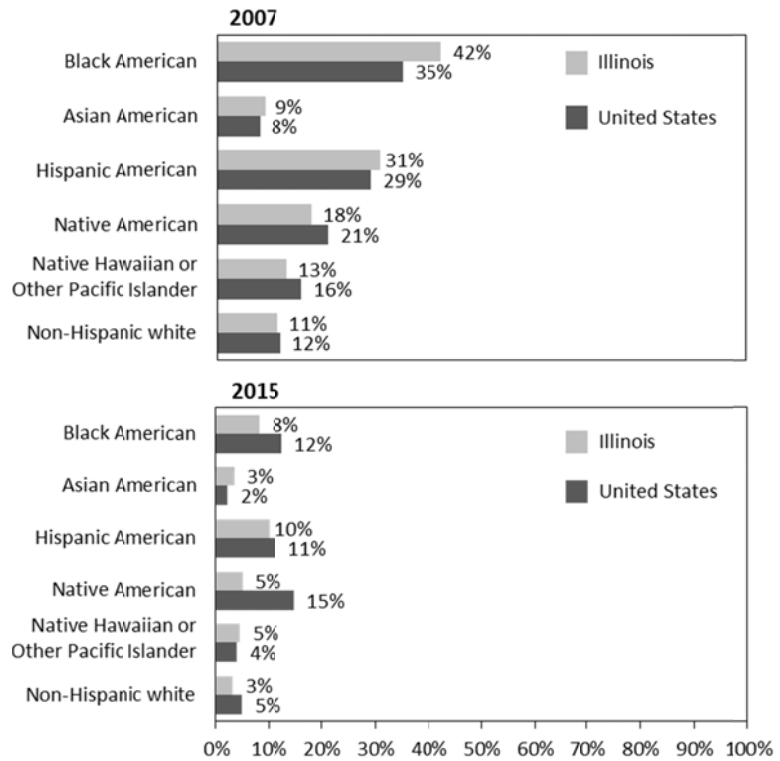


Figure C-15 indicates that in 2015 Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in Illinois were awarded subprime conventional home purchase loans at a greater rate than non-Hispanic white Americans.

Figure C-16.
Business loan denial
rates, 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 Census Division consists of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

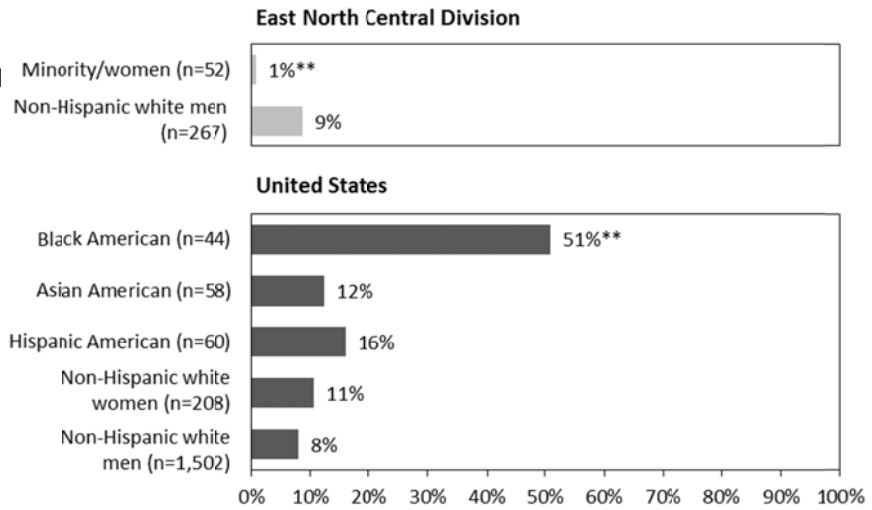


Figure C-16 indicates that in 2003 Black American-owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men. In contrast, minority- and woman-owned businesses in the East North Central Division were denied business loans at a lower rate than businesses owned by non-Hispanic white men.

Figure C-17.
Businesses that did not
apply for loans due to
fear of denial, 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 Census Division consists of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from
 2003 Survey of Small Business
 Finance.

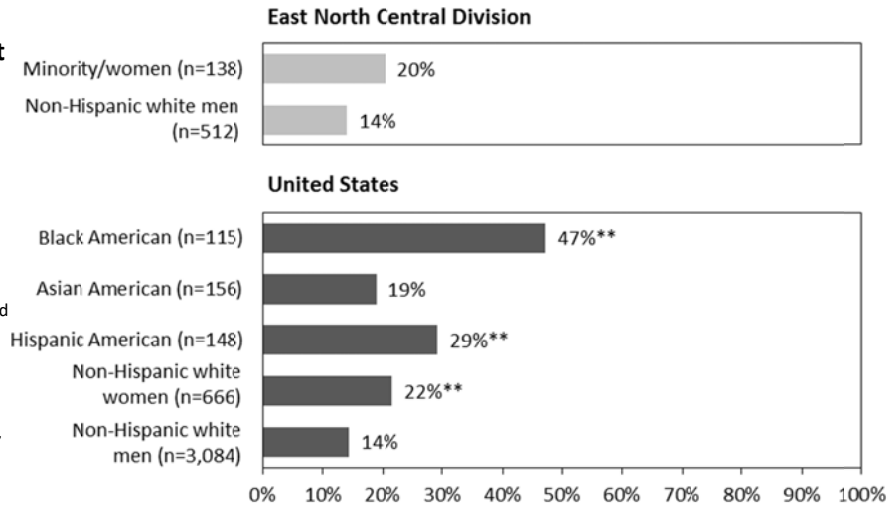
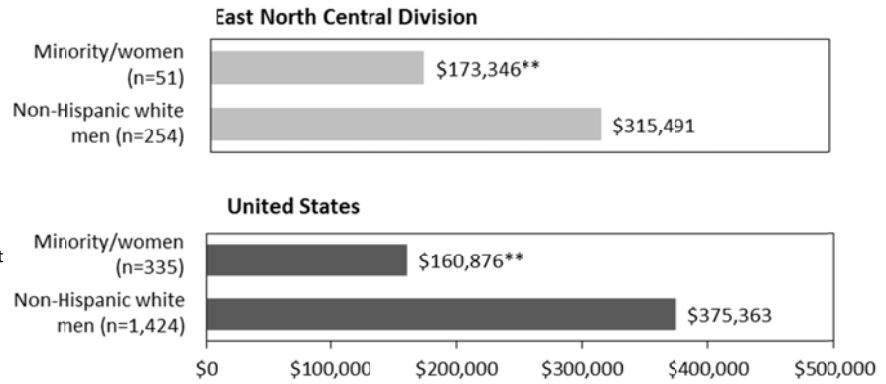


Figure C-17 indicates that in 2003 Black American-, Hispanic American- and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-18.
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 for the United States as a whole and the East North Central Region, respectively.

The East North Central Census Division consists of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

Figure C-18 indicates that in 2003 minority- and woman-owned businesses in the East North Central Division who received business loans were approved for loans that were worth less than those that businesses owned by non-Hispanic white men received. In addition, minority- and woman-owned businesses in the United States who received business loans were approved for loans that were worth less than those that businesses owned by non-Hispanic white men received.

Figure C-19.
Self-employment rates in study-related industries, Illinois and the United States, 2000

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 90% and 95% confidence levels, respectively.

† Denotes that statistical significance was not assessed due to small sample sizes.

Source:

BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Illinois	Construction	Professional Services
Race/ethnicity		
Black American	20.6 %	13.3 %
Asian Pacific American	18.2	3.8 *
Subcontinent Asian American	17.6	2.7
Hispanic American	10.5 **	7.4
Native American	19.8	10.1 †
Other race minority	18.4	0.0 †
Non-Hispanic white	21.3	10.9
Gender		
Women	16.8 % **	4.0 % **
Men	<u>20.3</u>	<u>12.5</u>
All individuals	19.9 %	10.3 %
United States		
Race/ethnicity		
Black American	15.2 % **	5.2 % **
Asian Pacific American	21.3 **	8.5 **
Subcontinent Asian American	17.9 **	6.2 **
Hispanic American	12.2 **	8.9 **
Native American	19.2 **	11.8
Other race minority	23.9	11.6
Non-Hispanic white	25.4	14.2
Gender		
Women	16.8 % **	7.5 % **
Men	<u>23.3</u>	<u>15.1</u>
All individuals	22.6 %	13.2 %

Figure C-19 indicates that in 2000 Hispanic Americans working in the Illinois construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Illinois construction industry exhibited lower rates of self-employment than men. Asian Pacific Americans working in the Illinois professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Illinois professional services industry exhibited lower rates of self-employment than men.

Figure C-20.
Self-employment rates in study-
related industries, Illinois and the
United States, 2011-2015

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 90% and 95% confidence levels, respectively.

† Denotes that statistical significance was not assessed due to small sample sizes.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Illinois	Construction	Professional Services
Race/ethnicity		
Black American	21.7 %	4.2 % **
Asian Pacific American	30.1	2.3 **
Subcontinent Asian American	20.3	12.6
Hispanic American	16.4 **	2.2 **
Native American	13.9 **	5.5 †
Non-Hispanic white	24.3	11.5
Gender		
Women	17.6 % **	7.1 % **
Men	<u>23.1</u>	<u>10.9</u>
All individuals	22.6 %	10.0 %
United States		
Race/ethnicity		
Black American	18.0 % **	7.0 % **
Asian Pacific American	23.2 **	7.5 **
Subcontinent Asian American	23.3 **	8.6 **
Hispanic American	17.7 **	8.9 **
Native American	18.5 **	11.0
Non-Hispanic white	26.4	13.0
Gender		
Women	16.1 % **	7.3 % **
Men	<u>24.2</u>	<u>13.5</u>
All individuals	23.5 %	11.9 %

Figure C-20 indicates that Hispanic Americans and Native Americans working in the Illinois construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Illinois construction industry exhibited lower rates of self-employment than men. Black Americans, Asian Pacific Americans, and Hispanic Americans working in the Illinois professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Illinois professional services industry exhibited lower rates of self-employment than men.

**Figure C-21.
Predictors of business ownership in
construction (probit regression), Illinois,
2011-2015**

Note:

The regression includes 15,794 observations.

*,** 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 and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2011-2015 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>.

Variable	Coefficient
Constant	-1.9736 **
Age	0.0362 **
Age-squared	-0.0002
Married	-0.0739 **
Disabled	0.1182 *
Number of children in household	0.0472 **
Number of people over 65 in household	0.0734 *
Owns home	-0.2127 **
Home value (\$000s)	0.0007 **
Monthly mortgage payment (\$000s)	0.0201
Interest and dividend income (\$000s)	0.0037 **
Income of spouse or partner (\$0000s)	0.0000
Speaks English well	0.0536
Less than high school education	0.1812 **
Some college	-0.0294
Four-year degree	-0.0361
Advanced degree	-0.0981
Black American	-0.1235 *
Asian Pacific American	0.1468
Subcontinent Asian American	-0.0547
Hispanic American	-0.2655 **
Native American	-0.2966
Other race minority	-0.3094
Women	-0.2849 **

Figure C-21 indicates that, compared to being a non-Hispanic white American or to being a man in Illinois, being a Black American, Hispanic American, or a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.

Figure C-22.
Disparities in business ownership rates for Illinois construction workers, 2011-2015

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	20.5%	23.4%	87
Hispanic American	16.5%	27.1%	61
Non-Hispanic white women	18.5%	27.2%	68

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 2011-2015 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/>.

Figure C-22 indicates that Black Americans own construction businesses in Illinois at a rate that is 87 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Hispanic Americans own construction businesses in Illinois at a rate that is 61 percent that of similarly-situated non-Hispanic white Americans. Non-Hispanic white women own construction businesses in Illinois at a rate that is 68 percent that of similarly-situated non-Hispanic white men.

**Figure C-23.
Predictors of business ownership in
professional services (regression), Illinois,
2011-2015**

Note:

The regression includes 2,137 observations.

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

"Speaks English well" and "Other minority group" omitted due to small sample size.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Variable	Coefficient
Constant	-4.9807 **
Age	0.1254 **
Age-squared	-0.0011 **
Married	0.1066
Disabled	-0.0552
Number of children in household	0.0267
Number of people over 65 in household	0.1903 *
Owens home	-0.1250
Home value (\$000s)	0.0005 **
Monthly mortgage payment (\$000s)	-0.0354
Interest and dividend income (\$000s)	-0.0013
Income of spouse or partner (\$0000s)	0.0003
Less than high school education	0.1744
Some college	0.3546
Four-year degree	0.4662 **
Advanced degree	0.5523 **
Black American	-0.5867 **
Asian Pacific American	-1.0467 **
Subcontinent Asian American	-0.1814
Hispanic American	-0.5910 **
Native American	-0.5100
Women	-0.1758

Figure C-23 indicates that, compared to being a non-Hispanic white American in Illinois, being Black American, Asian Pacific American, or Hispanic American is related to a lower likelihood of owning a professional services business, even after accounting for various other personal characteristics.

Figure C-24.
Disparities in business ownership rates for Illinois professional services workers, 2011-2015

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	4.1%	11.5%	35
Asian Pacific American	1.4%	10.8%	13
Hispanic American	2.4%	7.4%	32

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 2011-2015 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/>.

Figure C-24 indicates that Black Americans own professional services businesses in Illinois at a rate that is 35 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Asian Pacific Americans own professional services businesses in Illinois at a rate that is 13 percent that of similarly-situated non-Hispanic white Americans. Hispanic Americans own professional services businesses in Illinois at a rate that is 32 percent that of similarly-situated non-Hispanic white Americans.

Figure C-25.
Rates of business
closure, expansion, and
contraction, Illinois and
the United States, 2002-
2006

Note:

Data include only non-publicly held businesses.

Equal Gender 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.

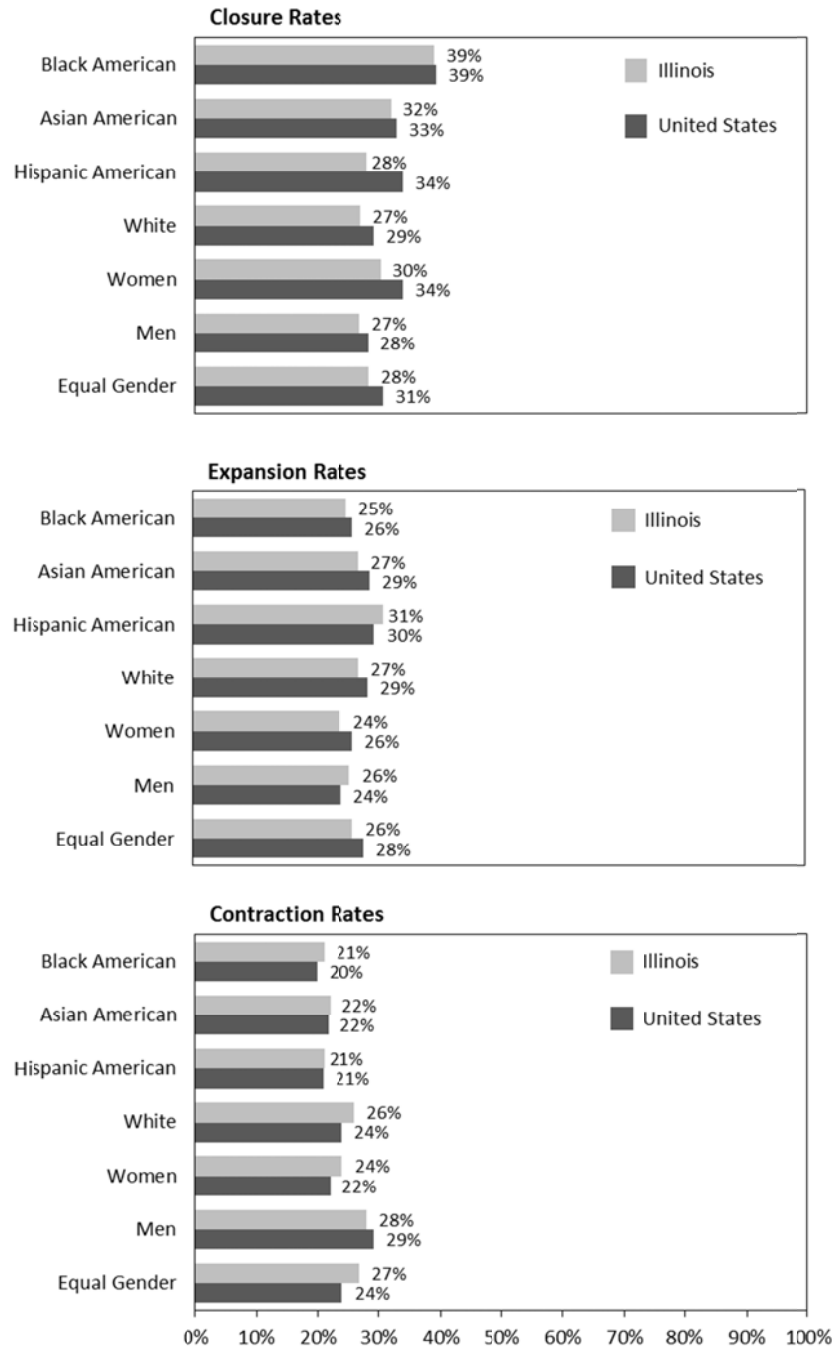


Figure C-25 indicates that Black American-, Asian American-, and Hispanic American-owned businesses in Illinois show higher closure rates than white American-owned businesses. Woman-owned businesses in Illinois show higher closure rates than businesses owned by men. Black American-owned businesses in Illinois show lower expansion rates than white American-owned businesses. Woman-owned businesses in Illinois show lower expansion rates than businesses owned by men.

Figure C-26.
Mean annual business
receipts (in thousands),
Illinois 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.

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

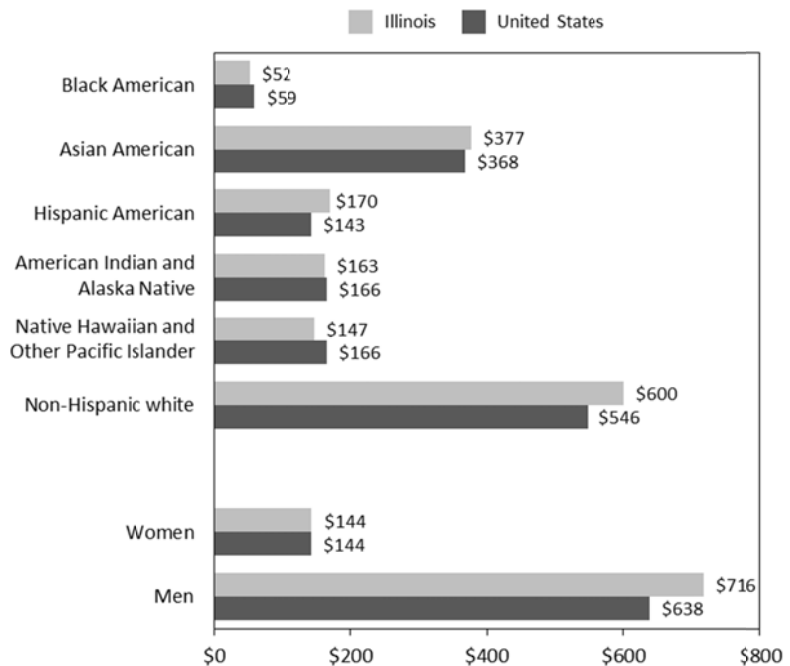


Figure C-26 indicates that in 2012 Black American-; Asian American-; Hispanic American-; American Indian and Alaskan Native-; and Native Hawaiian and Other Pacific Islander-owned businesses in Illinois showed lower mean annual business receipts than non-Hispanic white American-owned businesses. In addition, woman-owned businesses in Illinois showed lower mean annual business receipts than businesses owned by men.

Figure C-27.
Mean annual business owner earnings, Illinois and the United States, 2011-2015

Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars.

**/+ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for Illinois and the United States as a whole, respectively.

† Denotes that statistical significance was not assessed due to small sample sizes.

Source:

BBC Research & Consulting from 2011-2015 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/>.

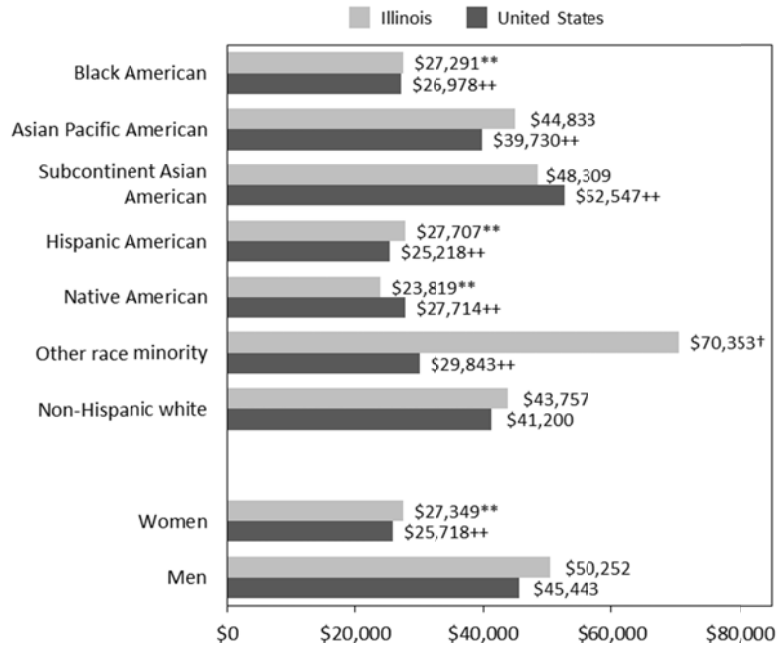


Figure C-27 indicates that the owners of Black American-, Hispanic American-, Native American-, and other race minority-owned businesses in Illinois earned less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Illinois earn less on average than the owners of businesses owned by men.

**Figure C-28.
Predictors of business owner earnings
(regression), Illinois, 2011-2015**

Note:

The regression includes 14,901 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. All amounts in 2015 dollars.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Variable	Exponentiated Coefficient
Constant	544.798 **
Age	1.152 **
Age-squared	0.999 **
Married	1.263 **
Speaks English well	1.024
Disabled	0.710 **
Less than high school	0.710 **
Some college	1.014
Four-year degree	1.280 **
Advanced degree	1.928 **
Black American	0.751 **
Asian Pacific American	1.086
Subcontinent Asian American	0.968
Hispanic American	1.029
Native American	0.687
Other race minority	1.599
Women	0.525 **

Figure C-28 indicates that, compared to being an owner of a non-Hispanic white American-owned business in Illinois, being the owner of a Black American-owned business is related to significantly lower earnings, even after accounting for various other business and personal characteristics. Compared to being an owner of a business owned by men in Illinois, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

**Figure C-29.
Predictors of business owner earnings
(regression), United States, 2011-2015**

Note:

The regression includes 433,808 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. All amounts in 2015 dollars.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2011-2015 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/>.

Variable	Exponentiated Coefficient
Constant	470.029 **
Age	1.153 **
Age-squared	0.999 **
Married	1.244 **
Speaks English well	1.158 **
Disabled	0.579 **
Less than high school	0.749 **
Some college	1.049 **
Four-year degree	1.320 **
Advanced degree	1.929 **
Black American	0.823 **
Asian Pacific American	1.111 **
Subcontinent Asian American	1.157 **
Hispanic American	1.049 **
Native American	0.679 **
Other race minority	1.152 **
Women	0.530 **

Figure C-29 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 business owned by men in the United States, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

APPENDIX D.

Qualitative Analyses about Marketplace Conditions

APPENDIX D.

Qualitative Information about Marketplace Conditions

Appendix D presents qualitative information that the study team collected and analyzed as part of the Illinois Department of Transportation (IDOT) disparity study. Nearly 200 business and trade association representatives provided input for Appendix D, which includes the following thirteen sections:

A. Introduction describes the public engagement process for gathering and analyzing the qualitative information summarized in Appendix D. *(page 2)*

B. Background on Businesses in Illinois summarizes information about how businesses become established, the types of contracts they work on, and what products and services they provide. *(page 3)*

C. Keys to Business Success summarizes information about certain barriers to doing business and keys to success including access to financing, bonding, and insurance. *(page 16)*

D. Doing Business as a Prime Contractor or as a Subcontractor summarizes information about the mix of businesses' prime contract and subcontract work and how they obtain that work. *(page 33)*

E. Potential Barriers to Doing Business in the Illinois Marketplace (Public or Private) presents information about potential barriers to doing work for the state of Illinois or the Illinois Department of Transportation (IDOT). *(page 40)*

F. Work with IDOT and Other Public Agencies presents information about working with or attempting to work with public agencies in Illinois including IDOT. *(page 62)*

G. Other Allegations of Unfair Treatment presents information about experiences with unfair treatment including bid shopping, treatment during performance of work, and allegations of unfavorable work environment for minorities and women. *(page 71)*

H. Insights Regarding any Race-, Ethnicity- or Gender-based Discrimination includes additional information concerning potential racial/ethnic- or gender-based discrimination. Topics include stereotypical attitudes about minorities and women and allegations of a "good ol' boy" network that adversely affects opportunities for minority- and woman-owned businesses. *(page 79)*

I. Insights Regarding Business Assistance Programs or Any Other Neutral Measures presents information about business assistance programs and other neutral measures. *(page 85)*

J. Insights Regarding Contracting Processes presents information about efforts to open contracting processes. *(page 91)*

K. Insights Regarding the Federal DBE Program or Any Other Race-/Gender-Conscious Program presents information about the Federal Disadvantaged Business Enterprise (DBE) Program. *(page 104)*

L. DBE Certification presents information about firms' experiences with DBE and other certification processes, and describes the advantages and disadvantages of holding a DBE or other certification. It also summarizes business owners' experiences with the Federal DBE Program and its implementation by IDOT, including any impacts of DBE contract goals on other businesses. *(page 115)*

M. Any Other Insights and Recommendations presents additional comments and suggestions for IDOT to consider. *(page 122)*

A. Introduction

BBC Research & Consulting (BBC) conducted public hearings and in-depth personal interviews between October 2016 and October 2017. During the interviews and hearings, participants had opportunities to discuss their experiences working in the local transportation contracting industry; experiences working for Illinois public agencies; experiences with potential barriers or discrimination based on race/ethnicity or gender; and other matters relevant to doing business in the Illinois marketplace. Throughout the study process, participating agencies and the BBC study team encouraged business owners to submit written testimony and comments concerning those matters.

In-depth interviews. The study team conducted in-depth interviews with 51 Illinois businesses and nine IDOT contract compliance officers. The interviews included discussions about interviewees' perceptions and anecdotes regarding the local contracting industry; the Federal DBE Program; and experiences working or attempting to work with Illinois state entities. Interviewees included individuals representing transportation-related construction and professional services businesses. The study team identified interview participants primarily from a random sample of businesses that was stratified by business type, location, and the race/ethnicity and gender of the business owners. The study team conducted the interviews in-person with the owner, president, chief executive officer, or other high-level manager of the business or association. Some of the businesses that the study team interviewed work exclusively (or, at least primarily) as prime contractors or subcontractors, and some work as both. All of the businesses conduct work in Illinois. 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 DBE-certified business and also reports the race/ethnicity and gender of the business owner.¹

Availability surveys. As a part of availability surveys that the study team conducted for the disparity study, the study team asked firm owners and managers whether their companies have experienced barriers or difficulties associated with starting or expanding businesses in their industries or with obtaining work. A total of 114 businesses provided comments. The study team analyzed responses to those questions and provided examples of different types of comments in Appendix D. Availability survey comments are indicated throughout Appendix D by the prefix “AS.” For details about availability surveys, see Chapter 5 and Appendix E.

Public meetings. In October and November 2016, IDOT and the study team solicited written and verbal testimony at public forums across the state. Public forums were held on the following dates in the following locations:

- Dixon—October 25, 2016;
- Schaumburg—October 26, 2016;
- Chicago—October 27, 2016;
- Peoria—November 1, 2016;
- Springfield—November 2, 2016; and
- Collinsville—November 3, 2016.

The study team reviewed and analyzed comments from those meetings and provided examples in Appendix D. Public forum comments are indicated throughout Appendix by the prefix “PM.”

Written testimony. All written testimony received by e-mail was analyzed by the study team and is provided in Appendix D. Written testimony is indicated throughout Appendix D as “WT.”

Women Construction Owners & Executives. The study team also met in-person with the Women Construction Owners & Executives (WCOE) in February, 2017 to collect comments from the organization’s members. Comments from that meeting are indicated throughout Appendix D by the prefix “TA.”

B. Background on Businesses in Illinois

Part B summarizes information related to:

- How businesses become established (*page 4*);
- Challenges in starting, operating, and growing a business (*page 5*);
- Types of work that businesses perform (*page 7*);

¹ Note that “male” or “white” are sometimes not included as identifiers to simplify the written descriptions of business owners.

- Employment size of businesses (*page 8*);
- Capability of businesses to perform different types and sizes of contracts (*page 10*);
- Local effects of the economic downturn (*page 10*);
- Current economic conditions (*page 10*); and
- Business owners' experiences pursuing public and private sector work (*page 13*).

How businesses become established. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Many interviewees worked in the industry or a related industry before starting their own businesses, or have worked for many years in the industry. [e.g., #6, #11, #18, #29, #30, #39, #58, #59, #60] Examples from the in-depth personal interviews include the following:

- The non-Hispanic white owner of a specialty contracting company commented that he had worked for other similar companies before deciding to start his own firm. He also added that he holds 100 percent ownership of the firm and has more than ten years' experience in the industry. [#3]
- The Hispanic American male owner of a MBE/DBE-certified construction firm commented, "I was a [specialty construction worker] for nearly 20 years in Chicago. I was bored and needed to do something else, so I started [my company] in the 2000s." [#56]
- The Black American owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm reported that he started his firm at the end of the 1990s. He said, "After running majority-owned companies, it was decided it was time for me to do it myself We have grown from just being an \$800,000-a-year company to where we are averaging about \$12,000,000 a year." [#10]
- The Black American male owner of a DBE-certified construction company reported that his family started the firm with him in the 2000s. [#1]
- The non-Hispanic white female owner of a DBE/WBE-certified specialty contracting firm reported that the firm started as a family-owned business in the 1980s. She added that she plans to eventually pass the firm on to her son. [#53]
- The non-Hispanic white male co-owner of an engineering firm stated that their business was formed as a result of a buyout among employees at another firm. He explained, "Some of us worked for another firm...There was a minor recession back in the early '80s, and the firm we were working for closed...Some of us decided to buy out ...what was left of that firm and start a new firm." [#26]
- The non-Hispanic white male representative of a majority-owned construction firm reported that he has worked for 15 years in the long-lived family business. He added that the firm consists of three smaller individually-owned firms. [#21]

- The non-Hispanic white male owner of an engineering firm established his own business after working for another local firm. He explained, “I worked six years for a local engineering firm, and I wanted to do bridge design on my own. I found that I could ...and go to work for the [IDOT] bridge office—and [I] almost did—but I took a chance and opened my own business.” [#31]
- The Black American male owner of a MBE/DBE-certified specialty contracting firm reported that he worked in a related industry for over 20 years before starting his own firm nearly ten years ago. [#55]
- A non-Hispanic white female owner of a WBE/DBE-certified construction firm reported that she had “extensive” experience in the industry; she recognized a need for DBEs in the industry so started her own firm. [#35]

Some business owners gave a wide variety of reasons for starting their own businesses.

Examples of comments from the in-depth interviews include the following:

- The Black American female owner of a specialty services firm reported that she started her business for personal reasons that expanded over time to include additional paid services. [#5]
- The Black American female owner of a MBE/WBE/DBE-certified specialty services firm reported, “I was awarded a grant ... for \$20,000 that covered the upfront costs of the business, the initial licensing, paid for the certification and paid for my insurances [to start my firm in the 2000s].” [#52]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported that attending a course prompted her to start her business. She said, “Our local community college offered a [night] course on how to start your own business” She added, “I was [employed] at the time [and] I went back for the [eight-week session]. By that time, I thought I might as well do it because that would have been in the summertime by the time I finished” [#60]

She continued, “I started the company in the 1990s in the summertime I worked while starting the company. In one year, I did both. So, the summer of the following year, I quit working and just jumped fulltime into doing this.” [#60]
- A non-Hispanic white female owner of a WBE/DBE-certified specialty contracting firm reported that family issues and job loss gave her the impetus to start her own firm. [#33]

Challenges in starting, operating, and growing a business. Interviewees’ comments about the challenges in starting, operating, and growing a business varied.

Two interviewees reported cost of materials as a challenge in starting, sustaining, or growing their business.

- The Black American male partial owner of a DBE-certified construction firm indicated that he faced challenges in the 2000s. He reported, “[There were] huge [materials cost]

increases where [materials] pricing increased over 200 percent. It was a \$13 increase Typically, we only get \$3 increase, and this happened [for] two years, back-to-back.”

He further reported challenges working with IDOT at the time. He said, “[Materials] prices jumped from \$80 to \$120. We had a project with IDOT at the time... We wrote letters stating that we bid the work in 2013, and since 2013 the price of [the specified material] has completely [changed], basically forced us to almost lose everything, and nothing could be done about it.” [#1]

- The representatives of an MBE-certified construction firm noted, “Another issue we have is material supplies and vendors. Everybody else can get us a Net 30 but they want us to pay cash... We went to a vendor, applied for credit three or four times. I mean, our credit rating is good... But they told us ‘Oh, we’re not accepting new credit apps now. We may when the company starts making a little bit more money’ ... Two days later, [a non-minority] came in and said ‘We just opened up a line of credit and I came to get this material’ ... the guy said ‘Yeah, go ahead get what you want.’ But we were trying to get credit with this company for years... I know it was because we were a minority... that’s twice that happened to us.”

The female representative of the firm also added, “[I] found out that my material vendors [are] giving all my competitors lower prices [by] two or three cents a pound. On a job where we got a couple hundred thousand pounds of steel, that kills us.” [PM6#2]

A few interviewees reported facing financial barriers regarding access to credit and other factors when they started their business as well as during the years that followed business initiation. Examples include:

- The Black American female owner of a DBE-certified specialty contracting firm reported that she was in need of financing to grow her young business. [#2]
- The minority male representative of a WBE/DBE-certified professional consulting firm reported, “The disadvantage as a small business is how you set up your financial aspect. If you need some financial [help], you cannot get it If you are small and you just started, and [have] no credit, nobody is going to support you or give you an opportunity.” [#15a]
- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned professional services firm said, “We have found it difficult to get the bank financing, given the conditions of the state.” [AS#10]

One interviewee reported relationships and networking as challenges in starting, sustaining, or growing their business. When asked to comment on challenges encountered by their company when starting a business, the non-Hispanic white female co-owner of an electrical company emphasized challenges related to networking and knowledge of potential business partners. She stated, “I would say...lack of knowledge of the suppliers and their capabilities, ...the connections to everyone, ...and [which prime contractors] you don’t want to bid jobs to.” [#23]

Some interviewees commented that customers or agencies are less willing to pay for quality work. For example:

- The representative of a non-Hispanic white male-owned construction consulting firm indicated that "It's harder for a smaller company, especially a family owned company, to compete whenever given the opportunity. We find people are not willing to pay for quality. We wind up being pinched out because we're more expensive." [AS#37]
- When asked whether there are any barriers to starting or expanding their business, the representative of a Black American female-owned construction firm referenced trouble with selection processes, saying, "[The] bidding process through IDOT had to be the cheapest bid. IDOT was not concerned about the quality, just the lowest bid." [AS#43]

Types of work that businesses perform. Interviewees discussed whether and why over time their firms changed the types of work that they perform.

Some interviewees indicated that their companies had changed, evolved or expanded their lines of work over time, or conducted a wide-range of services. For example:

- The non-Hispanic white female owner of a WBE/DBE-certified specialty contracting firm commented, "In terms of history, we started out particularly with the [specialty contracting]. We have since expanded. We actually do [specified contracting type] and we work both as a prime contractor and as a subcontractor..." [#53]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that the firm grew from a small [specified industry] company in the 1970s to a larger construction-related firm over time. [#18]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm commented that his firm had many "facets" of work that changed considerably over time. [#19]
- The male representative of a Native American woman-owned specialty services firm reported that the company performs [a specified list of] services. He added having plans to expand into [other specialty services]. [#41a]
- The Black American male representative of a non-profit business association commented, "Any place that Black businesses dwell, we operate in We have a reasonable concentration on construction." [#37]

Many businesses reported stable work types or little or no change in the type of work they do. Examples of interviewee comments include:

- The Black American male partial owner of a DBE-certified construction firm said the type of work the firm does has not changed. He said, "[We do] the same things... within the industry... Sometimes we think it's going to get better, but then we're right back to the same old thing...." [#1]

- The Black American owner of a DBE-certified construction firm commented that he performs strictly concrete-related work. [#54]
- The Hispanic American male owner of a MBE/DBE-certified construction firm commented, “I employ only [specialty construction] workers, and... we do anything that involves [related work].” [#56]
- A Black American male owner of a MBE/DBE-certified consulting firm reported, “We provide professional consulting services [for a number of public sector agencies].” [#12]
- The Black American male owner of a MBE/DBE-certified veteran-owned specialty contracting firm reported that the firm performs [a single type of specified service]. [#11]
- The non-Hispanic female owner of a WBE/DBE-certified construction-related firm reported that the firm is a materials supplier and performs transportation-related services. [#58]
- The Subcontinent Asian American owner of a MBE/DBE/MWRD-certified engineering firm reported, “[My firm] provides a selection of engineering services for the design and construction of [specialty] systems for industrial, commercial, and governmental properties.” [#7]
- The Black American owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm said, “We are doing major [specialty contracting], construction, commercial, and industrial [work].” [#10]
- The Black American female owner of a MBE/WBE/DBE-certified specialty services firm reported that his firm performs “selective [services].” [#52]
- The non-Hispanic white female representative of a business association reported, “It is a mix of trades... we have engineers, we have architects, we have almost every trade represented. Some companies are fairly large, and some are fairly small, so we kind of cover everything.” [#16]

Employment size of businesses. The study team asked business owners about the number of people that they employ and if their employment size fluctuates.

A number of companies reported that they expand and contract their employment size depending on work opportunities or market conditions; some reported using subcontractors, when needed, to increase resources. [e.g., #5, #8] Comments include:

- The Black American male owner of a MBE/DBE-certified veteran-owned specialty contracting firm reported that he usually employs “six or seven.” He added, “I go up to whatever the project allows ... [sometimes] ten or 12.” [#11]
- The Subcontinent Asian American owner of a DBE/MBE/MWRD-certified engineering firm said that his firm hires subcontractors when necessary. He stated, “We have two full-time

and two part-time employees right now... and eight contractors that help me on the jobs.” [#7]

- The Black American owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm said, “Currently I am about to bring in another person because I am going to be retiring at the end of 2019... I am bringing in another prospective owner.”

He added, “[The size of the firm] varies. [We have six] office employees, [and] field employees [that reach up to] 80. Right now, we are averaging probably about 35.” [#10]

- The Black American male partial owner of a DBE-certified construction firm stated that the company has “seven to 23 staff members, on and off,” depending on the project. [#1]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported that she has four employees, but depending on the project, she increases her staff. She added that IDOT projects require her to hire up to 20 employees. [#59]
- When asked to describe changes in the size of his firm over time, the non-Hispanic white male co-owner of an engineering firm described a period of steady growth during the first two decades, following by significant contraction during the last decade. He explained, “We started growing big time in '85, and I think we probably peaked...right at about 2008. We had pretty steady growth through that time. We were 35 [employees] and now we're – I think we're down to 13. Thirty-five when the great recession hit. And a lot of our clients went bankrupt in 2008. Or they're still around and owe us money.” [#26]

Some interviewees said that their firm changes in size seasonally. Statements include:

- The non-Hispanic white owner of a construction firm noted that his firm employs between 50 and 70 people depending on the season. [#4]
- When asked if his company expands and contracts based on variations in work opportunities, season, or market conditions, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm commented that while his firm does experience slower business volume in the winter, the firm attempts to maintain its staff year-round. He explained, “There’s small variations based on season, usually with land surveying. The winter months are kind of a down season, and so we usually bring on a couple of temporary guys in the summer, but we don’t do a whole lot of layoffs in the downtime. Usually, we just try to find things for people to do and hold onto those people.” [#25]
- The Black American male owner of a MBE/DBE-certified specialty contracting firm commented, “I can arrange for 25 to 50 guys, depending on the season.” [#55]
- When asked about potential expansion or contraction in employment or scale depending on work opportunities, season, or market conditions, the non-Hispanic white female co-owner of an electrical company stated, “It does expand and contract, probably mostly in the summer... A lot of times, I like to start in the spring, but... [during] seasons like this, where it

was real rainy, it was virtually impossible for people to get things underground done. And so, we couldn't really do any of that." [#23]

One business owner reported little or no change in the size of the firm. The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm reported employing a consistent staff of 15. [#58]

Capability of businesses to perform different types and sizes of contracts.

Interviewees discussed the types, sizes, and locations of contracts that their firms perform. Some interviewees experienced barriers regarding bonding, cash flow, and staffing.

One interviewee reported not being limited by different contract sizes. The non-Hispanic white female owner of a WBE-certified specialty construction firm reported that they do not have a strict limit to the size of contracts they perform. She added, "We don't take \$1 million contracts, but we take \$100,000." [#7]

Local effects of the economic downturn. A few interviewees shared comments about their experiences with the barriers and challenges associated with the economic downturn, for example:

- The non-Hispanic white female owner of a WBE/DBE-certified specialty contracting firm reported, "[During the economic downturn] we aggressively went after work and found that for the most part we were doing work for municipalities, and predominately [we] ended up doing [specified work]... because there was no other work available to us. That is key because the small contractors during the downturn were hurt very badly." [#53]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm commented that he blames the increase in his insurance on past recessions. He said, "I blame it on the inflation. Our problems with the recession... I have been having a hard time... [because] the insurance has become very hard to deal with." [#19]

Current economic conditions. Interviewees discussed how current economic conditions are affecting business in their industry.

A few interviewees reported not yet seeing an upswing in market conditions. For example:

- The non-Hispanic white male representative of a majority-owned construction firm said that the recent change in the economy has led to a steady decline in business. He reported, "Outside the 2008 to 2009 little boom, there has been a steady decline in available work. The elements that have changed in the market are that the number of available jobs have reduced and it costs more to execute them. There are also less subcontractors available, including minority participation subcontractors." He added that the firm previously did construction work in Missouri, but because work is no longer available in that market, the company closed its location there. [#21]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm responded, "[The] economy has been slow. It's hard to get work here in the state of Illinois." [AS#1]
- The female representative of a construction firm stated, "I used to have a very strong bottom line. Watched my revenues decline for the last three years. Cannot buy work, literally. We're making our living on \$10,000 projects when my biggest project was prime for \$1.2 million." [PM1#1]

Several interviewees referenced problems with the Illinois state budget or a general lack of funding in Illinois. Statements include:

- When asked to describe the current economic conditions for her company's industry, the non-Hispanic white female co-owner of an electrical company indicated that "it's slower than usual." She attributed this to "Lack of state funding...without a state budget, a lot of places have put a lot of things on hold. And anyone who [is] part of a government agency that give outreach services to people, and a lot of facilities, and Head Start programs, and those sort of things. We do work for them...but they are so careful and cautious. It's even all the other programs...even the schools have been a little more reluctant." [#23]
- When asked to describe current market conditions in their industry, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm characterized a mix of conditions across their different lines of business. He explained, "It really depends on which segment you're talking about...We have a lot of municipal clients and that is a mess right now Our towns around [southern Illinois] don't have any money, no grant funding, and they've basically lived on grant funding for so long to keep their water systems up, ...to fix their sewer systems, to build their water treatment plants and stuff, because the tax base is so low and all that. , [The small towns are] not getting the property tax revenue and stuff. So, now that a lot of the grant money has dried up, [and because of additional] state funding challenges ... [The small towns] are just kind of patching as they go and...there's no work for engineering companies. So...the big challenge in our industry is [reduced] infrastructure spending that is targeted at the things that we work on."

He explained further, "But on the other side, on surveying, it's pretty strong. So, we are actually fortunate to have that diversity, because it kind of helps us get through whatever challenge is going on in engineering." [#25]

- The representative of an Asian Pacific American female-owned construction firm said, "It is somewhat difficult to get work in the private sector. With...the limited amount of public work, that's been limiting to us." [AS#6]
- When asked to comment on the current market conditions for the company's industry, the non-Hispanic white male co-owner of an engineering firm referenced weaker market conditions due to reductions in funding among public-sector clients. He explained, "When we had [more] employees, maybe it was easier for us to get jobs. I think it's harder for our size firm to get the jobs we used to. In Bloomington, they decided they'd rather hire out-of-

town engineers to do their work just because they're bigger. And even if it's a small project, we're just kind of shut out of the market. But we get smaller jobs now, which means you have to have more of them to survive. And I think I mentioned before, the state of Illinois—some of our clients like nonprofits and school districts and small municipalities—are all short on funds. So, I think the state budget really is a significant factor – or lack of a state budget. For instance, we do work for Illinois State University and a lot of their projects are just kind of on hold.” [#26]

- When asked about any barriers to starting or expanding their business, the representative of a Hispanic American female-owned engineering firm explained, "It is harder to get work, because contracts have been held back by the conditions of Illinois." [AS#32]
- The representative of a non-Hispanic white male-owned engineering firm expressed frustration with the state budget, saying, "It would be nice if the state would pass their budget so some of my state clients could begin work." [AS#33]
- When asked about barriers to expanding their business, the representative of a non-Hispanic white male-owned trucking firm said, "It's tough to expand when they don't pay because they don't have a [state] budget." [AS#34]
- When asked about barriers to starting or expanding their business, the representative of an Asian Pacific American male-owned construction firm stated, "That state hasn't had a budget. That [has] impacted all engineering firms in the state." [AS#35]
- The representative of a non-Hispanic white female-owned construction and supply firm indicated that problems with the state budget have impacted their firm. They explained, "With [the state] budget crisis, we're leery to take a job. They sent a letter that they were aware we wouldn't be paid for a few months. We're a small business, and it's not good." [AS#36]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned environmental contracting firm said, "The state budget caused an issue...there [have] not been many contracts available." [AS#96]
- The representative of a non-Hispanic white male-owned engineering firm expressed frustration with state budget problems, explaining, "We have had projects put on hold and projects that just went away for lack of funding." [AS#97]
- When asked whether there are any barriers to starting or expanding their business, the representative of an Asian Pacific American female-owned engineering firm said, "There's no state budget, [which is] leaving a lot of different entities a little hesitant. There's no projects." [AS#98]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned construction consulting firm said that

the state budget problems have been an issue, adding, "The lack of a state budget has cut into training for the last two years." [AS#99]

- The representative of a non-Hispanic white female-owned demolition and specialty construction firm stated, "[Illinois is] not business friendly, [there are] too many restrictions and regulations that other states do not have." [AS#100]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm expressed frustration with the state budget, saying "[There] hasn't been many opportunities with [the] Illinois financial situation... Nothing published through the CBD or IDOT." [AS#101]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm referenced bureaucratic difficulties and slow payment, saying "The state government is difficult to work with, and you have to make political donations to be considered friendly. They're also really slow payers so you have to have the patience to work with them." [AS#103]

Several interviewees referenced high tax rates in Illinois as a barrier to their firm. For example:

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white woman-owned professional services firm responded, "Being in Illinois is a tax burden. It is crazy and you have to be a minority or a woman. You don't get anything because of the tax burden." [AS#106]
- The representative of a non-Hispanic white male-owned engineering firm indicated that "Taxes seem to be opposed to small businesses, making it hard to grow." [AS#107]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm referenced high income taxes for businesses as a problem, adding, "If [income taxes] continue to go up, our plan is to move [out of state]." [AS#108]
- The representative of a non-Hispanic white female excavation firm referenced high taxes, saying, "[The] corporate tax rate is too high. You can't expand if you can't make money." [AS#109]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned excavation firm stated, "Taxes are high and they don't pay their bills." [AS#110]
- The representative of a non-Hispanic white male-owned trucking firm said, "Illinois is a tough state to do work in. Everything is very costly. The fees associated with running a business are way higher than in any other state in the country." [AS#95]

Business owners' experiences pursuing public and private sector work. Interviewees discussed their experiences with the pursuit of public and private sector work.

Many interviewees indicated that their firms conduct both public sector and private sector work. Examples from the in-depth interviews include:

- The non-Hispanic white male owner of a specialty contracting firm reported that his firm performs both public and private work. He said, “I do not mind either one.” He went on to note, “Private pays quicker than public.” [#3]
- The non-Hispanic white female representative of a women’s business association reported, “I think the overriding difference between a woman- owned company and a non-woman- owned company is that women have a tendency to really pay attention to the pennies.” She added, “They are very conscious of money coming in and... out... That is the reason why these women have been able to ride all of the ups and downs of the construction industry for decades, because they can see trends coming early on and they can adjust for it... That is how they have been successful.”

The same representative commented that a key to success for the members is performing a mix of public and private sector work. She said, “Another thing I have seen is those women who have been able to have a combination, I call it a mixed portfolio, they do public work, but they also do private work. They also have somewhat of a balance there.” [#16]

A few business owners commented that their firm performs only in the public sector, or prefers public sector work over private sector work. [e.g. #1]. For example, when asked why the firm prefers public over private-sector work, the non-Hispanic white male co-owner of an engineering firm highlighted the importance of their personal relationships with the clients and local municipal entities. He stated, “I’ve been going there since ‘76, when I was with the other company and I developed friendships...I know the town’s needs [because] I have a library in my head of what’s happened in the past, and they can call me and ask questions. It’s just a very good relationship with a municipality, but also with the general public [private-sector clients] in that town. So it’s both, and ideally you form relationships with clients so that they come back and use you again if you provide the appropriate service.” [#26]

Some interviewees reported that they prefer private sector work to public sector, or that there are benefits to private sector work. Some of the comments indicated that performing private sector contracts was easier, more profitable, and more straightforward than performing public sector contracts. [e.g., #43, #53, #54] For example:

- When asked to explain the emphasis of his firm’s work on private sector clients, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm cited the firm’s early history as a land survey business. He explained, “Part of that [is] a function of how the company was started, because [the firm] primarily started as a land surveying company... [Private boundary surveys are] what you do whenever you’re a company that has three or four employees, because you’re not working on those public projects, you’re doing the small [projects]. But, we’ve kind of grown into the other stuff, because a lot of it is more consistent and more profitable...We’ve sought out the larger private [contracts] along with the public jobs are similar to those in that aspect, in that they are reliable and you can spread them out over a large period of time instead of knocking

them out in a week. So, basically, we're just responding to market conditions and how the company was started, but we do seek out the larger private and public work. That's how you get the consistency to keep everybody employed, too. That's part of it."

He went on to add, "[Working with the public sector is] just a different world. There was a difference in working with a private company compared to state government agency. The state government agencies can be a little more officious. There's a lot more paperwork and things to sign off on, a lot less calling in and getting stuff done." He added, "[Public sector work] can be a little more challenging. Working with a private company, we talk it out, and [working with] IDOT, on the other hand, would be complicated. Last year, you know, the big day-long seminar where they talk about calculating the overhead rate and how you do that. That's the sort of thing you have to do with state agencies... The expectations are different." [#25]

- When asked to explain why his firm prefers private sector over public sector work, the non-Hispanic white male co-owner of an engineering firm highlighted past concerns about bribery. He explained, "I don't like dealing with the state of Illinois or the federal government...When I first got into the business...basically you got your work by bribery, and I was never wanting to be an immoral person, so I didn't want to get involved in the political bribery that was involved in getting the work. At least I considered it bribery. So we didn't pursue it, and we've never pursued it since. Basically, if you wanted state work, you were told [that] five percent of your design fee went back as campaign contributions to the party in power, and if you were a contractor, 10 percent of your bid went back to the party in power. That was up until Dan Walker. When Dan Walker became governor, the first thing he did was he stopped all of the projects that were going so he could switch the campaign contributions, quote/unquote, to the Democrats [from] the Republicans, who had been in charge up until then. When this happened, [the governor] kind of drove the bribery aspect of [public contracting] underground, but basically the same firms that were doing work then are doing work now. They may have changed names, they may have been gobbled up by somebody else, or [there] may have been a few [new firms] that have started, but basically they're the same firms." [#30]
- The female representative of a construction firm commented, "If I had my preference... I'd take private work any day of the week. The reason being I know what I'm dealing with, and I'm almost assuredly going to get paid there. That's not the case with IDOT work. Because, in reality, IDOT always, and I mean always, takes the position that their contract is with the prime." (PM1#1)
- When asked to explain his preferences related to public vs. private-sector work, the non-Hispanic white male owner of an engineering firm expressed concerns about regulatory burdens. He explained, "IDOT has an abundance of rules and regulations you must keep up with, whereas the private sector doesn't know to have that generally." [#31]

A few interviewees said that pursuing public sector work is not challenging for small, new, women, and minority business owners. [e.g., #31, #40] For example, the Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm stated, "[It's] not

[challenging] in the ‘Chicagoland’ area because they have to use us. There are percentages for female-owned and minority-owned [businesses].” [#10]

C. Keys to Business Success

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Topics that interviewers discussed with business owners and managers included:

- Keys to success in general (*page 16*);
- Relationship-building (*page 18*);
- Employees (*page 20*);
- Equipment, materials, or products (*page 23*);
- Competitive pricing (*page 25*);
- Financing (*page 26*);
- Bonding (*page 28*);
- Insurance (*page 30*); and
- Other keys to success (*page 32*).

Keys to success in general. Many business owners and representatives expressed the key factors to success as professionalism, communication, teamwork, training, experience and reliability. [e.g., #2, #35, #39] Examples of related and other factors follow:

- A non-Hispanic white female owner of a women-owned DBE-certified specialty contracting firm reported that honesty, fairness, and communication are key factors to her firm’s success. [#33]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm stated that “good [leadership], good ideas, [and] honesty” are keys to the company’s success. He added that “[truthfulness] and good work on the job site” are also important. [#18]
- The Subcontinent Asian American owner of a MBE/DBE/MWRD-certified engineering firm reported, “First comes the experience. Clients value experience ... so once they know you are capable of handling the work [and are] qualified, that is a big plus sign and then you can add more staff with more qualifications. So, I think [what’s] key is qualifications and experience, both [of] these things go hand in hand.” [#7]
- When asked about general keys to success, the non-Hispanic white male representative of a WBE-certified construction company responded that availability and ability to respond to their customers’ requests. He explained, “I think it’s just a matter of performance... You just have to perform and to do what you say you can do... Not to be oversimplified, I just think

you have to perform on a high level and exceed expectations and that's what we strive to do every day." [#43]

- The non-Hispanic white male representative of a minority-owned supply firm commented that the firm's success is that it offers its customers years of experience in the industry. [#6]
- The female representative of a non-Hispanic white male-owned professional services firm referenced reputation as a key to their success. She explained, "In this town, it is very much who you know, and your reputation is everything...[The owner] is obsessive over the finished product... he doesn't like anyone to be able to drive by a job that he's done and say, 'Oh, that looks terrible,' or anything negative towards the company, because he's worked so many years to build up his reputation." [#29]
- When asked to describe general keys to success in the industry, the non-Hispanic white male co-owner of an engineering firm emphasized personal connections and specialization. He explained, "[Keys to success include] client list and competency in their area of specialization. You have to find a niche that is unoccupied and fill that niche. That way you can become successful. If you find a niche that's occupied with huge numbers of people, and it is growing, you're not going to be successful in that niche. In other words, you have to find a market, and then exploit that market." [#30]
- A Black American male owner of a MBE/DBE certified consulting firm commented, "... [For success] they need to have some experience and that is the 'catch.' You know, how do you break in to the market place. You also need to have someone who is willing to say that they know you, because if you do not have any experience and they do not know you, it is really tough. I think that you have to start somewhere...." [#12]
- When asked to comment on keys to business success, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm described how his firm built their reputation and relationships with customers. He explained, "One thing that we found very important, and this is based on our own internal marketing research,...is [the importance of] building a reputation [for] being communicative, doing high quality work, getting it done relatively quickly, and making an attractive product that looks like it's worth what you paid for it." [#25]
- The non-Hispanic white male representative of a trade association reported that the success of its members is because they are "not college graduate companies." He explained, "[The member firms] were operators, [laborers], carpenters ... the guys that walk it, live it, [and] breathe it...." [#38]
- When asked to comment on keys to business success, the non-Hispanic white female co-owner of an electrical company emphasized the importance of honesty in their relationships with their clients. She said, "That's how you continue to get jobs." [#23]
- A Black American owner of a DBE-certified construction firm commented that "working hard [and] trying to do the right thing" is a key factor to his business success. [#54]

- The Black American male owner of a MBE/DBE-certified veteran-owned specialty contracting firm stated that his keys to success are “hard work and staying mindful of what [he does].” He added that “taking care of other people” is also important. [#11]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm reported that her key to success is “a really good way of juggling everything.” [#34]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported, “You have to estimate [well] and get the job. That is ‘number one’” [#60]
- A Hispanic American male representative of an industry trade association commented on how business success is best achieved. He stated, “I think one of the things they need to do is understand whoever they are bidding to... [Firms should] really understand how they manage their individual public authority.” He added, “Whether it is the Tollway or IDOT... each one operates a little differently.”

He went on to describe how the association influences success of its members by stating, “What we try to do is give [firms] that background and that training to know how to bid properly, or have them understand that if they are bidding to a large [general contractor]... that they need to understand and put themselves in the prime [general contractor’s] shoes to understand how they are bidding a project.” [#13]

- The non-Hispanic white male representative of an industry association reported, “Funding is the biggest key to [business] success.” [#17]
- When asked to comment on any other factors related to business success in their industry, the non-Hispanic white female co-owner of an electrical company mentioned the importance of experience in different aspects of the business. She explained, “You got to be able to do everything. In a small business, when you try to minimize overhead, you have got to have some background in the construction industry. [But] you [also] need to know how to figure out profit margins, and to include things like taxes and stuff that’s not on your monthly statements...I think you’ve got to be able to do both ends of it.” [#23]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm indicated that successful firms require a lot of time investment and training. She said, “Construction is a very demanding business. I still work on an average of nine to 10 hours a day.” [#53]

Relationship-building. Across industries, most business owners and representatives identified relationship building, quality work, and repeat business as key components to success. [e.g., #2, #10, #18, #19, #33, #34, #38, #52, #55, #58, #59, #60]

Whether easy or difficult to achieve, many considered relationship-building a key to business success. For example:

- The non-Hispanic white owner of a specialty contracting firm reported that he has good relationships with customers. He reported, “[Relationships are] very good... [The customers] like us a lot because of our quality response times to their needs.” [#3]

- A non-Hispanic white female owner of a WBE/DBE-certified construction firm commented, “We are very client-focused. Whether one likes it or not, the customer is always right. If they are not right, you are probably going to lose them... We listen very intently to what the customer has to say. I think we have a very high rate of satisfaction. I'm not saying that we have never had a situation, but we do our best to solve any issue.” [#53]
- The non-Hispanic white male representative of a minority-owned supply firm commented, “We have great products, great inventory, and we have great service... We solve customers’ problems.”

The same business representative added, “The relationship we have with our customers is really strong... Our goal is to help our customers make more money. We have got a philosophy in terms of what we think will help them make more money, long term.” [#6]

- The minority female owner of a WBE/DBE-certified professional consulting firm stated, “Our relationship with our clients is excellent. We like them [and] they like us and our experience...” [#15]
- A Black American male owner of a DBE-certified construction firm reported, “90 percent of my clients call back... I have had a good working relationship with a lot of them.” [#54]
- The Hispanic American male owner of a MBE/DBE-certified construction firm reported, “We are one of the preferred contractors, subcontractors that they have. And how we do business, we are not the cheapest, but we are definitely preferred because of the customer service we give.” [#56]
- A Black American male owner of a MBE/DBE-certified consulting firm stated, “I think most important is that you have to put the client first.” He added, “I think as long as you keep that in mind... to demonstrate to the client that that is your primary focus...” [#12]
- When asked about relationships with customers, the Black American male owner of a MBE/DBE-certified veteran-owned specialty contracting firm commented, “I put my customers before me. All I want to do is give them the best that I have to offer.” [#11]
- The female representative of a non-Hispanic white male-owned professional services firm mentioned that their good standing in the business community has helped them with financial hurdles. She explained, “Our reputation has gotten us far. We never let a bill sit--I get a bill and the check is cut that day and that is how [the owner has] always operated. However, because the company has just a portion of what it used to, the bank at the end of 2016, which was obviously rough, wanted to discuss that floating \$50000.00 line of credit. But it was ultimately [the owner’s] connections with the president of the bank who knew how we’ve done business for so many years and that reputation...In case we do have a big job come up, we still have the ability to handle it with just one phone call.” [#29]
- The Subcontinent Asian American owner of a MBE/DBE/MWRD-certified engineering firm reported on relationship-building, “For smaller firms it is really hard to sustain [relationships] because we have to have repeat work, or we have to have work all the

time... The key is to have more than one client. So right now, I have seven or eight clients. So, if the work dries up, I can always go to different clients and help them.” [#7]

A few reported challenges in building relationships as part of public sector-contracting.

Comments include:

- The non-Hispanic white female representative of a women’s business association indicated that developing relationships is easier in the private sector. She commented, “I think the women who really go after the private work, when they are able to get work with a particular company, they do work very hard on developing that long-term relationship and staying very close with the company procurement person... within the company.”

She went on to say, “On the public side, it is high or low bid. You are here today, gone tomorrow if your bid is not done properly.” [#16]

- The non-Hispanic white male representative of an industry association stated that one of the ways to help businesses grow is to build relationships with agencies. However, he commented that rigid restrictions on relationships by politicians in Illinois make it difficult to build these relationships. [#17]

Employees. Business owners and managers shared comments about the importance of employees.

Many interviewees indicated that high-quality workers are a key to business success and often difficult to find. [e.g., #18, #34, #52, #55, AS#38, AS#55, AS#56, AS#61, AS#63] Interviewee comments include:

- The Hispanic American male owner of a MBE/DBE-certified construction firm stated, “Having the right people with me is big because you cannot do it all yourself. You have to have good people surrounding you.” [#56]
- When asked if his company expands or contracts in employment or scale depending on work opportunities, season, or market conditions, the non-Hispanic white male co-owner of an engineering firm indicated a desire to avoid staffing changes. He stated, “We try to keep staff, and...sometimes I think we should've reduced staff and seasonal aid, but we haven't because...we kind of feel like we're a family, and we want to keep people's paycheck coming. Looking back on that, that's a stupid thing to do, but...it's a good thing to do as a person. So, some of the toughest things we've had to do of late is lay off some people. But some people have left just because they want to move out of state to where job opportunities are better.” [#26]
- When asked whether there are any barriers to starting or expanding their business, the representative of a Subcontinent Asian American male-owned engineering firm referenced lack of outreach and workers, explaining, “[It’s] difficult to do business... [there are] no outreach programs [and a] lack of personnel when competing with Eastern companies.” [AS#54]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm referenced trouble finding workers, explaining, "We find that there not a lot of young people going [into] trade work. It is difficult to find skilled workers." [AS#57]
- The representative of a non-Hispanic white male-owned engineering firm said that a lack of qualified employees is their biggest problem, explaining, "We're having a hard time attracting talent because of factions and the state government. And people not wanting to move here." [AS#58]
- The representative of a non-Hispanic white male-owned trucking firm expressed, "It takes a lot of money and manpower to start a business in Illinois. The workforce and insurance is really tough. It's hard to keep and maintain good help." [AS#59]
- The representative of a Native American female-owned trucking firm referenced trouble finding employees, saying, "It's been impossible to find drivers." [AS#60]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white female-owned electrical firm referenced that "[There are] not enough good workers out there to expand. Better to stay small." [AS#62]
- The representative of a male-owned trucking firm stated that a lack of "quality workers" is their biggest barrier, adding, "[It] keeps them from expanding. In [the past] year [we] have gotten smaller, not bigger." [AS#64]
- A Black American male owner of a MBE/DBE-certified consulting firm stated, "You are only as good as the people that work for you You have to make sure that you have the best qualified people possible."

He added, "Networking and talent acquisition is critical in a business's development But when you are in operations, you have to make sure you have your own internal quality insurance over your staff, and ... make sure that they are committed to putting the client first." [#12]

- When asked about barriers or disadvantages for small businesses that focus on private versus public sector work, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm highlighted staffing. He explained, "...Our barriers have been basically the staffing problem and finding people here that we can employ to do the things that we need to do. Because it's specialized."

He went on to add, "...Having the right person in the right place is important to getting the reputation, because people expect professionalism and high-quality product...and you have to have the people to be able to do that." He added, "Also, in any industry where there's a licensing regime, that's a big deal to have the properly trained and licensed people." [#25]

- The minority female owner of a WBE/DBE-certified professional consulting firm reported on key staff, "My keys to success are the experience of the company ... the experience of the

engineers working with me, and experience of the management Over 26 years of construction experience helps.” [#15]

- The female representative of a construction firm noted, “One of the other things we’re now experiencing is luring away of employees. Just this week a labor BA came to my job site, tried to lure away one of my employees, [saying] ‘He’d get more overtime with somebody else.’ These things are going on on a regular basis.” [PM1#1]
- The non-Hispanic white male co-owner of an engineering firm highlighted challenges related to employee recruitment and retention in their local market. He explained, “[This area] is not viewed as a...great place to live. So, we have to look for people who are [already] from this area. We can train employees to do what we want them to do, [but] we cannot train employees to stay, and we’re interested in having our employees stay and not leave us. As far as engineers go, we’ve been...fairly successful [at] finding engineers who...live in this area and wish to stay here. We actually have attracted...a large number of female engineers, and they are mostly graduates of smaller universities. The second thing we look for from an employee is obviously the qualifications that they bring with them. Currently, we have about 30 people working here. Over half of them are technicians and drillers for our drilling operation. It’s very hard to keep decent help--particularly in the lower paid areas--due to the widespread amount of drug use. So, we have to find people who don’t use drugs, which is difficult. Then, we have to find people who show up, which is also difficult, particularly in ...the lower paid part of our company. [To hire] the upper-level technicians, we have to find people who understand algebra, [and] can do ...simple math. If you find a person like that, they’re typically less likely to not show up, but you have to pay them more, which we do.” [#30]
- When asked to comment on keys to business success related to employees, the non-Hispanic white female co-owner of an electrical company highlighted the importance of monitoring work and accountability. She explained, “It has to be where you’re in tune with [your employees]. You have to be hands-on...holding them accountable. You got to know what they are doing. We’re at the jobsites more, we’re checking in on them.” She also mentioned that checking in on her employees is “good for customer relations”, in that clients appreciate seeing the owner check in on a project.

She went on to comment on challenges related to employee recruitment and retention, stating, “...One of my major problems is getting competent [employees]...I’ve gone through a bazillion, it seems like. And then, it just turns out, you might as well just do it yourself ...which is not a good answer.” [#23]

- When asked about finding employees or DBEs to hire, the non-Hispanic white male representative of a majority-owned construction firm stated that no young people are coming forward in the program. He explained, “Our goal always was to try and hire a new hire from a college locally, Bradley or the University of Illinois, or ISU, to try to keep some Midwestern people in our company. [However], no one calls. No one sends in résumés.” [#39]

- The non-Hispanic white representative of a majority-owned construction firm reported on the importance of a strong employee pool indicating that some small businesses face manpower challenges. He stated, for example, “[It is] a common issue we come across, the small businesses... just don’t have the manpower to perform [well].” [#21]
- The non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm said, “A big challenge that’s particular for someone in our region is staffing. In rural, southern Illinois, finding the qualified people can be a challenge....We have a little bit of trouble attracting people to our area, because there’s not a lot of home-grown talent, but it’s [also] hard to attract someone from a major city and say, ‘Hey, would you like to move to rural southern Illinois and have an abandoned house next to your house?’” [#25]
- When asked about any barriers to starting or expanding their business, the representative of a non-Hispanic white female-owned construction firm said, “It’s a lot of trouble to hire female employees, which leads to a low rating from IDOT.” [AS#39]
- The representative of a non-Hispanic white female-owned construction firm expressed difficulty with finding quality workers, adding, “It’s harder to find OSHA-certified workers [and] people with experience.” [AS#40]
- The non-Hispanic white male owner of a construction firm stated that it’s hard to find good, qualified help. He added, “I think kids coming out of school nowadays, high school and college, they don’t want to work with their hands, and I think it’s getting to be a lost art, and I think that we are losing trades.” [#46]

Equipment, materials or products. Many business owners and managers discussed equipment and materials needs, and the importance of having the right operational equipment and materials for their businesses at a reasonable cost. For example:

- The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm commented, “When I bought equipment, I felt that if you look for it, you could get a good value. But, you have to be ‘savvy in what you are buying’ and [about] what is out there.” [#58]
- The Black American owner of DBE-certified construction firm reported, “[The cost of equipment is] a little high, a little steep, but it is what it is.” [#54]
- The Black American female owner of a specialty services firm remarked that equipment was a “huge investment cost.” However, she then explained, “It was doable because it was not like we jumped out there and said we were going to put ten vans on the road at one time... we knew how slow the State was paying before we got in to it, so we came in kind of wise starting with one vehicle and then over time it grew.” [#5]
- The non-Hispanic white female representative of a women’s business association commented, “For a smaller start-up company that does not have the advantage of the better credit ratings, the interest rates, the buying power, for them to sometimes even get a piece of equipment they need, is a struggle.

She added that for DBEs the challenge is even greater. She conveyed, “In a normal relationship [DBEs] might be able to go and borrow someone’s equipment, but because of the DBE rules... they cannot do that or they are limited with what they can do or they have to be very careful with what they do.” [#16]

- The non-Hispanic white owner of a specialty contracting firm reported that requirements were not fair regarding equipment. He said, “The biggest qualification they ask for... does not seem to be on a fair basis... We buy older equipment. It is cheaper to buy, cheaper to maintain; then to go out and buy an \$80,000 to \$90,000 truck. [The State] frowns on the fact that you own the older equipment... the fact that it is a '94 instead of a 2010, they frown on that... To be a prime contractor for the State, they require newer stuff.” [#3]
- The non-Hispanic white representative of a majority-owned construction firm identified access to equipment is a key to success in the industry. He reported that the equipment needed to perform [large contracting] work is expensive to maintain and purchase. He stated, “Equipment in the industry is very expensive whether you purchase it or rent it... The equipment becomes quickly outdated and new technologies replace it. To remain competitive in the market, you have to have enough financial resources to keep up with the changes in the industry.” [#21]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm reported that her trucks are a key to her firm’s success. However, she added that they are expensive to maintain. [#34]
- The non-Hispanic white male representative of a trade association reported that challenges exist for members who lease equipment. He stated, “They are the ones that are going to be hurting. As the downturn comes to IDOT... you cannot make the [lease] payments.” [#38]
- Regarding pricing for equipment, the Black American female owner of a specialty services firm said, “[It’s] very expensive When we speak in regards to the cars, the gas, all of that, it is very expensive....”

She added, “For people that are in this field, I believe there could be better discounts and things out there for us, which there is not many [of].” [#5]

- When asked if he is charged more than larger firms for materials and equipment, the Black American owner of a DBE-certified construction firm said, “Some of them do, but some of the guys I deal with give me a good price.” [#54]
- When asked to comment on keys to business success related to equipment, materials, or products, the non-Hispanic white female co-owner of an electrical company commented on the importance of speed in acquiring the necessary equipment, materials, and pricing. She explained, “As soon as we know of something, we have to get it [a price quote] out...from our suppliers, because you have to do the best due diligence to get the best pricing.” She added that “Equipment and tools...are [also] critical. You've got to have enough tools...you have to have the tools you need for the jobs before the jobs begin...and they have to work.

It's a huge undertaking. I'm almost to the point now, with the amount [that] equipment costs to maintain... [that] I would say possibly in the future we'll just rent." [#23]

- The male representative of a trucking firm commented on a perceived imbalance of opportunity in for black truckers. He explained, "It seems to me in District 8 there's a disparity in the participation on the projects that black minority contractors are not getting their share of the work. It seems like the lion's share of the work is going to white women. What are we gonna do to help black contractors to move into the mainstream and get the amount of trucks that the white women have? You find these black truckers, and I'm not a trucker. I'm just looking at it from the outside. [The black truckers] got 4 or 5 trucks, but the white women have 20. What can we do to help the black contractors get 25 trucks so they can compete and get the big jobs?" [PM6#5]

Competitive pricing. Business owners and managers discussed the need for competitive pricing when seeking business success. However, for some, staying competitive is a challenge. For example:

- The non-Hispanic white owner of a specialty contracting firm remarked that pricing is now lower than usual. He said, "Pricing for jobs right now is very low because we do not have the amount of state and government work that we had last year." [#3]
- Regarding pricing, the non-Hispanic white owner of a construction firm reported, "It is getting more competitive all the time, which is making it so that the pricing is getting much more difficult to make a profit."

He added, "[There is] increased competition and increased requirements that are put on the contractors as far as ... DBE requirements to meet specifications, timelines ... all the contractual obligations." [#4]

- When asked about pricing in his industry, the non-Hispanic white representative of a minority-owned supply firm stated, "Our pricing is low. The reason I can say our pricing is low is because we have a franchise-based system... There are 34 other franchises, and I know what their pricing is, and ours is the lowest. That has to do somewhat because we are in a very large market and we have some significant competition. The more competition drives prices down..." [#6]
- Regarding challenges to success for small and minority-owned firms, the Hispanic American male owner of a MBE/DBE certified construction company stated "... pricing, that is the biggest barrier. If someone were to get into [this industry] right now, he would be surprised to find out what the work is going for. It is very hard to be successful because it is ultra-competitive... There are people pricing jobs that are not good prices and the general contractors will take those prices and it drives the market down." [#56]

Financing. Many firm owners reported that obtaining financing was challenging and important in establishing and growing their businesses. Some indicated that financing was necessary to purchase equipment or survive poor market conditions. [e.g., #59] For example:

- The Black American female owner of a specialty services firm indicated that financing is challenging in her industry. She said, “When it comes to being able to get lines of credit and things for this business ... there could be other options and opportunities available for business owners that run such a business, because fuel is high [cost]. We average on a monthly basis, \$7,000 or \$8,000 a month, just in fuel.”

She continued, “If there were some type of account... open specifically for us in certain areas based around maybe where a lot of transportation companies are, [that would be helpful]. I feel like they could offer some leverage there in that area as far as financing goes and things of that nature, [like] lines of credit through different banks. I feel like the banks could look at business owners a little bit differently than the harshness that they give us when we come in to try to keep the business afloat...” [#5]

- The Hispanic American male representative of an industry trade association stated, “I think [financing] has always been a challenge. What we try to do... in both our workshops and our training programs, is to provide [business owners] with the lenses that they need to look at financials... Another thing we really try to push is making sure our members really read their contracts... Do all that before things get feisty.” [#13]
- The Black American male owner of a MBE/DBE-certified veteran-owned specialty contracting firm commented, “As far as the financing goes for minority-owned companies... it is hard to get funds....” He added, “If I had the funding I need, I could grow. Right now, they just want to haul you where they can haul you... That is why on the highways you do not see the minorities... [there are] very few out there.” [#11]
- The representative of a non-Hispanic white woman-owned construction firm referenced “access to capital and financing in order to do larger jobs” as a barrier to their expansion. [AS#51]
- When asked whether there are any barriers to starting or expanding their business, the representative of a Native American female-owned construction management firm said that “Help with financing for larger projects for payroll” would be beneficial to their firm. [#52]
- The representative of a Black American male-owned electrical firm referenced “obtain[ing] credit or financing” as the biggest barrier to their firm. [AS#53]
- The Black American male representative of a non-profit business association commented, “Capital access and bonding is one of the biggest barriers that exists.” [#37]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm commented, “It was easy and it was not easy; it depends... If you have to use your personal card... it is harder.” [#19]

- The Black American male owner of a MBE/DBE-certified specialty contracting firm expressed his challenges with financing by saying, “I got denied bank loans and loans based upon how much work I have done, and I cannot do work if I do not have the financing.” [#52]
- The non-Hispanic white female representative of a women’s business association commented, “Anytime a woman goes in for a line of credit or credit period, there are additional hurdles. There is a double-edged sword, particularly for those women who are DBE-certified.” She explained, “Because the way the federal rules are designed, DBE women must maintain certain caps, they must be below certain caps....”

She added, “In addition... as much as this is 2017, there is still the issue when a woman walks into a bank for a loan, particularly a construction loan, they are looking for who is the man... they still do that.” [#16]

Some businesses reported that financing is neither a key factor to their success, nor a challenge. [e.g., #3, #6, #21]. Examples from the in-depth personal interviews include:

- When asked about any issues regarding financing (and bonding and insurance), the non-Hispanic white male owner of a construction firm said, “That really has not been an issue....” [#4]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported that her business longevity has helped her with financing. She said, “It is probably a little different than [at start-up] because we have been around for a long time. I keep a strong bottom line.” [#53]
- The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm commented, “As far as equipment financing, we are okay with that. I think the interest rates are a little bit high, but they have been good to us knowing that the equipment is their collateral.” [#58]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm reported that she has a good relationship with her bank. However, she commented, “They always make me sweat it....” [#34]

One business representative reported that the firm he represents is solely financed with personal resources. The non-Hispanic white male representative of a DBE-certified woman-owned construction firm indicated that his parents did not rely on any outside financing; but instead, his parents relied solely on personal resources to finance the business. He indicated that this strategy limited their debt. [#18]

Bonding. Business owners reported on their access to bonding. Some experiences reported are positive, some are negative. For some, bonding is misunderstood or not obtainable.

Several interviewees reported little or no problems obtaining bonds, or that bonding was not required in their industry. [e.g., #3, #4, #5, #21, #33] Comments include the following:

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported, “Our banking and bonding [relationships] are pretty strong.” He added that this has allowed the firm to grow. [#18]
- The Black American female owner of a MBE/WBE/DBE-certified specialty services firm reported that she does not need bonding on some jobs. However, she noted that oftentimes the prime provides her firm coverage. [#52]
- The female representative of a woman-owned business stated, “We’re facing the same barriers we’ve been facing for 30 years. Access to capital, access to bonding, you know, interaction with the unions, and it’s all the same stuff that it was 30 years ago. It hasn’t changed.” [TA1 #1]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported that her business longevity makes bonding doable. She said, “We have bonding and I have a regular bank that I work with.” [#53]
- The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm commented, “Bonding, I have not used that yet, but I did once get bonding and the way I was able to do that was through the IDOT program.” [#58]
- The female representative of a construction firm commented that she does have bonding, saying, “I bond. It’s not my issue. But I will tell you, I know it’s an issue for many. And I also know that with the economy, my own bonding company questions me to no end. My bank, of late, has begun questioning things. I said to my banker, ‘You know, I’ve done a lot of work with you... [you have] never had one late payment from me.’ [The bank responded] ‘Well, we get worried if we see that there’s a change in income.’ I said, ‘I can understand that. Have you lost money? Do you have reason to think you’re going to?’ There is a different thinking with a small contractor, and for women and minorities. I believe that with all my heart.” [PM1#1]

Many interviewees indicated that bonding requirements are challenging and/or adversely affect small businesses’ opportunities to bid on public contracts. For example:

- The Black American owner of a DBE-certified construction firm commented, “My bonding has always been the same... Things are ‘high’ in this area.” [#54]
- When asked about barriers with bonding, the Black American male representative of a non-profit business association said, “I think there’s a lack of education still when it comes to the bonding because it’s all financials. Bonding is not insurance. Bonding is your ability to perform, capability, financials and [performance] on previous contracts. So, there’s a real

challenge when you're a smaller company and you don't have the resources that a majority firm may have...." [#37]

- Regarding small and minority-owned firms, the Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm commented, "[If] they cannot get bonded, they cannot get the big quality products... If they are new and cannot get the lines of credit which they need, they cannot get the bigger projects." [#10]
- The representative of a non-Hispanic white woman-owned specialty construction firm stated that "Getting bonding for larger projects... and obtaining DBE status" are their biggest barriers. [AS#44]
- The Black American female representative of a public agency stated, "A big barrier for them is financing to be able to obtain bonds. Cash flow becomes an issue. And I think a lot of it is that the DBEs don't realize that they don't know. That to me is a huge issue. I've had several of my DBEs come in and tell me that they're kind of struggling because of that, one, being able to get in with the prime, and then two, being able to sustain. And so those are huge barriers." [#44]
- The non-Hispanic white female representative of a women's business association commented, "There is bonding ... even purchasing. A lot of the majority contractors, they get a certain percentage rate for purchase orders. However, that same nice deal is not extended to a woman- or minority-owned company. And that is not necessarily based on value. Although, obviously some of the large companies certainly enjoy a way better rate." [#16]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm commented that bonding "is a tough game." [#59]
- The Black American male owner of a MBE/DBE-certified construction firm reported that "bonding is always an issue." [#57]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm stated, "It used to be easy. We used to have a rapport with the bonding company, even though we did not use it often... we used the services.... It is harder now." [#19]

A female representative of the same certified firm said, "They want to see finances, and they will not cover if we do not have a certain amount of money coming in.... It is hard because we want to get this job to make more money, but we cannot unless they approve us for bonding." [#19a]

- The representative of an MBE-certified construction firm commented on barriers related to bonding. He explained, "It's difficult for a lot of minority contractors to get bonding, and they could be certified but then they ain't capable of being bonded. And some of these general contractors require or insist that you have a bond. If you don't have a bond, they won't give you the job... You can do a \$100,000 job or a \$200,000 for \$50,000 but if you don't have no bond, they don't want you. They won't choose you, so there has to be a way

where certified minorities and women-owned companies, shouldn't be required [to have bonding]. They have to find a way that would exempt them from having to have a bond in order to get a portion of the small percentage that they are willing to give... like eight percent, nine percent, and that's ridiculous. That's not a lot of money. You know, the percentage can go up very substantially if they'd play the game fair but, then you got to have a bond, too?" [PM6#2]

- The representative of a specialty construction firm commented on restrictive financial burdens to joining unions. He explained, "[The unions] require a wage and welfare buy-in. I'd like to see maybe if that can be waived. They want the contractors to put up a \$25,000 bond for different jobs throughout the district." [PM6#3]

Insurance. The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to business success.

A few interviewees reported that the cost of buying and/or sustaining insurance, especially for small businesses, is a barrier. Some also referenced excessive insurance requirements.

Comments include:

- A non-Hispanic white female owner of a women-owned DBE-certified construction firm reported that insurance is a challenge in both cost and availability. She commented, "The insurance is the worst thing I have." [#35]
- The non-Hispanic white male owner of an engineering firm took issue with IDOT's demands regarding liability coverage. He explained, "[IDOT] wanted us to provide them \$1 million of professional liability coverage. That cost me, I think, \$11,000. I bought that after learning that I had to have it or we weren't going to get the job...I thought the requirements for \$1 million of coverage were pretty high. Guess what? The construction cost of the entire [project] was \$1,300,000. So, could we have screwed something up so badly that it would affected the whole cost of the whole job? Maybe we might have made a mistake on an elevation, on a curve and gutter, or some minor thing. But we couldn't have screwed up the whole damn job. So, that cost of that professional liability insurance was excessive." [#31]
- The Black American male owner of a DBE-certified construction firm indicated that he has experienced mostly high insurance rates. He said, "I have had guys give me high insurance and I have another guy who gives me low insurance.... Things are high in this area." [#54]
- A female representative of a Hispanic American male-owned MBE/DBE-certified specialty contracting firm indicated that the company was penalized by an insurance company because of an accident that did not involve the firm or its equipment. [#19a]

The Hispanic American male owner of the same firm added, "Mostly we were blamed for [the accident]. I do not know how they said we were supposed to be working that particular job site, but we were not, and I was able to prove it... but the insurance did not take it into consideration." [#19]

- The non-Hispanic white male co-owner of an engineering firm referenced personal experience with barriers related to costs and availability of insurance. He explained, "Engineers don't have to be bonded typically, [but] we [need] to have professional liability insurance. Sometimes [insurance] is hard to get, depending upon the market at that particular time. The insurance market is one that is very volatile, and [the availability of insurance] depends quite a bit on the current outlook of the insurance companies. A lot of times, [the insurance companies] don't want any new clients, and [then] they make it almost impossible to buy it. Now, is it as expensive as any [other] professional liability insurance? We've spent anywhere from three cents per dollar up through ten cents per dollar of revenue for a professional liability insurance [policy], depending upon the year, and unfortunately, it's mostly there because the clients demand that you have it, [but] it's rarely used." [#30]
- The representative of a non-Hispanic white woman-owned electrical contracting firm stated that "Getting an insurance company is the main challenge" to starting or expanding their business. [AS#13]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned construction firm referenced financial barriers, saying, "It is difficult. Capital and insurance requirements. It is all about the money, and we are a small business." [AS#73]

A few interviewees expressed concern about small businesses' ability to secure workers compensation insurance for employees. For example:

- The Hispanic American male owner of a MBE/DBE-certified construction firm reported, "[Workers compensation insurance] pricing is ridiculous... just because of the way Illinois is... Now it has changed a little bit, but nothing I would notice in my premiums. They need more oversight." [#56]
- The representative of a non-Hispanic white male-owned landscape architecture firm expressed that "The only problem we have is the cost of Workman's Comp." [AS#14]
- The representative of a non-Hispanic white male-owned trucking firm specified that "Unemployment insurance and workers comp insurance are killing business." [AS#72]
- The representative of a non-Hispanic white male-owned specialty construction firm referenced "High workers compensation, high unemployment compensation, [and] numerous regulations to do any kind of state work" as the biggest barriers to their firm. [AS#74]
- The representative of a non-Hispanic white male-owned specialty construction firm referenced workers compensation insurance as a barrier, saying, "Illinois workers comp laws [are] not conducive to business longevity." [AS#75]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned hauling firm stated, "Customers are

leaving [Illinois] because the workers comp rates are too high and their taxes are too high." [AS#76]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white-owned specialty construction and supply firm responded, "Taxes are too high, workman's compensation is too high, [and] income taxes are too high." [AS#104]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned trucking firm said, "High taxes and workman's comp is expensive." [#105]

Some interviewees reported that insurance requirements or obtaining insurance were not barriers, and indicated that insurance is an important business expense. [e.g., #4, #5, #21, #33]

Other keys to success. Several business owners and representatives mentioned keys to success that do not fall into the above categories. For example, two reported taking advantage of education and supportive services to achieve business success. A public agency representative reported that, although education is available, participation is low. For example:

- The non-Hispanic white female owner of a WBE/DBE-certified construction firm said that education is a key to success: "I am a strong advocate for education for myself... my office staff and my crew. We are a union... will utilize... union education... We... send our men for additional education... they all get OSHA training, they all get Red Cross training, and there are other classes that will come along [for] the entire crew." [#53]
- When asked about key factors to a firm's success, the non-Hispanic white female representative of a public agency said, "The best opportunities, I think, for [firms], would be to take advantage of our supportive service workshops and networking events [to get] face time with the prime." She continued, "A lot of the primes in this area use a lot of the same DBEs, so any opportunity that they have to meet with the prime... is much greater for them versus just sending them a bid and [the prime] not knowing who [the DBEs] are." [#14]
- The Black American male representative of a public agency commented, "The comments that I do have is, I will be looking at the QuickBooks... to make sure that we are providing the best quality workshop that we can provide.

He added, "Estimating: I will reach out to some of the primes and see if we can do some of the estimating workshops... not necessarily rely on the supportive services consultants. As far as [one of the contractors], I will try to reach out and see exactly what their process is to increase the number of people that participate in our events... People a lot of the times do not take something that is free and of value... I host an event, to the best of my knowledge, it is the best we can put together at the time and so... I am looking for participation. As far as the DBE's are concerned, they come in, there is no sponsors here, it is free, it may not be of any value and I think that is where we may have a problem." [#20]

D. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Doing business as a prime contractor or as a subcontractor (*page 33*);
- Challenges for small and minority- and women-owned businesses when seeking work as prime contractors/consultants (*page 35*); and
- Decisions to subcontract work to other firms. (*page 40*).

Doing business as a prime contractor or as a subcontractor. Business owners described their experience working as prime contractors and/or subcontractors.

A number of firms reported that they work as both prime contractors and as subcontractors/subconsultants. Examples of comments from the in-depth interviews include:

- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm stated that they used to do prime work for IDOT. She stated, “Let us say, both. As a prime, you can choose your jobs and do as much work as you can. As a sub, we do not have to have the expertise of hiring an engineer, or an architect, or a person that can also affect our profitability. By being a sub, we do not have to hire anyone.” [#19]

The female representative of the same certified firm added, “...When it comes to payments... [as a prime] we were able to talk to whoever hired us; when it comes to subcontractors, we cannot go directly to find out what is going on.” [#19a]

- The Black American female owner of a specialty services firm reported that she works as a prime for the State and as a subcontractor to prime contractors at other times. [#5]

A few firms that the study team interviewed reported that they primarily work as prime contractors/consultants or prefer prime contracting work. [e.g., #21, #43, #54] For example:

- The non-Hispanic white owner of a construction company reported that he does business primarily as a prime contractor. Regarding working with IDOT, he said, “Almost always prime, with IDOT... with IDOT probably 90 percent of our work is as a prime contractor and then possibly 10 percent as a subcontractor to other primes in the area.” [#4]
- When asked why their firm performs most work as a prime contractor, the non-Hispanic white female co-owner of an electrical company mentioned personal control over scheduling and her capacity to troubleshoot problems. She explained, “As we bid jobs and as we get jobs, they can flow in at whatever rate they come in. Our goal is always to try to keep our prime people out in the field. We want to keep moving them from job to job to job. Obviously, it’s a big timing thing.” [#23]
- When asked why their firm prefers to work as a prime contractor, the non-Hispanic white male co-owner of an engineering firm emphasized client communication. He explained, “We prefer that, because we have direct communications with the client. And sometimes, if

we're a sub, we don't have that, and the client doesn't understand what we feel is a better way to do things if it's being filtered through an architect or another prime who had perhaps their own reasons for trying to convince a client to do it a certain way. We like that communication with the client. That's the main reason, plus we have more control." [#26]

- The Black American male owner of a DBE/MBE-certified specialty contracting firm indicated, "I would say a prime contractor is better because then you are in control. You are dealing directly with the architect or the owner. You are not a third party... it is just you and the owner. [#8]
- When asked to explain why his firm works primarily as a prime contractor, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm cited control and speed of payment. He stated, "We prefer to work as a prime, partially because we have a little bit more control over what you do, and you get paid faster." However, he also commented on conditions under which they accept subcontractor work. He stated, "One advantage that we do have, based on where we are, is our overhead's a bit lower. Sometimes we can afford to be a sub whereas other people may struggle with that if they're based in a larger urban area and they have more overhead...We pay [employees] a bit less because of where we are... So, our costs are lower." [#25]

Some other businesses reported preferring subcontracting opportunities, being limited to subcontract-based work, or having difficulty breaking into the prime contracting arena.

[e.g., #33, #52, #57, #60] Comments included:

- The Hispanic American male owner of a MBE/DBE certified construction firm stated that he works only as a subcontractor. He added, "[Prime contracting] is a whole different level... I do not think I would get into it at this point in my life... I specialize in one thing... and that is what I concentrate on, being the best at what I do."

He added, "If I go into being a prime, I have to deal with new trades or multiple trades and this area here... has quite a few good ones that would be hard to compete against." [#56]

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that the firm mainly subs; however, he expressed that there are advantages to priming projects. He reported, "It's great because you get to run your project. It is your project and you do not have all the pressures as a subcontractor. [However], you also have a lot more responsibility. You better have the personnel to handle [extra paperwork]." [#18]
- The non-Hispanic white female representative of a women's business association reported that the members are primarily subcontractors. She commented, "I would say out of the 95 percent that are subcontractors, 85 percent... remain subcontractors, and the 10 percent... prime work." [#16]
- The Black American male owner of a MBE/DBE-certified veteran-owned specialty contracting firm remarked, "For me it is easier to get subcontractor work than prime

work... I do not want to do the whole 'phase up' ... I just want to do what I know how to do.” [#11]

- The Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm commented, “Sub is easier [because there is] less bonding requirement, less paperwork....” [#10]
- The Black American female owner of a DBE-certified specialty contracting firm reported that her firm performs as a subcontractor because its small size limits opportunities for prime contracting. [#2]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm stated that he is a subcontractor though he would like to work as a prime. He indicated that he could not work as a prime because “there is a hindrance based on my finances.” [#55]
- The Black American female owner of a specialty services firm reported that working as a prime for the State is challenging, “Because of the State’s delayed payments, it forces us to take on subcontracting [work]....” [#5]
- The non-Hispanic white female owner of a DBE/WBE-certified construction firm reported that she wants to become a prime and graduate out of needing to use the certification programs. She commented that it is difficult to find a prime that is willing to mentor her when eventually she will become the competition. [#59]

Challenges for small and minority- and women-owned businesses when seeking work as prime contractors/consultants. Business owners described the challenges they faced when seeking prime contracting/consulting opportunities.

Many mentioned barriers including a preference on some jobs for large primes with greater resources, low bid requirements, prompt payment issues, and other challenges. Examples include:

- The non-Hispanic white owner of a specialty contracting firm stated that one of the disadvantages or barriers to priming is that the requirements to becoming a prime are geared more towards bigger companies with their own plants. He explained, “ ... Part of the reason we are not a prime is we have bid a lot of other projects that require you to have a... plant... There is only a small group of companies that own [their own] plants. Even though we buy from those companies, we cannot bid those jobs because we do not own a... plant. Even [with] some of the smaller [public sector] jobs... we could not bid... because we were not a prime and we did not own a... plant. We could have bought the [materials] from the guy that owns the... plant. We could have done the work, just like the prime guys could have. That is one of the biggest complaints ... it seems like it is kind of fixed around a certain group of companies.”

When asked if the problem arose because of more primes moving into the area or if there was just less work in general, he then responded, “There is less work as far as the state and local governments because the money is not there....” [#3]

- When asked for comment about whether he thought there might be any challenges or barriers for a small-, minority-, or woman-owned business to be successful as an engineering subcontractor, the non-Hispanic white male co-owner of an engineering firm expressed concerns about challenges faced by female engineering subcontractors. He stated, “There are some primes that don't want to take orders from women if you can believe that.” [#26]
- A Black American male owner of a MBE/DBE- certified specialty contracting firm stated, “When you are a subcontractor... you have to wait for the prime to get paid and then for them to pay you. That is why... I [get] 70 percent of the money up front so I can go do the job, and let them work it out.” [#8]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported, “I prefer being a prime.” She added, “[However], there are a number of factors that affect becoming a prime... first it is a low bid situation... [It] is very difficult to compete with prime contractors who have their own quarries or have secondary businesses.

She continued, “We do [industry/specialty area work], so we do not have other businesses to draw from, so we have to get bids for everything that we will need so it makes a huge difference in the pricing... If [a prime] has three or four businesses, they can play with the dollars. We have to recover material and labor to make a profit and it makes a huge difference.” [#53]

- When asked whether there are any barriers to starting or expanding their business, the representative of an Asian Pacific American male-owned engineering firm said, “Contracts seem to go to typical firms. Minority-owned firms seem to get subcontracts instead of prime [contracts].” [AS#8]
- The representative of a non-Hispanic white male-owned engineering firm said that “getting paid on time” is the biggest barrier to business expansion. [AS#16]
- When asked to comment on general challenges for a small business working as a prime contractor, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm cited “capacity to do the work.” He explained, “I think that’s probably a really obvious answer, but on larger projects, it’s just getting the manpower and having the capacity to do all the work. I think that’s the biggest challenge. That’s why small businesses often end up as subcontractors, because they’re working for a bigger company who has the resources to marshal all the people that they need to get together to do a major project.” [#25]
- The representative of a non-Hispanic white male-owned environmental consulting firm said, “Mainly, the budget issues is what we have problems with. [And] not getting paid by IDOT. It took 2-3 months to get paid.”[AS#17]
- The representative of a non-Hispanic white male-owned engineering firm indicated that they have had “No barriers to any work, just barriers getting paid by the state.”[AS#18]

- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned construction firm responded, "None, other than the question of when the state will pay its bill." [AS#19]
- When asked about any challenges that a smaller firm might face, the non-Hispanic white male owner of a construction firm referenced payment, stating, "Well, getting paid on time. That's your biggest one. It's hard to run a company when the money's not coming in as fast as you're doing the work." [#46]
- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned construction firm said, "Payment from the state. It's not timely. It's what makes it hard to be competitive with bigger contractors." [AS#20]
- The representative of a non-Hispanic white male-owned surveying firm said, "They are slow to pay and that's keeping us from doing work with them." [AS#21]
- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm indicated that payment delays are a significant barrier. They explained, "We are working on a state-funded project, and that project was put on hold a few years ago. And there are still invoices that are unpaid. In that regard, I would be hesitant to sign another contract with the state." [AS#22]
- The minority female owner of a DBE/MBE-certified professional consulting firm reported, "To be honest with you, we did work as a subcontractor consultant for another firm and we felt it was okay. It worked well and we learned a lot; we built a good experience and we are trying now to become a prime."

She added, "We would like to be involved as a prime but IDOT says we need 'experience' first and this is not correct... because I know some companies... they were... a prime and they do not have experience... No experience and they were given from the first time as a prime, so why is IDOT not fair with everybody." [#15]
- When asked to describe the kinds of challenges faced by small businesses working as prime contractors, the non-Hispanic white female co-owner of an electrical company referenced burdens related to the volume of meetings. She explained, "One time...I literally had a 'must go-to' meeting ...every single day. And [the other co-owner] and I couldn't even manage. It's virtually impossible to get your work done...and they expect you to be there." [#23]
- The non-Hispanic white male co-owner of an engineering firm commented on the relationship between the size of their business and the type of work they are able to pursue. He explained, "Just being small now, we don't have as many engineers that have specialties that we used to have. So, it means that if we do take on a big project, we usually have to bring in another firm to assist. And I'm thinking in terms of electrical, structural, geotechnical, and maybe even hydraulics...Because even though we have good engineers they can't be good at everything." [#26]

- The male owner of a construction firm identified “prompt payment” as an issue. He explained, “One of the issues that I see is getting payment, prompt payment. I’m a subcontractor to the primes... [and] it takes me about a month or two to receive my payment. I would like to see that increase into a lot less time.” [PM3#2]
- The representative of an MBE-certified construction firm relayed an anecdote about a lack of prompt payment on a job. She explained, “It wasn’t actually an IDOT job, but it was a job we got because we were MBE. The guy didn’t pay us for four months. He kept telling us he hadn’t been paid... I’m calling the city asking [about it]... I finally got to the bottom of it... He didn’t turn in our line of work for us to get paid. He did that intentionally. Ended up owing us \$200,000, [which] about killed us. But he was trying to put us out of business.” [PM6#2]

One business owner reported mixed messages for small and minority- and women-owned firms, expressing that some public agencies are committed while others are not. The Black American male owner of a MBE/DBE-certified professional services consulting firm reported mixed messaging among public sector entities in Illinois as a challenge when seeking work as a prime. He stated, “I think there is a little bit of both... if you were to ask me this question about five years ago, I would say there was more of a disadvantage, but I think now I have noticed that the City of Chicago and especially Illinois Tollway Authority have been really trying to get new MBE/WBEs [involved]... They have expressed, sometimes directly, sometimes indirectly, that they do not want to see the same old teams... They are trying to rotate in new companies.” On the other hand, he continued, “For IDOT, I still have to do my qualification and prequalification application in order for [specialty consulting] services, that is what I will be submitting for, so in terms of IDOT, I believe they are doing the same thing. I have not been to too many IDOT outreach engagements.” [#12]

Interviewees reported a variety of reasons behind their preferences to work with certain prime contractors or subcontractors. Examples include:

- When asked if her firm had any preferences to work with certain subcontractors, the non-Hispanic white female co-owner of an electrical company affirmed that she does have preferences, largely related to subcontractors’ responsiveness. She stated, “I can call them and they will come.” [#23]
- When asked whether his firm preferred to work with certain primes, the non-Hispanic white male co-owner of an engineering firm mentioned a strong preference for primes with a good record of timely payment. He stated, “Some are notorious to pay slowly, and some don’t communicate well.” [#26]
- When asked to describe their preferences to work with certain subcontractors, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm mentioned preferences for working with familiar businesses who have a record of performing high-quality work. He explained, “We basically have a set of people that we know. That world is kind of small and tight knit anyway, especially in a region like ours. Everybody knows who everybody is. You kind of know who gets the job done quick, and

you like their work and that's where you go. There's only one or two people in any particular niche that you have in mind. So you call them up and get the job done." [#25]

A few interviewees commented on their mixed experiences working with small businesses and minority- and woman-owned businesses. Examples include:

- When asked to comment on her experiences working with other small businesses or minority- and women-owned firms, the non-Hispanic white female co-owner of an electrical company denied having any issues with women-owned firms, but did reference negative past experiences with minority-owned firms. She said, "No issues with any women-owned [firms]. DBEs, that's a different story." She added, "They say they're a business, [but] they can't get us bids, they can't get the material, and all they want is [for] us to do all their work for them. And they want [us] to run [the contract] through them." [#23]
- The female representative of a construction firm commented on attempts to work with DBEs, saying, "We have a big problem that when the DBE comes to us, the NAICS codes are not issued properly. So they want to apply for a certain part of the bid, but they don't have the NAICS codes... If they don't have those codes, even if we want to use them, if they have worked before in private sectors, we are not able to use them. So that's very important... I take the time sometimes to call the agency if they have been certified... I try to call, help them, and try to make them explain what is going on with the jobs they have done, or why we cannot use them because of the NAICS codes. We have this problem. It's currently a lot."

She went on to add, "Capability is one issue that we also encounter. They don't have the capacity sometimes. Even though we try to break down the job and try to give them small portions of the project, sometimes they cannot handle the whole process, because they don't have the manpower... insurance is another issue. They don't have the insurance. They cannot bank the project. So that's something again that I feel they need the support, the customer support from IDOT, so they can explain better what they have, because they literally feel they open the business, they get the certification, and they're ready to roll. And sometimes that's not the situation." [PM2#1]

Two interviewees reported facing challenges finding qualified subcontractors when the need arose. For example:

- The non-Hispanic white male representative of a majority-owned construction firm indicated that IDOT's list of DBE contractors is difficult to utilize, as few subcontractors on the list are available when subcontracting opportunities arise. He explained, "It was not a lack of outreach on the part of IDOT, but that the companies [on the list] were not available." [#21]
- The female representative of a construction firm noted, "We also have companies in Chicago, and it's wonderful because you have a full gamut of DBEs... a full pool that you can work with. Rockford area is different. And we always have the same trades that we have to use over and over and over because there is not much to pick." [PM2#1]

Decisions to subcontract work to other firms. Business owners described their process behind deciding to subcontract work to other firms. For example:

- The non-Hispanic white male co-owner of an engineering firm indicated that his firm rarely subcontracts out work to other firms. He explained, “Very little, but we do sometimes [sub out] drilling work when we’re getting too busy for our drillers to do it.” [#30]
- The non-Hispanic white male representative of a WBE-certified construction company stated, “We try not to subcontract out, just for safety reasons.”[#43]

E. Potential Barriers to Doing Business in the Illinois Marketplace (Public and Private)

In addition to barriers such as access to capital, bonding, and insurance that may limit firms’ ability to work with public agencies, interviewees discussed other issues related to working for public agencies. Topics included:

- Learning about public sector opportunities as a prime or a sub (*page 40*);
- Opportunities to market the firm (*page 41*);
- Prequalification requirements (*page 42*);
- Licensing and permits (*page 44*);
- Size and span of contracts (*page 46*);
- Any unnecessarily restrictive contract specifications (*page 47*);
- Prevailing wage, project labor agreements, or any requirements to use union workers (*page 48*);
- Bidding processes (*page 52*);
- Non-price factors used to make contract awards (*page 56*); and
- Timely payment by the agency or prime (*page 57*).

Learning about public sector opportunities as a prime or some sub. Business owners reported challenges to learning about available work in the public sector. For example:

- The non-Hispanic white male owner of a construction firm stated, “We do [try to learn about public sector work] but I guess every agency is different to work with. There are different set of rules, obligations, so you have to kind of ‘weed’ your way through that.” [#4]
- When asked to comment on challenges learning about prime contracting opportunities, the non-Hispanic white male co-owner of an engineering firm mentioned difficulties related to learning about smaller public projects. He said, “Just finding out that the jobs are there. Often times, by the time we know the job is there, they already hired someone. In the private market, it seems like it's who you know and it's not out there on an RFQ. In the public sector, oftentimes the RFQs are for bigger jobs, and the small jobs you just don't hear about.”

When asked to describe how his company does learn about work, he added that their firm learns of most subcontracting opportunities through architectural firms. He explained, “It’s usually people will call... Often times, if it’s through an architect that only does the architectural [work], they don’t want to sub [engineering work] to one of their competitors. So, a lot of our sub work comes from architects who don’t have engineering or surveying in their grand scheme of work.” [#26]

- The representative of a specialty construction firm expressed frustration about the timing of bids and outreach events by an entity other than IDOT. She explained that she received an initiation to bid and an outreach event invitation, but after communicating with the company she was told that the bid had been released two months earlier. She added, “If the bid was out already for a couple of months, all I would be doing is wasting my time. I also would have wasted my time going to the outreach event. This proves to me that they have no interest in getting actual participation on projects. They just want to pretend they want participation.” [WT#3]

Opportunities to market the firm. Business owners shared a range of marketing experience. Some reported being constrained by their own marketing efforts or having limited access to good marketing opportunities. For example:

- The Black American female owner of a specialty services firm reported on her ability to market her firm to public agencies and others. She commented, “Not really. They put us on a list and we are referred. So, I guess that [is] marketing; they give us different vendors that we can go through and those vendors call us with trips.” [#5]
- A Black American male owner of a DBE-certified construction firm commented, “I have been as positive as I can be [regarding marketing the firm to public agencies and others]. I could always be more. It is dependent on me; I have to put forth the effort.” [#54]
- The non-Hispanic white female owner of a DBE-certified woman-owned construction firm reported a need to increase her marketing. She said, “I am pretty slim in that area. I am hoping to branch out with that... but Illinois is so unstable now that you are afraid to do a whole lot.” [#35]
- A non-Hispanic white female owner of a DBE/WBE-certified construction firm reported her desire for more help from trade associations that could increase the marketing of her firm to public agencies and others. [#60]
- The minority female owner of a DBE/WBE-certified professional consulting firm specifically addressed IDOT’s resistance to offering marketing assistance to small businesses. She relayed her experience requesting marketing assistance from IDOT by stating, “Four years ago we asked IDOT why they did not advertise for us as a small business.” She indicated that IDOT responded, “We cannot tell the people who are already in the business for a long time that those people [who] are small, why don’t you give them a hand... [IDOT] said it is up to you, you should be able to contact [primes] ... [IDOT] cannot contact them, just come to the event and be on your own.” [#15]

A number of businesses reported being disillusioned by the fact that despite some level of marketing there are limited opportunities in the marketplace for work. Examples from the in-depth interviews include:

- The non-Hispanic white male representative of an industry association commented that there are not enough construction projects to market at this time. [#17]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm reported that though he is "... able to market ... there is still a limited amount of work [available]." [#55]

A few businesses reported minimal challenges when marketing. For example:

- The Hispanic American male owner of a MBE/DBE certified construction firm remarked regarding the marketing of his firm, "No problems there." [#56]
- The non-Hispanic white male representative of a trade association reported, positively, that IDOT gives participating companies ample opportunity to market their firms. [#38]

Prequalification requirements. Public agencies, including Illinois state agencies, sometimes require construction contractors to prequalify in order to bid or propose on government contracts.

Many interviewees reported that prequalification requirements in public sector present barriers to obtaining or performing work, including for IDOT. Comments follow:

- A Black American male owner of a DBE-certified construction firm reported that the prequalification requirements are not fair. He commented, "They kind of do what they want to do." [#54]
- The non-Hispanic white male owner of an engineering firm shared concerns about increasing burdens for his business and industry related to prequalification requirements. He explained, "In order to do work for IDOT, you have to fill out a statement of experience and financial condition...This is something where IDOT can review your experience to see whether or not they even want to hire you. In general, this is a good document, [but] it is exhausting to fill this out every year, and every year it changes. They keep finding more things they like to fool with, and in order to get a job, you better be prequalified in a certain category or you're not going to get the job...I found these qualification things somewhat of a hindrance."

He went on to say, "I think [IDOT's] efforts are well intended, [but] they have become like this six-inch thick specs book...compared to one say, an inch thick. They have kind of gone overboard." [#30]

- A non-Hispanic white female owner of a DBE- WBE-certified construction firm reported, "You have to be prequalified with a state of Illinois..." She added, "I remember walking out of a purchasing agent's office not happy. He followed me down the hall and said, 'Oh you

will get this taken care of next time around.” She continued, “... I ended up in my office to discover I did not even know what prequalification was. [I then] discovered what prequalification was and within a couple of days drove to Springfield got my prequalification... You cannot do that now.”

She then added, “I think [prequalification] has become a tool to keep people out... It is an impediment that is put there to keep people out. It is a lot of work. I personally have a real problem with the amount of information, because the person with the knowledge can obtain information [that] is nobody’s business and I have a problem with that. I really believe that a lot of the information is not confidential and I am just not convinced that it remains confidential... I feel that the prequalification is one more impediment, just one more expense.” [#53]

- The non-Hispanic white representative of a minority-owned supply firm, regarding the prequalification process, remarked, “[Prequalification] is awful because of the organization of the company... the problem is we have six owners, and the amount of documentation that needs to be supplied for six owners is mind boggling; six tax returns, six of this, six of that, six of everything. It is too much information required. I am sure there is a reason for it in somebody’s mind, but here is our financial tax return, here is who the owners are, here are our affiliations. We filled all of that out in the major application part.” [#6]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm, regarding prequalification requirements, remarked, “Outrageous.” [#11]
- Regarding prequalification requirements, the non-Hispanic white male representative of a DBE-certified woman-owned construction firm commented that “it handcuffs the smaller company.” [#18]
- The non-Hispanic white female representative of a women’s business association recommended, “I think there are a number of things that IDOT could do to make prequalification a bit better... We had submitted a report to [staff member] that addressed a lot of those recommendations and some of the agencies are just not willing to undertake [them] but they really should look at them to make it more open.” [#16]
- The Black American male owner of a MBE/DBE-certified construction firm said, “I do not want to say they purposely put [prequalification requirements] in place, but I think there is a system set up where they want a caliber of construction companies... and the way they have it set up basically weeds out the smaller companies and the small people.” [#57]
- The non-Hispanic white male representative of a majority-owned construction firm said the ever-changing and higher standards from IDOT cause challenges for small businesses in general, which can prevent them from thriving in the marketplace. [#21]
- Regarding prequalification, the Hispanic American male representative of a minority trade association remarked, “I think IDOT definitely needs to broaden it... I know it is a challenge

for the State, but there are firms that... branch off into other areas to grow their business... part of it is the application and the DBE rules.” [#13]

- The female representative of a woman-owned business commented on excessive prequalification requirements, saying, “You have to have audited financial statements. Yeah, that’s usually about \$20 or \$30 grand. A lot of people can’t afford a \$30,000 audited financial statement.”

She went on to add, “You’re out there competing against people that have big bucks in their pockets, and we’re limited. We can’t grow our businesses, because if you really grow them, then we’re out of the program, which is one of the few things we have around to help us... But we’re competing against people that it’s a totally unfair competition.” [TA1 #1]

However, some interviewees indicated that prequalification requirements are not a barrier or are standard in their industry. [e.g., #5, #19, #35, #38, #58, #60] Examples of those comments include the following:

- The non-Hispanic white owner of a construction firm reported that his firm is prequalified. He remarked, “We are prequalified so that is not an issue. It is more about prequalifying a subcontractor I think.” [#4]
- The Hispanic American male owner of a MBE/DBE certified construction firm reported that prequalification requirements are fair. [#56]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm reported that IDOT’s prequalification requirements are “fair.” [#55]
- The non-Hispanic white female owner of a DBE/WBE-certified construction firm reported that “they screen people fairly.” [#59]

Licensing and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Interviewees discussed whether licenses, permits, and certifications presented barriers to doing business.

Many business owners and managers reported that obtaining licenses and permits is not overly difficult or not required in their industry. [e.g., #3, #5, #19, #33, #38, #55, #57, #58, #59] Examples of those comments include the following:

- A non-Hispanic white female owner of a DBE- WBE-certified construction firm reported, “... For the most part we do not have to be licensed for the type of work that we do... It depends on the ordinances of the community. If you are doing DOT work, we are going to [perform a specified task], you have to get a permit. Those do not cost but you do have to apply to get a permit. And in certain areas you do have to have a permit to work in a certain area.” [#53]
- The Hispanic American male owner of a MBE/DBE certified construction firm reported, “[In our industry] we do not have any special permitting.” [#56]

- The non-Hispanic white male co-owner of an engineering firm did not believe that licensing and permits represent a barrier to doing business in Illinois. He explained, “Anybody can get a professional engineers license. It’s not that difficult.” [#30]
- A Black American male owner of a MBE/DBE- certified specialty contracting firm stated, “The City of Chicago has made it extremely easy for us... The biggest issue about getting my permits is when I have an architect. They give me a letter, I sign it, and the architect takes it down there. If it is a small enough job as I am doing, from time to time I get right on that computer and I can print that permit out in hours. My license is renewed yearly, they even allow me a three-month period prior to my debt due date.” [#8]
- When asked about licensing and permits, the representative of a non-Hispanic white male-owned construction firm noted delays while calling in for oversized load permits. He added, “I don’t know if they can update it to where it’s a little bit more convenient. It seems like it takes two or three days to get a permit, when you need one that day for oversized loads... It needs to be to where it goes in effect right then and there. My issue with that is legally, even though we have a permit and the state knows about it, I can’t legally haul anything until I have paperwork in hand. It doesn’t matter if they e-mail it to you and you make a copy, you have to have the original, otherwise they can give you a fine. I wish they would work with us a little more on that.” [#47]

A number of business owners reported that obtaining licensing or permits could be more of a barrier for small and minority- and women-owned businesses than larger firms. Examples include:

- A Black American male owner of a DBE-certified construction firm reported that the licensing and permit processes are harder for him since he is a minority business owner. [#54]
- When asked about any barriers faced by their firm, the Black American female owner of a DBE/MBE/WBE-certified specialty services firm reported that licensing and permitting requires different levels of insurance. She said, “Licensing... you have to have so much, not only have the city business license, but you have to have so much in insurance. You have one requirement just to get the license, and then once you get the city business license, to get a permit [for the contract] [the] requirement [is] totally different.”

She added, “You may only need \$100,000 [insurance coverage] to get a city license; but you need \$1,000,000 for the contract. I feel [to] be fair ... let the person know, ‘Okay, you get the license, but you want to work in the public sector, this is everything you are going to need to work in the public sector,’ not just you get your license and then you find out.” [#52]

One interviewee expressed concern about licensing renewal in relation to bidding. When asked to comment on barriers to doing business in the Illinois marketplace related to licensing and permits, the non-Hispanic white male co-owner of an engineering firm explained, “We’re about ready to send back in our prequalification, but we can’t because the state hasn’t sent us our design firm registration [license renewal] yet, which we have to send in [with the IDOT

prequalification application]. And this past year, there was no notice when those were coming due ...we sent in our application, and it still hasn't come back. So we're waiting." [#26]

Size and span of contracts. Interviewees had a range of comments as to whether the size of contracts presented a barrier to bidding.

Some interviewees reported being restricted by contract size or that the size and length of contracts they typically secure do not reflect their capability to perform larger, longer-term jobs. For example:

- The Black American male representative of a non-profit minority business association, when asked about Black American primes and the size of their contracts, responded, "Oh yes, we have some primes... but when you say 'prime' where they can do \$50,000,000, \$100,000,000, it does not exist.... There is no bonding capacity [for Black American prime contractors]." [#37]
- The Black American partial owner of a DBE-certified construction firm reported that his firm could work on larger contracts if the opportunity existed. [#1]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm reported that he is not satisfied with the size of his contracts. He said, "I feel that we should have bigger contracts." [#55]
- The Hispanic American male owner of a MBE/DBE- certified construction firm reported that he would like longer contracts. [#56]

A few interviewees commented that many small businesses do not always have the capacity to take on larger or longer contracts. For example:

- When asked if he or his firm had experienced barriers to doing business in Illinois related to the size or length of contracts, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm expressed challenges related to capacity and succession planning for skilled positions. He explained, "A lot of times, a small business [does not] have the redundancy that you need to take on some [larger or longer contracts]. I think that's a barrier, because, if you have an engineer that you know is probably going to retire in two years, but you have a three-year contract, you're already thinking about 'what am I going to do then?' But if you're a bigger company, and you have 10 engineers, that [capacity] is not a problem." [#25]
- When asked about barriers to starting or expanding their business, the representative of a Subcontinent Asian male-owned engineering consulting firm expressed that the size of their firm was a limiting factor, saying, "We wanted to [work] for an agency in Chicago, but we were considered too small." [AS#11]

One business owner reported that the opportunity in public sector for multi-year contracts is attractive. Black American male owner of a MBE/DBE certified consulting firm commented,

"I think they are good because they are multi-year engagements...the minimum is usually three years." [#12]

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.

Some owners and managers indicated that some specifications are overly restrictive, do not make sense, and present barriers. Examples of interviewee comments include the following:

- A non-Hispanic white female owner of a DBE/WBE-certified construction firm reported that overly restrictive contract specifications are challenging and are factors in her decision to be a prime or a subcontractor. She said that she has had contracts that she could not sign because of the restrictive provisions within the contract. [#53]
- The non-Hispanic white female representative of a women's business association commented that firms need "in-house counsel" to read and understand the contract specifications. [#16]
- The representative of a non-Hispanic white female-owned electrical firm relayed trouble with the application process, saying, "When we applied for a contract, the paperwork was way too much." [AS#42]
- The non-Hispanic white American female owner of a WBE/DBE- certified construction-related firm reported, "I know in material, sometimes, government agencies, not just IDOT... will make it so that [with] the restrictions only certain people can do [the work] based on equipment type or equipment needs. They will make it difficult just so they can have the company they want doing it." She continued, "I have come across that more in supplies." She concluded, "[Overly restrictive specifications] have hindered us from bidding, maybe this year, two jobs or three." [#58]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm indicated that certain restrictive contract specifications, when applied, cause work to be more difficult and the costs to increase. [#18]
- When asked if she had any feedback related to contract agreements, the Black American female representative of a public agency stated, "I really think that a lot of the DBEs... they feel like they have to accept the contract agreement as written, because if they don't they might not get the work." [#44]
- The female representative of a construction firm commented that overly restrictive contracts have been a barrier to her firm. She explained, "A number of years ago... I received a contract. They took everything but my firstborn. I sent it back to the company. I said, 'If you'll sign this, so would I.' Well, needless to say, I didn't get the work, and they weren't happy with me. I said, 'Well, would you sign it?' [and they said] 'Well, no.' I said, 'Well, then neither am I!'"

She went on to add, “I read my contracts word for word. I mark out what I don’t like. That is not the case with most of your DBEs, be they women or male... Any lawyer that would allow these contracts to be signed by the subcontractor probably should not be paid.” [PM1#1]

A few interviewees reported no barriers resulting from overly restrictive specifications. [e.g., #33, #38, #55, #59]

Prevailing wage, project labor agreements, or any requirements to use union workers. Contractors discussed prevailing wage requirements that government agencies place on certain public contracts. They also discussed other wage- and union-related topics.

Many business owners and representatives indicated that prevailing wage requirements present a barrier to working on public contracts, for a variety of reasons. Examples of interviewee comments include:

- The non-Hispanic white owner of a specialty contracting firm indicated that the prevailing wage requirements are too “vague” and unenforceable. He commented, “The prevailing wage program is so vague... [It] is a joke... [Some companies] claim prevailing wage, they fill out the prevailing wage paperwork, but when they can beat me by \$20,000 on a bid, they are not paying prevailing wage. They cannot be, in order to get the bid down that low.” [#3]
- The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm reported, “We are doing a bid right now... we bid it at ... prevailing wage prices; we make the industry standard on mark-up, so I know that we are within range and we are being told that we are \$40 [per unit] higher than somebody else that is bidding the same job.” [#58]
- The female representative of the Hispanic American male- owned MBE/DBE- certified specialty contracting firm reported, “When we work with our own guys and pay prevailing wage, it is not a problem. But it is just when we have to deal with other companies and when we are not getting paid ... but have to pay no matter what, even if they work for one day, we try to stay away from that.” [#19a]
- The representative of a non-Hispanic white female-owned construction firm said, “Some of the prevailing wage projects are difficult, and we’re non-union, which also makes it difficult.” [AS#81]
- The non-Hispanic white male representative of a WBE-certified construction company commented that they do not do much work for government agencies. He explained, “I think there are some challenges, especially with us being non-union.” He added that jobs for which they must use prevailing wage rates can cause problems for their workforce. He explained, “That was a little challenge to us... If we were awarded a prevailing wage contract [for a project], then we have one crew—that’s five or six people out working on that. They’re getting paid a prevailing wage, [but] we don’t pay that wage to the rest of our employees. That creates a little bit of turmoil internally for us. We were always really careful about that. We’ve always been interested [in working with public agencies]. It just seems like it’s tough and that’s not the way we grew our business, working in that sector.”

We're not real familiar with the processes or even how to go about getting into it, really."
[#43]

Two interviewees expressed frustration with firms who falsely or temporarily label themselves as "union" or "prevailing wage." For example:

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned trucking firm expressed frustration with prevailing wage projects, stating, "I feel strongly that in a prevailing wage [project], if you have not had a prevailing wage, you should not be able to bid a project. If you have been caught cheating on your paperwork, you should not [win] projects." [AS#15]
- When asked what factors would rule them out of a job against their competitors, the non-Hispanic white male owner of a construction firm stated, "Me being union." He commented that some businesses say they're union when they're really not, and he subsequently loses work to them. He added, "If they got rid of the union, I think my doors would shut. My guys wouldn't work this hard for less wages or less benefits, and I don't blame them. And I'm in the union myself." [#46]

Many business owners reported on barriers they faced related to project labor agreements and requirements to use union workers. Examples include:

- The non-Hispanic white female owner of a DBE-certified woman-owned construction firm stated, "Until we got the new Governor who quit putting project labor agreements on everything, it was going to break my company."

She went on to add that "union versus non-union" presents a challenge for her firm. She said that if a prime does not want to hire her firm because it's non-union, IDOT says, "Okay."
[#35]

- The representative of a non-Hispanic white woman-owned specialty construction firm indicated that their lack of union status was a barrier, stating, "We are a non-union contractor, so it's difficult." [AS#111]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white female-owned construction firm referenced the added expense of being union, saying, "We are a union contractor. We pay a higher wage and benefits than non-union firms." [AS#112]
- When asked about any additional disadvantages or barriers to business success for small businesses, the female representative of a non-Hispanic white male-owned professional services firm referenced the cost of union work. She stated, "For us it's – we can't underbid jobs. We can't lower our price--our estimating theory-- because we are a strictly union operating company... I mean, just next door, we're undercut by half." [#29]
- The non-Hispanic white male representative of an industry association stated that prevailing wage, project labor agreements, and requirements to use union workers would

affect the status of DBEs. If a small company decides to unionize, they will take on unfunded pension liabilities, in addition to collective bargaining agreements. [#17]

- A non-Hispanic white female owner of a DBE- WBE-certified construction firm mentioned, “I think one of the biggest barriers that contractors face, in order to do business in the State, you almost have to be union. Even though we spout prevailing wage, the reality is... the wages, and the wage structure, smaller businesses are priced out of the market. We cannot compete with a non-union company, we cannot.” [#53]
- When asked if there are any challenges related to unions, the Black American male owner of a DBE/MBE-certified specialty contracting firm replied, “Yes and no.” When asked to elaborate, he said, “It is a barrier... [the union] picks and chooses... who [the union] harasses... they will come and they will not even stop at [the prime’s] job, but me as a sub, they will stop... they will card everybody and call [us] into their office to see if we are caught up on the dues.” He concluded that this behavior is evidence of a “small guy - big guy” mentality. [#55]
- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned electrical contracting firm responded, “Our biggest problems have been projects that are only interested in Union labor. [And] lack of work in general.” [AS#41]
- The non-Hispanic white male co-owner of an engineering firm viewed prevailing wage requirements, project labor agreements, and other requirements to use union workers as a barrier to his business. He added, “That is why we don’t go to Chicago.” [#30]
- The non-Hispanic white male representative of a majority-owned construction firm indicated that unions are a barrier to DBEs. He commented that although IDOT may not require the project to use union labor and pay prevailing wages, it may create problems for the prime firm if it is union shop. He explained, “The unions don’t like union companies to use non-union labor or non-union subcontractors.”

He added, “If we hire someone who is non-union, then the unions will picket your job and shut you down. It has happened to us before and then we had to negotiate with the unions and explain to them we have DBE requirements and need someone to fulfill them.” [#21]
- The Hispanic American male representative of an industry trade association stated that although the unions might be treating everyone badly, the particular way the union treated the Hispanic signatories was “horrible.” [#13]
- The non-Hispanic white owner of a construction business reported, “We know in this area we have to pay union wages and use union labor. We cannot even think about putting a job non-union. We do not do that because this whole area is a union area.” He added, “That could be an issue with subcontractors that we could potentially use if they are not signatory to the union.” [#4]

- The non-Hispanic white female owner of a DBE-certified specialty contracting firm commented that she is “ripped off” by the unions because primes require “you... to be union or they are not even going to look at you.” [#33]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm expressed, “I feel okay with [unions] if you allow the minority contractors to come to the union.” When asked to elaborate, he explained, “When you leave this site, as you go to the expressway, and you take a look and you do not see anything but ‘white boys’ out there. That is all you [have]... Wherever you go, if you go downtown, that is all you see.” [#11]
- The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm reported, “Non-union companies are bidding on IDOT at rates that are higher than my union rates and they are being given it because I think that there is some pressure from politics to give certain groups the work and it is really affecting, I believe, women.” [#58]
- The non-Hispanic white female representative of a women’s business association reported, “There is a movement... even with prime companies, to get away from unions. I think they have been beaten up enough and the unions have begun to somewhat cannibalize each other and contractors are kind of being caught in the middle of it, where it is [becoming costly].” [#16]

Some firms said that prevailing wage requirements are fair and requirements for union workers are not a barrier when working on public projects. Examples include:

- The Hispanic American male owner of a MBE/DBE certified construction firm reported that prevailing wage requirements are fair. [#56]
- The non-Hispanic white female owner of a DBE/WBE-certified construction firm reported, “I have a good relationship with the union... I am pro union.” [#60]
- The non-Hispanic white male co-owner of an engineering firm did not see prevailing wage provisions, project labor agreements, or any other requirements to use union workers as barriers to doing business in the Illinois marketplace. He stated, “No, no problem, no issues. A lot of our work is municipal, and they've got to [pay] prevailing wage. Most of the contractors we like to deal with are union contractors that pay prevailing wage, and they're usually easier to work with and do good work.” [#26]
- The Black American male owner of a MBE/DBE-certified construction firm commented, “I feel like it is fair... if you are going to do union jobs, you have to pay union wages....” [#57]
- The male representative of a Native American woman-owned specialty services firm said that the firm is a unionized, signatory with 16 unions. [#41a]

Two business owners reported both positively and negatively on unions. For example:

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm stated that requirements to use union workers are not a barrier. He remarked, “The

union model is a good model, but when the union gets too strong and demands things, it could be bad. Unions are more heavy-handed and the work rules are hurting the contractors more than the money. If non-unions could bid, it would cripple the DBEs because they couldn't compete." [#18]

- The non-Hispanic white male representative of a WBE-certified construction company reported that their biggest concern with doing IDOT work is that they are wary of repercussions from unions. He explained, "We've had some run-ins [on a project] where we've had some incidences and had some equipment damaged and destroyed in the past, with the suspicion that it was union organized. We've always kind of shied away from that a little bit. I think that's one big takeaway, I think why we've never went that way, never wanting to make ourselves a target, I guess."

He went on to add, "Don't get me wrong, I'm pro-union and I think that if we didn't have the unions, none of us would be making decent wages. I have a lot of friends who work in unions. That's the reason for our non-union shop to probably not want to get in that realm. I think that's one of the bigger ticket items." [#43]

One business owner commented on barriers that occur due to district/union misalignment.

When asked to describe her experiences related to prevailing wage, project labor agreements, or union labor requirements, the non-Hispanic white female co-owner of an electrical company explained that while prevailing wage requirements benefited her firm, she had experienced challenges related to misalignment between local municipal contracting districts and labor/union districts. She stated, "State and federal and whatever [firm] does municipal has to be prevailing wage, and that's good for us... [However], IDOT districts don't exactly line up with ...the unions. And so...challenges [occur] when [IDOT does] multiple site projects in one bid." [#23]

Bidding processes. Interviewees shared a number of comments about bidding processes.

Many business owners said that procedures for bidding and proposing present a barrier to obtaining work or put larger firms at an advantage. Comments include:

- A Black American male owner of a MBE/DBE certified consulting firm commented on a need for more transparency, saying, "You do not know... what your competitions' results are, or what their bid submittal is... That is up to, of course, the agency, and whoever is writing that bid document." [#12]
- The Black American partial owner of a DBE-certified construction firm reported, "When you bid on work for other agencies, they share contract value so you have an idea of where you should and should not be. [However], IDOT will not give you any indication of what they figure the contract value is, which is kind of hard to bid if you don't know what to bid at, or have some type of guideline or what should be."

He added that IDOT's engineers may spec a job as an estimated \$500,000 project; however, the project could be as much as \$700,000, depending the specs and plans. He explained, "IDOT will not give you any indication, but they will tell you your bid is not within

engineers' estimates. 'Okay, so what are the engineer's estimates?' You don't get that information." [#1]

- The Black American female partial owner of a DBE-certified construction firm reported that the company qualified to bid as a prime on a project and "really we won the contract." She added that her firm was informed that they lost the contract because a page was missing. The missing page was not a signature page, but was "almost like a back page" nothing to do with the bid. She added, "The lady was sitting on top of the contract in her chair." [#1a]

The Black American male partial owner of the same DBE-certified construction firm concluded that the bidding process is "unfair." [#1]

- The non-Hispanic white male co-owner of an engineering firm believes that IDOT's bid process is more difficult compared to other public agencies. He stated, "Probably harder ...just more paperwork involved. [Either] most other public sector [agencies] are not as intense [with the] amount of paperwork ...or we're more used to it, and maybe that's part of it too, since we're not doing that many IDOT projects. You need to have one person that's delegated to keep up to date with IDOT." [#26]
- The male representative of an MBE/DBE-certified construction firm referenced a past bid on an IDOT project, saying, "It was a project that also had IDOT participation in it, and we were bidding as a subcontractor to most of the generals on that project, and I submitted a bid for some of the work... My bid number was a lot lower. When I got the bid tabulation for the bid, they were a lot higher on their pay item [as reported to IDOT], and we never got a call back. Never got anyone to respond, and, you know, that -- although I knew that kind of practice was going on, but this just kind of showed the extent of that." [PM5#1]

One business owner reported being bullied by primes in the bidding process. The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm commented, "Yeah, I mean in the past they have given our work away, [the primes] tried to bully us out of prices. I feel right now that there are companies that have not been bidding appropriately and that is really creating an unfair industry. [#58]

Another business owner reported knowing that primes use his firm's bid, but do not use his company when the contract is awarded. The Black American partial owner of a DBE-certified construction firm reported working as a subcontractor while bidding as a prime contractor to IDOT "to no avail." Regarding bidding as a subcontractor, he said, "... Bid against other DBE's... my competitors and other [specialty contracting] companies... I have to beat them... once all that's done, I then have to bid against the prime because they have the right to say, 'we don't want to use you at all, we decided to do the work ourselves.'"

He further explained that there were "so many instances in which we submitted bids... we keep track of all our information where we can see the prime contractor actually used our numbers to get the bid and decided not to use us and to spend the money however else they wanted." [#1]

Amount of “paperwork” or paying for bidding services presents burdens to small firms. Some interviewees commented on the difficulty of extensive paperwork. For instance:

- The non-Hispanic white female owner of a DBE/WBE-certified construction firm reported, “The amount of paperwork that goes into things is ridiculous with the State....” [#59]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm commented that the paperwork required to bid “is not easy.” [#33]
- A non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm highlighted general challenges related to public agency paperwork. He explained, “The paperwork is pretty challenging. There’s a certain amount that’s required, [and] it’s a lot for a new person.” [#25]
- A non-Hispanic white owner of a construction company reported having full-time staff designated for managing bidding and accompanying paperwork. [#4]
- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm responded, “The paperwork involved with IDOT projects... the paperwork took so much time for the financial statement and financial qualifications.” [AS#9]
- When asked if he had tried to pursue work with IDOT, The non-Hispanic white male owner of a construction firm, stated that he hadn’t. “I think, back in 2014 I printed off a pre-qualification form, and then when the printer ran out of paper I just quit worrying about it. There’s a lot of paperwork there. You have to get pre-qualified, and I just didn’t want to go through that stuff.” [#46]

Cost of/time for preparing proposals. Some interviewees commented that the amount of time and costs presented a barrier to their firms, for example:

- The non-Hispanic white female owner of a DBE/WBE-certified construction firm reported, “I just looked at an IDOT letting today actually tracking my time on one of the projects because it is small and my time [is valuable] I had to look at this and say, “This is too small.” She added, “We are in business to make a profit and if we cannot make a profit that we cannot stay in business.” [#60]
- A non-Hispanic white owner of a construction company commented, “We have a cost to prepare every proposal... It is a very substantial cost, we have people working in the office full-time and that is all they do... prepare the quotes and the estimates and we hope we can recoup that cost if we are lucky enough to get the job.” [#4]
- A non-Hispanic white female owner of a DBE- WBE-certified construction firm stated, “Of course... if you are striving to ultimately become a prime contractor, you need to be aware of the expense and what the challenges are. Yes, it is very expensive to bid....”

The same business owner added that time constraints cause barriers specifically for DBEs when bidding projects. She commented, "... I think one of the biggest problems for the DBE is the time issue. After they have worked outside all day long, you have to realize that many of them do not have an office staff. The owner is probably working, the wife or girlfriend or whoever that may be is probably handling the books... when they come in worked eight or ten hours, they do not want to sit down to computer and start scanning for things. It is a difficult issue." [#53]

- A non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm commented that his firm invested significantly more time and money in accounting-related services to prepare proposals for the public sector compared to the private sector. He explained, "We have to engage help from accounting firms, and that does take more work, because it's more meticulous. You want to make sure you get it just right, because people are looking at it, which is good. [The accounting service] helps you understand your business and what you're spending money on, but there is a lot more time that is invested in that, and there is a cost to it." [#25]

Short deadlines to submit a bid. A few reported very short bidding deadlines on some projects, for instance:

- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm commented, "Well it all depends on what company you are dealing with... instead of them giving me the layout two-to-three weeks ago, a lot of them give it to me with two-to-three days before you have to turn it in." [#11]
- The non-Hispanic white male representative of a majority-owned construction firm reported, "On the bid side, schedules are still very tight...." [#39]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white woman-owned trucking firm explained, "[There are] a lot of regulations that are not necessary, and we don't get info on bids in a timely manner." [AS#2]

On the other hand, a few interviewees commented that the amount of time and cost is part of doing business. For example:

- The non-Hispanic white female representative of a women's business association remarked that firms must factor bidding costs into their overhead. She commented, "Bidding and submitting proposals... is part of doing business. If this is the arena you want to play in, you have to know that is part of it, you have to be prepared for it." [#16]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm reported, "Overall, it is pretty good... What we do is take the project... and take some time each day to work on it and then at the end, maybe a day or two before that is when we finalize the numbers." [#19]

- Regarding the cost of bidding, the Hispanic American male owner of a MBE/DBE certified construction firm commented, “We have money involved in [bidding], but that is part of the program. If you want to get work, you have to bid.” [#56]
- When asked about proposal preparation, the non-Hispanic white male representative of a WBE-certified construction company commented that they have not had any significant problems. He explained, “The bidding process, I don’t know, I don’t think we struggle with that. I mean, we’ve all been doing it for years and years and we have a lot of in-house tools to help us get through the bid process, and then meeting the criteria of the scope of work and the way that the customer wants it presented in the bid proposal, sometimes those get pretty detailed. Typically on the projects that we do... there’s not hundreds of layers of different line items. It’s usually three or four, and we bid on those and we’re awarded later on.” [#43]

Some specifically reported on the pros and cons of bidding related to seeking work with IDOT. For example:

- The non-Hispanic white female owner of a DBE/WBE-certified construction firm commented, “Thank goodness to the new rules for showing a good faith effort We do get invitations to bid ... I am being proactive...” She added, “I’m going to go on the IDOT website and see who the prime bidders are ... I am going to call those bidders and say ‘look I am interested in setting up [specified tasks] for this [contract opportunity]’” [#60]
- The non-Hispanic white female owner of a DBE-certified woman-owned construction firm remarked, “[IDOT is okay]... I know what I am bidding on, so it is not usually a surprise... [however,] sometimes the plans are pathetic.” [#35]

One interviewee expressed frustration with the bidding process due to a lack of results. When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned construction consulting firm expressed frustration with the bidding process and lack of results, saying, “[We] gave up on bidding and never got anywhere with city of Chicago projects.” [AS#3]

Non-price factors used to make contract awards. Several interviewees commented on non-price factors used to make awards, whether by IDOT or others. Examples include:

- The non-Hispanic white male co-owner of an engineering firm expressed concerns about the weight of firm size vs. firm location in public contract award decisions. He explained, “The qualification-based selection [process] for some towns [is a barrier] – and I’ll say Bloomington in particular – they want the biggest, best firm with the best brochures, and price is not an issue. And if [the firm is] out-of-town and it’s going to cost more to do it, that doesn’t matter. And the state statute says ...there are several factors you can consider, and one of the factors is location-- meaning you’re close to the project and you can do it more efficiently-- [but] the City of Bloomington does not use location as one of their factors. So, the selection process means the big firm gets the job, even if it’s a small job that a small firm can easily do. As a member of the Illinois Society of Professional Engineers, I’m supposed to

be in favor of qualifications-based selection, and I am. However, all the factors need to be considered. Not just your size ...your location, which is one of the factors that's supposed to be considered, ought to be in there." [#26]

- When asked to comment on non-price factors public agencies or others use to make contract awards as a barrier to doing business in Illinois, the non-Hispanic white male co-owner of an engineering firm expressed concerns about historical biases in public contracting. He explained, "They're supposed to give out the [contract awards] based on competency rather than on price... but when I first started out in the business, basically, [whomever] you donated your campaign contributions to [determined] who got the work." [#30]

Timely payment by the agency or prime. Interviewees often mentioned slow payment or non-payment by the customer or prime contractor as a barrier to success in both public and private sector work.

Many interviewees indicated that slow payment can be damaging to companies. Interviewees reported that payment issues might have a greater effect on small or poorly capitalized businesses. [e.g., #1, #5, #13, #19, #19a, #33, #39, #57, AS#84, AS#85] Examples of interviewee comments include:

- The Black American owner of a DBE-certified construction firm reported that untimely payments are unfair. He said, "I did the job in May and got paid in July." [#54]
- The non-Hispanic white female representative of a women's business association stated, "[Timely payments] will always be the over-arching issue." [#16]
- A non-Hispanic white female owner of a DBE/WBE-certified construction firm commented on how untimely payments can affect subcontractors by stating, "I say it is a problem of the agency, because they all have this rule that they do not have the contract with the sub. It is a way of shifting the responsibility... subs come and go because of the issues that they face." [#53]
- One Black American male owner of a MBE/DBE-certified consulting firm remarked on the benefits of prompt payment, saying, "If the agencies could pay their MBE/WBEs, consultants, small businesses, then help [MBE/WBE/DBE/small businesses, consultants] grow that capacity, help them to be able to have spare capital by not sending them floating six months, try to shrink it down to two months" [#12]
- The Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm reported, "We have done projects, especially for... CPS, it will take two years for them to finish paying us. They hold our retention past the contract time. We will finish the project and... they will wait until that has passed before they give us all of our money. In the meantime, they have occupied the schools, doing damage, and still calling us to get the repairs." [#10]

- The non-Hispanic white male co-owner of an engineering firm acknowledged timely payment issues as a barrier to performing public sector work in Illinois. He explained, “Most of my clients pay in under 90 days. If we get over 90 days, we call them up and usually we get paid pretty quickly after that, because my clients want me to work for them again. Now that’s another reason we don’t do much work for state agencies. [I] had a friend... [and] basically he went bankrupt even though the state of Illinois owed him several million dollars.”

He added another anecdote regarding payment, explaining “When my dad first got in business...we did three jobs for the state of Indiana...The state of Indiana approved his projects, and then sent him a very nice letter that said that, unfortunately, they had no money to pay him, and [that] he would have to wait until the next fiscal year to be paid. And so basically, you know, the profitability of [an engineering firm] is like 10 percent...And he’s already spent the money to do the work, so he [was] in debt...He had to borrow 50 percent of his yearly gross for essentially six months until the new fiscal year for the state of Indiana started, which basically ate up his 10 percent profit...That’s one of the reasons why he looked around to get out of that [public sector] market.” [#30]

- When asked about payment within 30 days, the minority female owner of a DBE/WBE-certified professional consulting firm remarked, “No, never... For example, we worked before on a contract and we did not get paid for five months from starting the contract until I called... the [prime] company was getting paid on time.” [#15]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm stated that timely payment by the agency or prime can be a barrier, especially when there are extras. He reported, “Getting paid for the extras due to the regulations” has been a problem.

He added that he would prefer that the State pay the subcontractor directly after everything has cleared, but believes IDOT would face opposition from the General Contractors because it may hold up the payment process waiting for everything to clear. [#18]

- The Black American female representative of a public agency commented that payments are a big issue in her district. She said, “I’ve been really stressing with the DBEs to contact me if they haven’t been paid timely, but I find that the biggest issue is that they don’t contact me. And so we go six months, a year, and they haven’t gotten paid.”

She added that two substantial prime contractors have gone out of business recently, and they were known to have had trouble with prompt payment. She explained, “In the case of one of the smaller primes who went out of business, I have had DBEs who never got paid for the work that they performed, and some non-DBEs who didn’t [get paid either]. Unfortunately, I think that’s a huge issue, because that’s only the stuff I heard about. So, I figure if I’m hearing about that much, there must be more of it going on.” [#44]

- A Black American female owner of a DBE/MBE/WBE-certified specialty services firm stated, “The pay varies from contract to contract. Some contracts say ‘you get paid when we

get paid' and that job could be up to three months. There are entities like [Chicago Housing Authority] that requires the primes to pay the subs every 30-days depending on the project, especially if it is a Section (3)... Some owners do not require you to the pay subs in a timely fashion...." [#52]

- When asked about timely payment by the agency or prime, the non-Hispanic white owner of a specialty contracting firm stated that they are paid by the prime so it is up to the prime to get things moving in order for his company to be paid. He commented, "... We are a subcontractor, [so] getting paid on any of those jobs that we are qualified subcontracted for can really get to be a headache." He added, "If that prime contractor... does not submit his paperwork, or paperwork is messed up... I mean, I have got stuff I have had 120 days or better on to get paid... they kept screwing up the paperwork, or they could not get their ducks in a row with engineers, [or] get the quantities approved... I'm borrowing money from the bank, paying a premium on the interest to keep my company alive, because I cannot get paid."

The same business owner, when asked if the State offered interest for late payment, responded, "To my knowledge, no, but I have never been paid directly by the State... [we are] at the primes mercy." [#3]

- When asked about timely payment by a prime or agency, the Black American male owner of a DBE/MBE-certified specialty contracting firm commented, "I do not think that prompt payment is prompt payment." [#55]
- The non-Hispanic white female owner of a DBE/WBE-certified construction firm remarked, "In some ways it has been a barrier... There are barriers in the fact that some people 'forget' to pay. 'Oh, it slipped through the cracks'... one [project] I worked [on for] six to seven months to be paid. And the primes... know we are not going to say anything." [#60]
- The Black American female representative of a public agency reported, "We've had subcontractors that have not been paid timely; some of them do not let us know." She added that "getting more help" would help the process. [#36]
- The Black American male representative of a public agency commented that small businesses could "drown" waiting on the big companies to pay them. [#32a]
- When asked if he has any suggestion for IDOT, the non-Hispanic white American representative of a supply firm commented, "I am not sure if I want to work for the State or not based on... payment terms." He added, "We may look at this and [ask] is this going to be a 60-day payment term, is this going to be 120-day payment term, how much of a headache is this going to be for us with the State. We will look at that and before we actually figure that out, we have to start working with them to understand that. There could be some concerns with us where we would say that that business is not worth it for us." [#6]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned professional services firm referenced

problems with prompt payment, saying, "The state does not pay their bills... We have to work outside the state." [AS#82]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white woman-owned architecture firm stated, "The state does not pay their bills. It's an adverse climate for doing business when the state does not pay in a timely manner." [AS#83]
- The female representative of a business commented on payment problems, saying, "That's always a problem when you're working as a sub. Sometimes more so than others. I mean, I've worked with some really great prime consultants that I think paid us before they ever got paid. But then we've got others that I know they got paid. And they've got their money in the bank and we're waiting for months after." [PM4#3]

Two interviewees reported that responsibility for prompt payment on IDOT contracts lies in the hands of the resident engineer on the job. For example:

- When asked if primes or agencies pay him in a timely fashion, the non-Hispanic white owner of a construction firm responded, "That is the one good thing I think about IDOT is their payment systems. If the resident engineer on the job gets his paperwork done, it goes through the system very quick... the problem lies in the resident engineer not in IDOT. Once it gets submitted the payment usually comes pretty quickly." [#4]
- The non-Hispanic white female owner of a DBE-certified, woman-owned construction firm commented, "I have the most trouble when IDOT is not the engineer on the job. They will have another firm be resident engineer; when they do that I usually have a hard time getting paid in a timely manner." [#35]

One interviewee expressed reservations about working with IDOT due to their reputation for slow payment. The non-Hispanic white male owner of a construction firm commented that he heard horror stories about the payment process, and since they're still a new, small company trying to build up cash flow, he isn't willing to take that risk. He added, "We do work with companies that do work for IDOT and they're telling me 120 [days], three months getting paid, that would be hard for me to swallow." [#46]

Two interviewees reported that prompt payment has not been a problem, or that they appreciate online payments. For example:

- The non-Hispanic white female owner of a DBE/WBE-certified construction firm stated, "I do like the way Illinois puts those payments online and I check them every morning..." [#60]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm commented, "The State, if you turn in your paperwork every week, you get the money." [#19]

- When asked to comment on her experiences with timely payment on IDOT work relative to other public sector work, the non-Hispanic white female co-owner of an electrical company commented positively on her payment experiences with IDOT. She said “I think IDOT does well, actually...This year, we did two little things for them and it seemed like they were quicker.” [#23]
- When asked to describe his experiences with payment on IDOT work, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm indicated that his firm had experienced past challenges but that the current payment situation was more positive. He explained, “We had some delays a few years ago, but once we got paid, they even paid us interest. It’s hard to complain. I feel like we have a pretty positive experience with getting paid from IDOT. It’s always on schedule and within terms and all that.” [#25]
- The female representative of a Hispanic American male owned DBE/MBE-certified specialty contracting firm reported that payment from IDOT “in most instances... have been good.” She added, “I think it is pretty good because they have a section on the website that says who got the job and when they get paid and that helps us.” [#19a]
- The Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm reported regarding IDOT, “I have worked with them and I found they pay. They are for the most part very professional in dealing with us [and pay on time].” [#10]

One interviewee commented that they do not continue working with primes who do not pay promptly. The non-Hispanic white American female owner of a WBE/DBE- certified construction-related firm commented, “We have taken major strides to eliminate companies that cannot pay us on time. That is part of our internal process.” [#58]

Two interviewees from public agencies reported that subcontractors are paid within 30 days. For example:

- When asked if she receives complaints from subcontractors regarding untimely payments, a non-Hispanic white female representative of a public agency responded, “Have not had any complaints.” They are getting their money within 30 days or else I would be getting a phone call from the DBE.” [#51]
- A non-Hispanic white representative of a public agency, when asked if payments to DBE’s are within 30-days, reported, “From what I am aware of, yes. I always tell them if they are not to let me know, and there have been some cases where they are not getting a payment from a prime; we go in and [enforce] prompt payment.” [#14]

F. Work with IDOT and Other Public Agencies

Interviewees discussed the following topics:

- Experiences working with IDOT (*page 62*);
- Learning about subcontract opportunities with IDOT (*page 68*); and
- Recommendations for improving state agencies' bidding, contracts, prompt payment, and other processes (*page 69*).

Experiences working with IDOT. Interviewees spoke about their experiences with public agencies in general and with IDOT in particular.

Many business owners interviewed reported working with IDOT [e.g., #10, #16, #19, #23, #34, #35, #37, #52, #57, #58, #60] Examples of comments follow:

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that the firm has worked for Chicago Transit Authority, Metro, and IDOT. [#18]
- The White male representative of a trade association reported that “all” of the association members conduct work for IDOT. [#38]
- The non-Hispanic white male representative of a majority-owned firm reported that the firm works regularly as a prime on IDOT projects. [#21]
- When asked about working with IDOT, the Black American male owner of a DBE/MBE-certified specialty contracting firm reported that 30 percent of his work this year was on IDOT projects. [#55]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm reported that 80 percent of her work is with IDOT. [#33]

Some business owners reported not working for IDOT, or that they see work with IDOT slowing down. For example:

- The Black American female owner of a DBE-certified specialty contracting firm reported that she has not worked for IDOT since 2014. [#2]
- The non-Hispanic white male representative of a majority-owned construction firm reported that 75 percent of his work used to be with IDOT. He added that now his IDOT projects are half. He remarked that “there is not much out there.” [#39]
- When asked why they have not attempted to pursue work with IDOT, the female representative of a non-Hispanic white male-owned professional services firm said, “Personally, I know a big reason why the [owner] has never gone after bidding for IDOT jobs is the budget issues and the concerns of payment... It’s just very tedious requirements.

Time consuming, material consuming paperwork. And there seems to be a large disconnect if you call administration within IDOT compared to field [representatives].” [#29]

- The female representative of a construction firm noted, “There was a time when we did a considerable amount of IDOT work. I’m trying to think if we did IDOT work last year. Maybe one small project. Nothing this year.” [PM1#1]
- The non-Hispanic white male co-owner of an engineering firm indicated past negative experiences with IDOT prequalification requirements. He explained, “At one time, when I was much younger, I sent in a [letter of] interest in everything that we were prequalified to do for four years, and I received no answer back from IDOT.”

He then added that his firm no longer attempts to pursue work with IDOT due to perceived biases against firms that lack a prior history of IDOT contracting. He explained, “Basically, [IDOT has] an inherent belief...that unless you’ve done work for IDOT before, you shouldn’t do anymore work for them. And until they get past that negative assumption [about] other firms, then it will continue.” [#30]

- When asked why they have not pursued work with IDOT, the non-Hispanic white male representative of a WBE-certified construction company expressed that it has more to do with their internal structure than a problem with IDOT. He explained, “I think, at least the opportunities that we have had... we were pushed [by public agencies] into doing the prevailing wages, which caused internal turmoil here... Sometimes our rates are already to prevailing wage, but sometimes they weren’t, so internally, it caused a little bit of strife.”

He went on to add that the firm has worked with IDOT once before, and is still interested in learning about opportunities from IDOT. [#43]

A few business owners discussed positive experiences while working with IDOT. For example:

- When asked about his experiences working with public agencies or IDOT, the non-Hispanic white owner of a specialty contracting firm reported that his experiences have been positive. He said, “We have done alright with that because the primes that we subcontract from are really in good standing with IDOT and do a lot of IDOT work... It has not been a real big problem for us because we are second-tier down from the prime. [The prime] issues the contract to us... the prime is the “go-to” for IDOT. [#3]
- The Black American male owner of a MBE/DBE-certified construction firm stated, “[Working on an IDOT job] was a positive experience; it was a profitable situation.” [#57]
- The non-Hispanic white owner of a construction firm commented on the importance of good relationships. He said, “For the most part... we have a very good relationship with the IDOT personnel and the offices we work with in this area... We feel that we probably have a better relationship with the IDOT personnel than with some of the private companies we work with.” [#4]

Some business owners discussed challenges they face when working with IDOT. For example:

- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm, when asked if he has attempted to work with IDOT replied, “Yeah, I tried to work with IDOT, but the ‘paperwork.’” He reported that he never was able to secure a contract with IDOT, explaining, “I never reached it because the people that I was dealing with at IDOT, the paperwork they wanted, did not really make much sense to me.” He added, “I never got past the paperwork because I am doing other things... [that do] not require all that paperwork.” [#11]
- When asked to comment on barriers to doing business in the Illinois marketplace, the non-Hispanic white male co-owner of an engineering firm indicated past challenges related to documentation. He explained, “Paperwork would be the main issues that we would have. We had issues with [a project] in a small town that were mainly issues between our engineer and the IDOT people with regard to a humungous amount of paperwork needed that took a lot of time. It’s one of those jobs where it’s sidewalk in a small town...and their regulations were like it was an interstate in Chicago. So, it made the engineering fees way too high a percentage of the project...So, we didn’t even build [the sidewalk] all [the way] to the town. The town wasn’t happy, [but] they didn’t seem unhappy with us— they were unhappy with IDOT.” [#26]
- The Black American male partial owner of a DBE-certified construction firm reported an experience with a prime’s lag in completing a project. He said, “...The prime was late in completing their work, and [was] being charged liquidation damages... knowing that we were the last [on the job], and if we did not finish in time, they would put the liquidated damages on us, and we could not afford that cost.”

He then added, “IDOT allowed the prime to complete our work and just kicked us off the project when we showed them the proof that this was not our mistake.” [#1]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm reported that she was advised to seek opportunities outside of IDOT. She continued, “[But] I am not going to just bash IDOT... Of all the lettings this year, I have probably gotten on a half to three-quarters of what we bid [with IDOT].” [#33]
- The representative of a construction firm referenced negative experiences while bidding subcontract work. He explained, “I submitted a bid proposal as a sub-contractor to a large prime contractor for a local municipality contract... This project had state, federal, and local funding and [was] governed under IDOT standards. [My firm] bid...lower than the awarded prime contractor’s unit price. [We were] not awarded the project. I contacted the prime contractor and they would not give me a reason for not accepting [our bid proposal].” [WT#4]
- The minority female owner of a WBE/DBE-certified professional consulting firm stated that although she “still likes IDOT,” it is not fair in giving opportunity to everybody. [#15]

- The female representative of a woman-owned business referenced problems with resident engineers on IDOT jobs. She stated, “They give us the delivery ticket. It says 41,223 pounds. You put it in... there’s no more left over. The resident [engineer] says, ‘Oh, no, I think that was only 41,117 pounds’... He’s got the delivery ticket in his hand... That’s very common. It happens on every job [with IDOT].” [TA1 #4]
- The representative of a construction firm commented on problems with payment and communication from IDOT. He noted that their prime contractor went out of business briefly following a project, and as a result, he had a very difficult time receiving payment. He added, “If it wasn’t for [the project residential engineer], [we] would not have received payment.”

In reference to the same project, he stated, “I have experienced bias from [specific IDOT contract compliance officer]... [That contract compliance officer] did not bother to contact [another individual] or me to find out the issues on [that project]. Three years later, [the same contract compliance officer] conducted a performance evaluation on [my company] stating that I did not submit [specific forms]. [The contract compliance officer] did not make me aware that I had to complete these forms. Then, in 2016, [the contract compliance officer] contacted me about submitting certified payroll on the project. The project got completed in 2014. [The contract compliance officer] should have requested these items at that time, and not 3 years later.” [WT#4]

Many interviewees spoke about their positive experiences with IDOT’s and other public agency outreach efforts. For example:

- When asked about IDOT’s outreach efforts, the non-Hispanic white owner of a construction company commented, “We have been to some of the outreach programs... some of the area prime contractors and the area DBE contractors... We can all get together and meet each other and talk, it is good where you can put a name to a face and kind of try to develop a personal relationship.” [#4]
- The Black American male representative of a public agency reported, “They go out to local groups... If I see a contractor out doing work... we approach them and ask if they are DBE certified... We host a specific program, but at the same time our consultants are supposed to reach out to the consultants on the managerial side, they are supposed to reach out as well.” He added, “last year we had at least fifty workshops that we hosted ... if you want to conduct business with IDOT, we will help you succeed.” [#20]
- A non-Hispanic white female owner of a DBE-WBE-certified construction firm reported “... I think efforts are made by IDOT... I call it ‘education’ as opposed to outreach. Some marvelous programs [existed]. I faithfully attended these for 37 years. My reason being, support what they do because I think education is key and I never walk away without taking something from a meeting... I think that IDOT makes the effort” [#53]
- The Subcontinent Asian American male owner of a DBE/MBE/MWRD-certified engineering firm said, “IDOT is very helpful when they helped intern me, they taught me QuickBooks,

they taught me all the capability statements, everything. This is what IDOT has helped me [get] where I am right now.” [#7]

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that “IDOT outreach effort [operates] in good faith. A good example is the DBE conference.” [#18]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm reported that IDOT’s outreach is good. The female representative of the same firm commented, “I think they are really good. When we have an opportunity, they are always there. They give us a call back; they help us out.” [#19a]

Another female representative of the same firm added, “I agree... we have been to two-to-three outreach meetings or sessions each month.” [#19b]

- The Black American female owner of a DBE/MBE/WBE-certified specialty services firm reporting liking that IDOT regularly sends emails to its contractors. [#52]

Some interviewees reported limited outreach from IDOT, and other related challenges regarding outreach efforts. For example:

- The Black American male owner of a DBE/MBE-certified specialty contracting firm commented, “I think it is limited. I think they really reach out to the general contractors rather than us... it is not direct communication with [IDOT].” [#55]
- The Black American male owner of a MBE/DBE-certified construction firm said that IDOT’s outreach is “non-existent.” [#57]
- The Black American male representative of a non-profit minority business association, when asked his opinion of IDOT’s outreach, stated, “I think IDOT under the current piece have fared poorly in my honest opinion. Even though I have a great deal of confidence in this administration, I do not think IDOT, from my perspective, has done a very good job. We used to meet with the Secretary of Transportation once a month... but the fact of the matter is they are not sitting down talking to the African American community at the level it used to happen on a continuous basis. There is not the outreach.”

He added, “There is not the community involvement in terms of the outreach... that I used to see on a continuous basis. In addition, I bet you if you watch the numbers, that the numbers reflect a significant decline in minority participation, especially in the African American participation. If you track it you’ll find significant downturns across the board.” [#37]

- When asked about IDOT’s outreach efforts, the non-Hispanic white owner of a construction company commented, “I have noticed at some of [the IDOT outreach] meetings that some of the IDOT personnel do not understand the cost of being in business.” He added, “When they try to recruit their minority subcontractors and try to help them, they do not necessarily understand the cost of being in business as far as the additional costs.” He further reported,

“It is not just the cost on the job and what it takes to manage the job, finance the job, put the estimates together, and I think that could be a problem on how IDOT is trying to lead these subcontractors.” [#4]

- Regarding public agency outreach to businesses, a Black American male representing a public agency stated, “It’s not very good... in the area that we are, it seems like there’s not a lot of opportunity for a minority contractors or DBEs....”

He went on to add that he does not receive feedback on the effectiveness of the agency’s outreach. He reported hearing, “Nothing other than doing it [outreach] offseason, or doing it when it rains. But you can’t predict the weather.” [#32]

- When asked about receiving outreach about IDOT opportunities, the non-Hispanic white male representative of a WBE-certified construction company said that they do not receive communication from IDOT. He added, “I don’t know how to get into it. I’ve never researched it out. I’ve never gone down that road too awful far.” [#43]

Some interviewees commented on location or time constraints that impact attendance at IDOT’s outreach events, and some opportunities for improvement. For example:

- Regarding subs attending outreach events the non-Hispanic white female owner of a DBE-WBE-certified construction firm said, “I would place some of the blame on the subs, [the outreach events] are free, you do not even have to pay for these things, and they do not attend. Now, I would also defend the subs because many of them do not have staffing, be it office staff, or a crew, that they can walk away for two or three hours and attend a session. It is a double-edged sword, but I do think that IDOT makes that effort.” [#53]
- A non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm commented that his firm was unable to participate in outreach sessions due to the firm’s location. He explained, “When anything happens, it’s always like ‘here’s one [outreach session] in Chicago, and one in Springfield’ ...I understand why [IDOT doesn’t] have one in Marion, because there’s no people down here [in southern Illinois]... So, we get all the [invitations], we just don’t participate to the extent we would, if we were, for example, a Chicago-based company.” [#25]
- The non-Hispanic white female representative of a public agency reported that IDOT often holds its events in the winter because they know [contractors] are working during the summer and do not come. She also stated, “We do not get a lot of DBEs that show up. It varies, but this is one thing right now... each district is responsible for having two workshops.”

When asked if her district thought about hosting events after business hours, the same representative commented, “Yes... [others’ after-hours events] seem to be [well attended]... in [our] district, we have not had one after hours... [although] they are trying to accommodate more.”

She further commented that “maybe there is not enough outreach at IDOT,” adding that “it is not working.” She commented, “I may have gotten some complaints about it... I have gotten more negative than positive on the workshops... To make outreach better... we need to have, besides the once a year conference... we need to set up more workshops or events for the DBE’s and prime contractors together, suggesting maybe after hours. I do not see a lot of that... I need to be promoting this, not just an e-blast.” [#51]

- The non-Hispanic white male representative of a majority-owned construction firm recommended that IDOT hold outreach events and training, especially in the winter. [#21]

Learning about subcontract opportunities with IDOT. Many companies explained that it was difficult for them to learn about subcontract opportunities. Others reported effective ways of learning about potential subcontracting, or that prime contractors reach out to them.

Challenges learning about prime and subcontract opportunities with IDOT. Some faced challenges when seeking new opportunities with IDOT, for example:

- The non-Hispanic white female representative of a women’s business association remarked, “I would... guess that... younger companies that are... trying to get their foot in the door and really trying to prove that they can do this work, if they are bidding to any entity or IDOT directly or to a prime, that there is a big frustration level that they have bid any number of times and have gotten nowhere.” [#16]
- The non-Hispanic white female owner of a DBE- WBE-certified construction firm reported, “The last [IDOT] letting did not have one project that we were interested in bidding. The bulk of the money is slated for I-74. We cannot work I-74 and make money [as] it is too far... There are very few projects out there for a contractor. The landscapers will travel, that is a given; the trucking companies clean house as they are trucking companies; but contractors like us, to get our equipment down there that is expensive... there have been very few IDOT opportunities of late, local roads a few... We probably spend a minimum of an hour a day just looking at opportunities that are out there, and it is local roads.” [#53]
- The Subcontinent Asian American male owner of a DBE/MBE/MWRD-certified engineering firm reported, “The way I attempted to work with [IDOT] is that I contacted the consulting firms who are working on the jobs. Because of the way my prequalification is I cannot go on my own on any specific job, so I have to team up with some larger firm and it is totally up to the larger firm to decide if they want me to be on their team.” [#7]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm stated, “I feel that most of the time it is a waste of time... For example, I bid to a general contractor... if he feels it fulfills his goal doing [a specified task]... to keep his guys busy, that is what he will do... he is getting a better percentage on his part of the contract... and it is killing us... If you want to put this on a fair market, there should be DBE participation.” [#55]

- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm stated that he did not get most of the contracts that they bid on with IDOT. However, he added, “General contractors will always tell you that you are too high, always.” [#19]
- The Black American female owner of a DBE/MBE/WBE-certified specialty services firm commented, “You go to the pre-bid conference for IDOT work, you get the bid, the requirements in the bid sometimes are so extreme that for a small company it is difficult just to fulfill the bid process... I cannot say when you look at the bid, IDOT is being unreasonable... there are a lot of safety issues and concerns when you are doing any type of construction.”

She added, “[However] I found it challenging every time I attend the pre-bid conferences for IDOT, that would be hosted by [prime company], the bid application was ... completely insane.” She further said, “You would go there to get the information, you will feel encouraged then you get home and look at that bid package... and the bid due date was a month from the pre-bid conference. There is no way I can fulfill all those requirements within a month.” [#52]

Recommendations for improving state agencies’ bidding, contracts, prompt payment, and other processes. A number of business representatives and business owners commented on or made suggestions for improving other Illinois state agency procedures.

- A non-Hispanic white owner of a construction company recommended that IDOT make the information available immediately instead of holding on to it, which can cause the contractors to rush. He explained, “It would be nice that when they post the letting they could get the jobs out and available for view... It would be nice if all that stuff was ready and when they announced the letting that the clients and proposals would all be available at that time.” He stated, “IDOT has lost a lot of personnel and I think they have trouble getting all that stuff downloaded... and checked.” [#4]
- The representative of a non-Hispanic white female-owned architecture firm indicated that communication from the agency has been a problem for their firm, saying, “We have never received call backs or letters declining services... They need to update the way they contact consultants, and make an effort to level the playing field and not show favorites.” [AS#48]
- The non-Hispanic white female representative of a women’s business association suggested that IDOT offer direct pay. She added, “I can understand the State’s side or IDOT’s side of where [IDOT] only has so many people and they can only do so much. So administratively, the real fix would be if there were enough money to where they could fully integrate technology. Unfortunately, they are not there. It is expensive; money is not there.” [#16]
- The male owner of a construction firm expressed frustration with IDOT’s five-day period following letting dates. He explained “Why are they given five days to seek DBE goal to reach their DBE goals for their contract?... A general contractor should automatically have their DBE participants already in the contract the day they submit their bid into IDOT. They’re given five days extra to shop the pricing.” [PM3#2]

- The female representative of a construction firm recalled frustration with a situation where she filed a claim with IDOT because money was held back from her firm by a prime contractor. She explained, “You cannot sit a DBE across the table from every IDOT employee or four representatives from that company and expect to get to the bottom of something... I’m not intimidated... but I know that to speak openly means no [more] work.” [PM1#1]
- When asked if her experience with IDOT’s bid process was easier or harder relative to other public sector work, the non-Hispanic white female co-owner of an electrical company indicated that she thought it was harder due to requirements related to hard-copy delivery. She explained, “It’s harder because we had to...deliver the bid.” She added, “For a small business. If you have 50 employees in an office, I’m sure [that business] can free somebody up to go to Springfield. We don’t have that.”

She went on to recommend an online system for bid invitations, saying “That’s what a lot of the other places do now...online bidding [for IDOT projects] would be great.”[#23]

- The non-Hispanic white male representative of a majority-owned construction firm stated that among the IDOT districts there are major differences in the organizational operations that need improvement. He said, “Traffic control, flagging, regional engineers, union agreements are all different and present challenges for both the business and small business.” [#21]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm indicated regarding contracts, communication is missing between the contractor and the state engineer. He suggested that by adding a panel and having an open forum, IDOT might solve the problem. [#18]
- The Black American male owner of a MBE/DBE-certified construction firm commented, “Payment, in a timely fashion... I think first off, it touches a lot of people’s hands, the paperwork, before it really gets to the point where it gets to where it gets signed off on. So, I think... it is something how they are working internally, not having enough people handling that stuff or it is not their money so they are not rushing.” [#57]
- When asked to comment on approval of work by prime contractors, the non-Hispanic white male representative of an industry association commented that he does not agree with the State controlling payment to subcontractors. He conveyed that if the State wants to act as the prime contractor, then the state will be responsible for the entire process; the prime contractor will not be responsible. He commented, “It’s a corrupt system and it will not work” He stated, “The state is asking for suicide... they will not be able to manage the sub community if they take this on.” [#17]
- The Black American male representative of a non-profit minority business association, when asked about the experiences of the membership in securing opportunities with IDOT, stated, “Let me give you the biggest recommendation... The EEO office cannot be under the district... because the district is forcing people to agree with their prime contractors. Because it used to be, the EEO Office reported directly to the Secretary... but they did not

come through the district. So, the district fundamentally can change the score, do other things that are not very good for business when you have to report to the district engineer who's really bigger obligation is to the prime contractor. It is a problem in and of itself. You have to move the EEO offices away from the authority of the district... It used to be that way. We've gone back to the old way, and I think it has created a problem for us, to be quite frank." [#37]

- When asked about any feedback relative to pursuing work with IDOT, the female representative of a trade association expressed that she has received calls from several members regarding the cumbersome nature of the pre-qualification process. [#40]

Two interviewees expressed trepidation about IDOT's follow through in regards to disparity study results. For example:

- The female representative of a business development center expressed concerns related to IDOT communication and follow through. She stated, "One of the things that I hear from contractors who come in is the difficulty of getting responses back from IDOT... And let's say, for example, [this study determines] that [IDOT] needs more minorities or African American participation. The community that I come in contact with is not confident that IDOT will reach out to them or respond to them... to address some of the disparity or provide the resources— and when I say resources, I mean technical assistance—for that contractor who may be deficient in some area to overcome that deficiency."

She went on to add, "[BBC will] provide some excellent recommendations, I'm sure. What I'm not so sure about is how those recommendations will translate into increased minority participation. And I'm specifically referencing African American men and women." [PM4#1]

- The male representative of a government office commented, "A couple of years ago the county saw that there was a disparity in minority participation with contractors. We actively—proactively—created a program to provide technical assistance to minority contractors. And then presented... that [program] to IDOT knowing that the disparity in [that district] was a large problem. But again, that fell on some deaf ears. And what we were going for was to attempt to get some assistance from IDOT to help us with providing technical assistance or some funding support to continue our program... You know, we identified the issue. We even created a program to help address the issue. But then IDOT... is absent from that solution. So, I hope that in going forward in this new disparity study that there is action taken afterward." [PM4#2]

G. Other Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Denied opportunity to bid (*page 72*);
- Bid shopping and bid manipulation (*page 72*);
- Treatment by prime contractors and customers during performance of the work (*page 74*);

- Unfavorable work environment for minorities or women (*page 75*); and
- Any double standards for minority- or woman-owned firms when performing work (*page 77*).

Denied opportunity to bid. The interview team asked business owners and managers if they experienced denial of the opportunity to bid.

Many interviewees indicated that they did not experience or have no knowledge of denial of opportunities to bid. [e.g., #11, #12, #13, #16, #18, #19, #19a, #35, #53, #55, #57]

Several other interviewees reported being denied opportunities to bid, or not knowing, but suspecting, denial of opportunity for bid might have occurred. For example:

- The non-Hispanic white American female owner of a WBE/DBE- certified construction-related firm, commented, “I have not been denied an opportunity, but I have seen all the times we have read receipts [on an email]... and we will see it was trashed, not read.” [#58]
- The non-Hispanic white owner of a specialty contracting firm reported that by not owning his own material plant he is denied opportunities to bid on projects by stating, “Through the fact that we do not own a [materials] plant, that eliminates us from a lot.” [#3]
- Although the non-Hispanic white male owner of a construction firm had not been denied any opportunity to bid on IDOT jobs, he stated, “[With] private bids... you never know.” [#4]

Bid shopping and bid manipulation. Business owners and managers often reported being concerned about bid shopping, bid manipulation and the unfair denial of contracts and subcontracts through those practices.

Many interviewees indicated that bid shopping and/or bid manipulation exists or they felt that it might be prevalent. [e.g., #11, #42, #59, #60, PM6#4] Examples include:

- The non-Hispanic white female owner of a DBE/WBE certified construction firm stated, “It happens all the time.” She added, “I think they have a right to contact someone for a bid, I do not think that right extends to the telephone call that says, ‘I have got a bid of \$5,000 from Subcontractor A, will you do it for \$4,000?’” [#53]
- The Hispanic American male owner of a MBE/DBE certified construction firm commented, that he has experienced bid shopping, He reported phone calls where he was told, “You know what, you are in the running, can you help me out.” He added, “That tells me right there... which means I have to drop my price. The day of letting after they changed the rule, I felt it.” [#56]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that bid shopping and bid manipulation “goes on repeatedly in the industry... it’ll go on forever.” [#18]

- A non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm suggested that his firm had experienced unfair bid shopping on smaller local public sector work, but not at the state level. He explained, “We have heard of and experienced [bid shopping] on a local level... In our experience, that can be a big problem with local governments, because there’s not as much oversight in some of those smaller communities... So, unscrupulous people that we’re aware of did ‘this and that.’ That can be a problem. It’s hard to compete with that when you’re trying to do everything above board and it’s frustrating because you know other people aren’t.” He added, “As far as the state is concerned, we don’t experience a lot of that.” [#25]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm stated, “I think that ‘seven days for [primes] to get the bids in from the subs’ ... I do not know who did it, but they did not have good intentions for [subs] when they did it.” He added, “Now it allows the contractor to come to me and say ‘look, here is his number’ ... they can shop now. They increase the chance to shop now within those seven days... I feel that it increases the chances to shop.” [#55]
- The non-Hispanic white female representative of a women’s business association stated, “Bid shopping still goes on... but not to the extent that it used to.” [#16]
- The representative of a construction firm commented, “I have also experienced bid shopping, where prime contractors receive [my company’s] bid proposal, then they take [it] to another contractor to bid at a price lower than my bid. I do not receive any opportunities or calls from prime contractors, architects, engineers, owners, municipalities, [or] state and federal agencies, to perform work on projects that don’t require minority participation.” [WT#4]
- The representative of an excavation firm commented on problems with bid shopping, saying “They come back to me two, three days later [and say] ‘You sure? Somebody could do lower... [Is that price] where you want to be?’ If my number goes in at the beginning, that’s how it needs to be. Otherwise it kills you. You can’t make any money. They beat you down and it’s horrible. I mean, I’m sure they do it to everybody... But the bad part about it is they’re bid shopping. Point blank, period, they’re bid shopping. It needs to stop.” [PM6#6]
- The female representative of an MBE-certified construction firm identified bid shopping as a barrier to their firm, commenting, “When MODOT or IDOT changed that to three days, that just opened up the doors for them to bid shop [with DBEs]. I know they do it... It used to be whenever the general contractor had to turn in the DBE that they were going to use the day of the bid. Now they’ve got three days to shop and look for somebody lower. So they need to get back to that.”

She added, “They call me. ‘Can you, can you do any better on your number?’ ‘No, that was my number when I bid. If I could’ve bid better, I would’ve gave you a better number that day.” [PM6#2]

Several interviewees do not perceive bid-manipulation and/or bid shopping as prevalent, or are not bothered it. [e.g., #12, #19, #35] For instance:

- The Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm stated, "... We are contracting directly with the State. We do not have to go with the personalities of the general or prime. They cannot shop us and they are told who they are going to deal with." [#10]
- The non-Hispanic white male representative of an industry association stated that bid shopping is fair and that the sub-contractor should know their business. [#17]
- The non-Hispanic white male owner of a specialty contracting company said, "That is all part of being in the business. That is what keeps the business legit." [#3]

Treatment by prime contractors and customers during performance of the work.

Several business owners described their experiences with unfair treatment by contractors and customers during performance of work. For example:

- The non-Hispanic white female representative of a women's business association reported knowledge of unfair treatment by primes. She remarked, "Highway work... I have heard a number of times where a contractor is working on a project and the prime says, 'Hey... after today you are done... we are bringing somebody else in.' And they bring somebody else in and by the time you are able to connect with IDOT and get it resolved it is over." [#16]
- The non-Hispanic white female owner of a DBE-certified woman-owned construction commented, "Some primes treat you really good and some are asses... For the most part, I know which primes I like and which ones I need to watch." [#35]
- The non-Hispanic white female owner of a DBE/WBE-certified construction firm reported, "Just this week, I got some blueprints for [a specialty task] and I sent an email to the prime saying, 'When do you need this done?' ... [The prime] said, 'Tomorrow.' I said, 'What happened? Why you did not call me?' Whether they legitimately forgot to call me or were just trying to put me under the gun that is hard to say... Another issue that happened [was when] I was supposed to be installing [specialty construction work]... [the prime] stated he [conducted the installation], which was part of [my] contract." [#60]
- When asked about treatment by customers, the female representative of a non-Hispanic white male-owned professional services firm said, "It's just the regard for [women] in this profession...It's a never ending stream of they'll walk in and ask, 'Is there a guy here to [do this task]?' And I just smile and like, 'Well no, there isn't a guy. But I will if you'd like.'" [#29]

Many business owners reported little or no experiences with unfair treatment by prime contractors and customers during performance of work. [e.g., #11, #19, #33, #59, #60] Examples follow:

- The non-Hispanic white male owner of a specialty contracting business when asked if he has ever experienced unfair treatment during the performance of the work reported, "Everything seems to go smoothly." [#3]

- A Black American male owner of a MBE/DBE certified consulting firm commented, “Whomever we have teamed up with, going through the statement of qualifications or the RFQ process, you start to have an intimate relationship with [the prime] so you do not have a situation where they are just going to treat you however.” [#12]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm reported, “They love my work.” [#11]
- The non-Hispanic white male representative of an industry association stated that it is all right for the prime contractor and customer to make sure the work is being done correctly; however, he added that they must “ensure that they are treating all of their sub-contractors with fairness and respect.” [#17]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported being “treated really well.” [#18]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm commented, “I feel that the general contractor does protect us to a certain extent....” [#55]

Unfavorable work environment for minorities or women. A number of interviewees reported examples of unfavorable work environment specifically for minorities or women. Others reported no awareness of any unfavorable work environments.

Some interviewees reported experiences with working in unfavorable work environments minorities or women. Examples of comments include:

- The non-Hispanic white female representative of a women’s business association commented, “There is the initial discrimination or harassment [towards] women on construction sites... Women have to deal with the sexual bias. In addition to that, they have to deal with the sexual harassment. It still does happen now.” She added, “I would like to think it does not happen to the same extent it used to happen, mainly because of tolerance levels and corporations have been sued enough times. [However], it still definitely exists.” [#16]
- The non-Hispanic white American female owner of a WBE/DBE- certified construction-related firm reported, “Not everybody knows that [we are a woman-owned firm] and then when they find out... I have been told, ‘We do not do business with woman-owned companies.’ They are only using us because they have to. We have had companies try to price fix and try to tell us what they would pay us or else they will not use us... I have gone out on job sites and they will [ask], ‘Why are you here?’ They will call me ‘baby’ and ‘sweetie’ or whatever and it is very inappropriate... I have been in business long enough to earn respect so it happens less now than it has in the past.” [#58]
- The non-Hispanic white female owner of a DBE- WBE-certified construction firm commented, “A state consultant came in on the project, was very obviously racist... comments [were] made about my employees being of Hispanic background. It was so deep that another subcontractor, a landscaper, talked to me about the issue with his employees.”

She added, “They were treated so badly that several of them did not want to work on this project and it was a very large, high-profile project.”

When asked if something was done about that incident, she replied, “Unfortunately, the EEO for District 2 had not visited this project often and... said they were not aware [of the incident].” [#53]

- The Black American female owner of a DBE/MBE/WBE-certified specialty services firm commented, “Construction is construction. However, would it be nice if there were two ‘Porta Potties’... it would be nice, sometimes, to not have to hear ‘you and I [have] the same haircut’... I know they are chauvinists... I have noticed [it], especially when you are out on the road.” [#52]
- When asked about unfavorable work environments for minorities or women, the female representative of a non-Hispanic white male-owned professional services firm referenced past negative experiences. She said, “I’ve had inappropriate comments. Obviously I expect it from truck drivers coming through here all the time, that I’m used to... But there have been inappropriate comments made [about] my appearance, my age, and my gender, by the truck drivers [and] by our former IDOT inspector – supervisor – that came around and did monthly rounds. I have been asked to lunch more times than I can count, and he always showed up here at 11:45 knowing that we close from 12:00 to 1:00 for 15 years. But in addition, it’s been said more times than I can count that it’s good for business to have a young attractive girl running your office... because the message is always better delivered with a pretty smile.” [#29]
- The non-Hispanic white female owner of a DBE/WBE-certified construction firm reported, “Maybe 20 percent of the time we have some issues... there was one time I had to bring the ‘EO’ officer into a job, and that was probably in 2011 or 2012....”

She added, “We were doing a [specified task]... and the inspector was with us... approving all the work we did... all of a sudden... nothing meets the standards.” She further said, “Our biggest hurdle with IDOT is why pay [the inspector] to sit there, and he is supposed to be approving our work as we go... if anything is wrong, they are there, but he will not say anything and then at the end of the job they come and say, ‘No, you did all of this wrong’.” [#59]

- The non-Hispanic white male co-owner of an engineering firm, acknowledged awareness of unfavorable work environments for female engineers. He explained, “... Sometimes, I think, contractors aren’t as willing to go along with what a woman tells them to do. And I base that on our women engineering employees.” [#64]

Some interviewees reported no experience with unfavorable work environment for minorities or women. [e.g., #18, #19, #33, #35, #55] Interviewee comments include:

- The non-Hispanic white male owner of a construction firm stated, “I do not think so. There is a set of rules, and IDOT has their specifications and plans, and as long as you abide by [IDOT’s] specifications and plans it is pretty well even across the board for everyone.” [#4]

- The Hispanic American male owner of a MBE/DBE certified construction firm reported that although women are wanted in the industry, few join. He said, “Generally you do not see that many women in ironwork [for example], but the women that I do know... in it, for the most part, are more than capable of doing their job.” The same business owner added that in his industry there are no barriers or disadvantages for small firms based on race or gender. [#56]

Any double standards for minority- or woman-owned firms when performing work. Interviewees discussed whether there were double standards for minority- and woman-owned businesses.

A number of business owners and representatives reported double standards based on race, ethnicity, or gender. For example:

- The Black American male partial owner of a DBE-certified construction firm reported that “Engineers treat minority companies and subcontractors completely different than they do a prime contractor... They know the prime contractor has more protection, more lawyers, and a lot of their buddies are friends with their bosses or the directors.”

He added that he has experienced a prime engineer treating him as if he was incapable of doing the work. He said, “They were almost questioning our accountability, our credibility every time we were there. I then have to prove to the engineer that I know what I am doing [and] that I have been doing this prior to him... [It’s] not just seniority engineers, they send their brand-new people out there too. People I could have trained myself.” [#1]

- The non-Hispanic white female owner of a DBE-certified woman-owned construction commented, “Men like to work with men, honestly... it is pretty obvious men would rather work with men.” [#35]
- The female representative of a woman-owned business relayed an anecdote concerning inequality in bonding approval. She said, “[A colleague of mine] was married, [then] got divorced... She got the company in the divorce. She was certified as a female-owned business, had been involved in the business to some degree, but was forced to become totally involved in the business after the divorce. [Her former husband] was able to get... performance and payment bonds on projects. She couldn’t. Same business, same work, same everything... But he could get bonds, and she couldn’t get bonds. So, I mean, there’s been a double standard for 100 years. The double standard hasn’t gone away. It just hasn’t.” [TA1 #1]
- The non-Hispanic white American female owner of a WBE/DBE- certified construction-related firm stated, “I have been told... these contractors prefer MBEs to WBEs when we are on jobs... because they get the 25 percent instead of the five, so we are very insignificant.” [#58]
- The non-Hispanic white female representative of a women’s business association described women as being “all things to all people.” [#16] She explained, “The man goes to work [and]

works all day. Then he can go have a beer with the guys at night... [and] go home... Women, they are out on the job site all day long... [At] three o'clock, when their employees leave, they go back to the office and they have to do the back-office stuff. They have to do the payroll, they have to check everything... and then they have to go out and do some of the industry networking... [and] make it home in time to go to bed...." [#16]

- The female representative of a woman-owned business commented, "Anytime somebody... learns what I do, the first question is, 'Oh, what does your husband do?' It's this automatic assumption that my husband must be involved somehow with my business." [TA1 #4]
- The female representative of a woman-owned business expressed, "How many times have they called for 'mister' on the phone... they want to talk to the president. You know, they refer them to me. They hang up on me." [TA1 #1]
- The Black American female owner of a specialty services firm reported unfavorable treatment based on gender. She commented, "I would not call it discrimination, but women are looked at, and I have been in several meetings where we are looked at as if we cannot handle what is being given. One instance was with PACE. When we tried to go forward with PACE, it was [as if we were asked], 'Can you really handle it?' So, it was a disadvantage I believe... women are looked at as if we are in less control... like we cannot handle what they are giving us."

When asked if she will bid on a PACE contract again, the same business owner said, "I was discouraged, very discouraged. So, it was a disadvantage there because I walked out [wondering], 'What could we do?'" [#5]

- The female representative of a woman-owned business expressed, "When a woman goes for a loan, or when they go for bonding, one of the questions is 'are you married,' and if the answer is yes, they insist – you have no choice – they insist that the husband sign the loan, so that they are personally responsible. Now vice versa, there are a number of male-owned companies, when they go for a loan, they are not asked to put their wife as a cosigner... And they also are not an indemnitor on a bond. So banks and bonding companies treat women differently than they would a male-owned company. And it's probably also true of minority-owned companies. I am unaware... of the minority-owned companies who are male whose wives, if they're married, are asked to cosign a loan. They somehow just don't care about the wife of let's say a Hispanic contractor, but they definitely care about the husband of a woman-owned business." [TA1 #2]
- The female representative of a women-owned business commented, "My husband is retired. I go to do the loan. They say, 'We need your husband to stop by to sign.' I said, 'For what?' 'Well, we need his personal guarantee.' I said, 'he's not earning any money.' And they said, 'it doesn't matter.' And they wanted me to put up the life insurance policy." She added, "They don't even ask if the wife makes more than the husband, because they don't care."

She continued by saying, "This is a bank with whom I've done business for 25 years. I said, 'Can you look over your records? Who has always written the check for the mortgage, for

the trucks, for whatever, the farm?'... I'm the one who has always paid you for 25 years. [The bank] has never received one check from my husband, ever. But they still had to get my husband." [TA1 #8]

For a few business owners, double standards did not exist. [e.g., #11, #55] For example, the non-Hispanic white male representative of a DBE-certified woman-owned construction firm indicated that there are no double standards for minority- or women-owned firms when performing work. He commented, "[The] project manager just wants to get the work done." [#18]

H. Additional Information Regarding any Race-, Ethnicity- or Gender-based Discrimination

The study team asked interviewees about whether they experienced or were aware of other potential forms of discrimination affecting minorities or women, or minority- and women-owned businesses. This part of Appendix D examines their discussion of:

- Any stereotypical attitudes about minorities or women (or MBE/WBE/DBE) (*page 79*);
- Any "good ol' boy" network or other closed networks (*page 80*);
- Any other allegations of discriminatory treatment (*page 83*); and
- Factors that affect opportunities for minorities or women to enter and advance in the industry (*page 84*).

Any stereotypical attitudes about minorities or women (or MBE/WBE/DBEs).

A number of interviewees reported stereotypes that negatively affected minority- and women-owned firms. [e.g., #18, #55, #59] Examples from the in-depth personal interviews include:

- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported, "We are making strides, but there are still those issues there." [#60]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm commented, "As far as when I do not know something, where do I go and not look weak? Because with some people... when I ask for help, it is construed as [if I] do not know what [I] am doing." [#59]
- The Hispanic American male owner of a MBE/DBE-certified specialty contracting firm reported, "I do not like... the misconception that... we are getting 'special treatment.'" [#19]
- The female representative of a woman-owned business stated, "It's assumed that our husbands run our businesses... and we had a guy from [a company] tell us that one time... he said, 'Well, you little ladies just stay home and bake cookies. You don't need to worry about this stuff'... And he almost got attacked after that came out of his mouth. And people still talk about it to this day. But it's still the same. I mean, you know, they revert to their old ways all the time." [TA1 #1]

- The Black American female owner of a MBE/WBE/DBE-certified specialty services firm reported, “When you are MBE/WBE it is obvious. You show up, they have the meeting for the subcontractors [and] we are sitting there going over timelines... It is obvious [that] she is the woman, she is [Black American].”

However, the same business owner added, “The DBE portion is something totally different because you do not have to be [Black American] to be DBE or female. You have to fall under certain income, and that is really when you start to see that ‘green-eyed monster.’ You hear the rhetoric that because your company now is considered the... ‘poor kid’... the only reason you are here is because you are on scholarship.” [#52]

- When asked to comment on stereotypical attitudes about minorities or women in his industry, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm, acknowledged awareness of stereotypes related to women in the surveying industry, but also indicated that he didn’t necessarily agree with those stereotypes. He explained, “If I were to say anything [about stereotypes], it would be stereotypes about women doing outdoor survey work... That creates some barriers of entry for women, because there’s that kind of old-fashioned attitude about men go out in the field and hack stuff with machete and that kind of stuff. There are stereotypes about that. ‘Women don’t want to do that, women stay away from it, men do that kind of thing.’ ... Those stereotypes aren’t necessarily true. A lot of women love doing that stuff. But the [stereotypes] do exist.”

He then added, “I’m not familiar with [stereotypical attitudes towards] racial minorities, because there aren’t a lot of racial minorities that we deal with in our industry. There’s hardly anyone to make stereotypes about if someone were doing it.” [#25]

Any “good ol’ boy” network or other closed networks. Many interviewees reported the existence of a “good ol’ boy” network or other closed networks. [e.g., #55, #59, #60] For example:

- When asked about the existence of “good ol’ boy” networks, a Black American male owner of a DBE-certified construction firm stated that persons from different ethnicities usually give work to business owners with similar “color [to] their skin.” [#54]
- Regarding “good ol’ boy” networks, the non-Hispanic white female owner of a DBE-certified woman-owned construction firm reported, “I know companies that refuse to use DBEs... Yes, there is a game going [on] out there, definitely.” [#35]
- A non-Hispanic white female owner of a WBE/DBE-certified construction firm reported, “It is there. It is alive and well... We have a strong ‘good ol’ boy’ network. I could write a book on that subject... I think that it is certainly out there....” [#53]
- The Black American male owner of a MBE/DBE-certified specialty contracting firm remarked, “My biggest hang up with the industry is that it is hard to get in with the ‘good [ol’] boy’ network....”

He added, "I find the biggest thing about being a minority contractor is that the other minorities do not share their information with you, and some of the bigger contractors will not do business with you because they are under the 'good [ol'] boy' network..." [#8]

- The non-Hispanic white female representative of a women's business association commented, "Absolutely, that was the whole reason... organizations were founded, because they were excluded."

She added, "I think it has become a bit more open. I think there [are] still some areas where there is a lot of resistance to having [minority] and women participation in with the groups." [#16]

- The Black American male partial owner of a DBE-certified construction firm reported that when his firm complained about his prime, his prime told other primes, "This guy is causing trouble for me." After this, he felt that his firm stopped getting the jobs they normally would. [#1]
- A Black American male owner of a MBE/DBE-certified consulting firm commented, "I think that... just the way that the Chicago market is... you have to get into those networks. That is the tough part. Once you are in and they see your work, it gets better for you. Until that point, it is really tough for you to break into the network." [#12]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm commented, "It is still the 'good ol' boy,' and it is going to [continue to] be the 'good ol' boy' ... It is what it is." [#11]
- The non-Hispanic white male co-owner of an engineering firm acknowledged the existence of closed networks. He stated, "It's there, but I think it's less than it used to be. Now maybe it's because I'm not in a good old boy network anymore. I think we see the good old boy network more in the private sector, because clients use the same people over and over again, and they go to their country club and see them there. I don't think it's as strong in the public sector." [#26]
- The non-Hispanic white male co-owner of an engineering firm acknowledged awareness of closed networks and referenced their benefits to his firm. He explained, "I benefit from them greatly, because I have a lot of friends in the niches that I serve, and they give me the work rather than give it to others. You're never going to get away from who you know being an important part of getting business... That's the way life is. Now, if you happen to be a woman, and you get to know the people, then you'll be [in] the 'good ol' boy' network too."

He went on to add, "I have [a closed network]. I know people all over the state that give me work... which is why I'm successful... And when I retire in the next few years... my position will be taken over by a woman... She'll become the operating partner, and she'll have it for a few years, and then one of the other engineers will take it. She's got the 'old boy' network too, because she's been around." [#30]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned architecture and engineering firm indicated that they have had trouble getting contracts, adding, "There seems to be some elements of 'Who do you know' to get contracts." [AS#67]
- The representative of a Black American male-owned construction firm expressed that "It's a matter of who you know, not what you know. It's an uneven playing field." [AS#68]
- When asked whether there are any barriers to starting or expanding their business, the representative of a Black American male-owned professional services firm stated, "Illinois has to be the worst for minorities and entrepreneurial development. And everything falls into cliques here, which impedes [company] growth." [AS#69]
- The representative of an Asian Pacific American male-owned architecture firm stated, "We feel that we are not given opportunity on projects or getting qualified. [The] same people [are] getting the same work." [#70]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white female-owned engineering firm mentioned favoritism, explaining, "When proposals are just released, the prime consultants and sub teams form very quickly, making it hard to get in on the deal as part of a team. [And] the prime consultants seem to always choose the same subs for each project." [#71]

Some interviewees said they do not encounter closed networks or think they are a thing of the past. Examples of comments include:

- The Hispanic American male owner of a MBE/DBE-certified construction firm reported, "I have not seen that too much... not for what we do." [#56]
- The non-Hispanic white male representative of an industry association reported no knowledge of any closed networks based on ethnicity or gender. [#17]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm commented that the "good ol' boy" network no longer exists. However, he did comment that there are other closed networks that exist based on past working relationships. He added that while closed networks are difficult barriers to break down, if a new company is consistent, they will eventually be successful in joining the closed network. [#18]
- Regarding barriers based on being a minority- or women-owned business, the Black American female owner of a MBE/WBE/DBE-certified specialty services firm commented, "I would say [there are barriers] specifically when you are doing public works, because when you do not have the manpower, the equipment, and the financing... the bigger companies do 'push you out' ... It makes it still very difficult..." [#52]

Any other allegations of discriminatory treatment. A number of interviewees had comments related to topics not discussed above. For example:

- When asked about any allegations of discriminatory treatment, the Black American male partial owner of a DBE-certified construction firm replied, “I could tell you specifically when it started. When we first started in 2012 up to 2014, everything was clockwork. Then when we went to Springfield and we got [an award], somehow, we became a moving target for the prime contractors. I guess blackballers... From there, it was one issue after the next.” [#1]
- The male representative of an engineering firm commented on the complexity of problems in the Collinsville area, saying, “There's horrific endemic racism and sexism in this area. I can speak to it. I've seen it. I don't know how you fix that necessarily, but the labor unions have a strong hold here that they will not let go. It's politically connected to the entire strata of everything that goes on in this area. So if you're on the outside looking in, it's very difficult to break through. And even when you're part of the system, it's even harder if you're not on the inside group that makes the decisions. And it is a societal issue that needs to be addressed.” [PM6#9]b
- The female representative of a Native American woman-owned specialty services firm reported that a public entity representative told her, “You are not Indian.” She replied, “What does an Indian look like?” She went on to say that minority business owners “should not have to defend [themselves].” [#41]
- A WBE/DBE-certified professional consulting firm reported, “Believe me, there is discrimination everywhere. As a woman, wearing a scarf, and being Muslim, there are many things there for me.” [#15]
- When asked about barriers to starting or expanding their business, the representative of a Hispanic American female-owned construction firm referenced discrimination, saying, “The owner feels looked down upon occasionally because she is a woman and Hispanic.” [AS#7]
- The Black American owner of a DBE-certified construction firm commented, “When they call me and find out I am a [Black American] man, they hang up.” [#54]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm commented, “They do not want us out here in the first place. They do not want minorities or women out here. They want to keep everything for themselves, the white people.” [#11]
- The female representative of a construction firm stated, “I was furious that my employees did not come to me [to tell me about] discrimination on the job. Then I get a tap on my door literally one day, early one morning, here's a contractor, a subcontractor, entire crew minority... discriminated on the job to the point where his employees... had reached the point where they were refusing to go there.” [PM1#1]
- The female representative of a business commented that she has experienced gender-based discrimination from a prime contractor. She explained, “I was working on [phase one of a

project] with this particular prime, or one particular gentleman specifically, would make comments about the fact that he had been visited by other sub-consultants, other female sub-consultants, and that they were very friendly with him. And would kind of allude to the fact that maybe I should be friendlier too. Well, that definitely wasn't going to happen, and I would make statements, that 'Well, I'm not going to wear short skirts'... I'm a pretty strong gal. I've been on construction jobs my entire life... so I blow that kind of stuff off. So, as we're getting into phase two negotiation... I'd been hearing about he may not use us to do the phase two work. I continued to kind of blow him off, because when you're selected as a team for a project, they're committed to using that team. They cannot just go and find another sub at any point in time without the approval of IDOT... As we're negotiating, he's like, 'Well, my idea is that you'll do this, this and this.' And I said, 'Well, that's not what we've been talking about. We've been talking about us doing the entire [piece of this project],' which is a substantial amount of work, and [what] he was talking about us doing was hardly anything. And then it came out that he had said, 'Well, you know, I know you just had a baby and that weighed in heavily on my decision.' And so specifically at that moment... I called him out on it. I did tell him it was discrimination. And immediately, I called my EEO Officer." [PM4#3]

One interviewee reported not observing any additional race-/ethnicity- or gender-related discrimination. This non-Hispanic white male representative of an industry association commented that there is no discrimination based on ethnicity or gender. [#17]

Factors that affect opportunities for minorities and women to enter and advance in the industry. Some interviewees discussed factors that affect the ability of minorities and women to enter and advance in the industry. For example:

- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm commented, "The system is designed to [keep] minorities out of this industry, and that is what all the big companies do." [#11]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm stated that minorities and women may find it difficult to enter or advance within the industry if their qualifications are not up to par or if they don't present themselves well. [#18]
- When asked to comment on factors that affect opportunities for minorities and women to enter and advance in her industry, the non-Hispanic white female co-owner of an electrical company expressed concerns about electrical work being a male-dominated industry. She stated, "I would say it is definitely a man's industry... and you struggle to show your place." [#23]
- The non-Hispanic white male co-owner of an engineering firm believes that opportunities for women in engineering are improving. He explained, "When I went to college, [female engineers] were rare, but it has gotten better." However, he also shared an anecdote suggesting continuing problems with the perception of women pursuing a career in his industry. He stated, "...We send engineers to junior high schools to talk to kids about careers, and when [the student is] a girl, [other students] give that [girl] a lot more static than they give a guy. That's just... it doesn't seem right." [#26]

- The female representative of a construction firm commented, “I feel the construction industry is white male-based, and it’s intended to stay that way. That’s my real opinion about it.” [PM1#1]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white female-owned construction firm indicated that “Just being a woman in the transportation industry” is a barrier, adding, “Construction is even worse. There is still a mindset that women shouldn’t be in this industry.” [AS#50]
- The female representative of a woman-owned business referenced rumors about woman-owned businesses, saying, “They throw so many roadblocks in front of woman-owned companies, such as delayed payment, or this concept of ‘I don’t want to use a woman-owned company because I have to pay every two weeks, and they’re not competitive,’ and they make up these stories... when it’s not true. I mean, if I could tell you the number of times that [they’ve said] ‘Well, it just costs more. I have to pay them more often, and it just costs more.’ And if you ask anybody whether they charge more – if they’re not the low bidder, they’re not going to get the work anyway. So there’s this – all this disinformation out there about working with woman-owned companies. And they feed each other. If one person – if one contractor says ‘It’s so much harder to work with a woman-owned business because you have to pay every two weeks, and you had to pay more, and there’s more paperwork,’ well, then that becomes gospel.” [TA1 #2]
- The representative of a trucking firm referenced barriers for younger workers entering unions. He explained, “[We’ve] got new recruits coming out of the college... and they want to know how do you go about getting in the union to proceed on being truck drivers and construction engineers like the others. And they seem to run into problems and hard times getting in there and getting that done. That makes it hard for us when we tried to first start off to help the youth to get these jobs and they go to school and get this education for the jobs [but] still can’t get in the right areas and the places they need to get in the union to get in the contract jobs. So I want to know what can you try to do to help the youth that’s graduating from college that’s taking these courses that’s trying to get these jobs and how do they go the way of getting into the union without going through all the red tape by getting in the union?” [PM6#7]

I. Insights Regarding Business Assistance Programs or Any Other Neutral Measures

The study team asked business owners and managers about their views of potential race- and gender-neutral measures that might help small businesses and minority- and women-owned businesses, obtain work in the Illinois contracting industry. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics. The following pages of this Appendix review comments pertaining to:

- Knowledge of programs in general (*page 86*);
- Technical assistance and support services (*page 86*);
- On-the-job training programs (*page 87*);

- Mentor-protégé relationships (*page 88*);
- Joint venture relationships (*page 89*);
- Financing assistance (*page 90*);
- Bonding assistance (*page 90*);
- Assistance in obtaining business insurance (*page 91*); and
- Assistance in using emerging technology (*page 91*).

Knowledge of programs in general. The study team reported on their awareness of and experiences with business assistance program.

Some interviewees reported having knowledge of or participation in business assistance programs. [e.g., #16, #53, #59, #60]

Other business owners reported having little or no knowledge of assistance programs in general and/or are not participating in any programs. Examples of comments from the in-depth personal interviews include:

- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm reported having heard of business assistance programs but indicated little knowledge of them. [#11]
- The Black American female owner of a MBE/WBE/DBE-certified specialty services firm indicated that she has no knowledge of any business assistance programs. [#52]
- The non-Hispanic white male representative of an industry association stated that the association had considered collaborating with agencies to assist or run training programs, but decided to pass on the opportunity because they valued their independence and were concerned about political influence. [#17]

Technical assistance and support services. Interviewees discussed different types of technical assistance and other business support programs. Some interviewees reported whether technical assistance and support services are helpful.

A number of business owners reported that technical assistance and support services are helpful. [e.g., #2, #18, #55, #59, #60] Examples of comments from the in-depth personal interviews include:

- The Black American male owner of a DBE-certified construction firm reported that he has utilized technical assistance programs and found them to be helpful. [#54]
- The non-Hispanic white female representative of a women’s business association reported that firms working in the road construction industry utilize support services. [#16]
- The non-Hispanic white male co-owner of an engineering firm expressed positive opinions regarding technical assistance and support services. He explained, “I have a favorable

impression for most of the [support services]. I've gone to at least one of the business assistance ones that talked about getting business, and it was kind of geared to DBEs and MBEs. And that's one reason I went, because I was thinking about possibilities [for the female engineers at the firm]. A lot of the technical programs are quite good that are offered, and we send people to those when we can." [#26]

- The Black American female owner of a specialty services firm reported to have attended one event. She remarked, "It was great info given. It brought up a lot about financials and things of that nature, as far as getting more work." [#5]

Some business owners do not find technical assistance programs useful or are unaware of such programs. Examples include:

- The Hispanic American male owner of a MBE/DBE-certified construction firm stated, "I did not need the technical service support. I [only went] to a few seminars on getting paid, because I was not getting paid." [#56]
- When asked about technical assistance programs, the Black American male owner of a MBE/DBE-certified specialty contracting firm stated, "I would say it is not enough. Even though it is quite a bit, it is not enough... They are informative, but that is all it is, information." [#8]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm reported that she was never told about technical services support programs. [#33]

On-the-job training programs. Interviewees discussed their perceptions of and experiences with on-the-job training programs.

Some interviewees felt that on-the-job training programs would be useful or had participated in such programs. For example:

- Regarding on-the-job training programs, the non-Hispanic white female owner of a WBE/DBE-certified construction firm said, "We have utilized the educational programs through IDOT." [#53]
- A Black American male owner of a MBE/DBE-certified specialty contracting firm stated, "I think [on-the-job training] is very encouraging to contractors and to people looking for employment. I think every little bit helps, especially in the disadvantaged communities we live in." [#8]

A few interviewees said that on-the-job training programs would be helpful but awareness is low. [e.g., #33, #55] For example, the non-Hispanic white female representative of a women's business association reported, "Some [members] have utilized OJT, but my guess is there is a good number of them that probably do not know about [the on-the-job training programs]." [#16]

Mentor-protégé relationships. Business owners and representatives reported on any experiences with mentor-protégé programs, some negative and some positive. [e.g., #2, #18, #33] For example:

- The Black American male owner of a DBE-certified construction firm stated, “I have signed up for that [mentor-protégé] program... They called me one time, and I have not heard anything else from them... I never got one of those jobs.” [#54]
- Regarding mentor-protégé programs, the non-Hispanic white female owner of a WBE/DBE-certified construction firm reported, “I am aware of mentor-protégé [programs], [but] I would be very surprised if someone would want to mentor us. I just do not think that is going to happen.” [#53]
- The male representative of an MBE/DBE-certified construction firm commented on mentor protégé programs, saying, “You know, I have talked to contractors about that. You know, they basically said ‘Hey, there is no benefit for us to be in this program,’ and one of the things I’m saying [is] well, why would they want to... if I was to enter into a mentor protégé program with the general contractor, and he was to come in and start teaching me, well, then wouldn’t you think that would prevent me from bidding to other general contractors? Because why would they want to train me, give me this knowledge, only for me to go out and give to their competitors.” [PM5#1]
- The non-Hispanic white American female owner of a WBE/DBE-certified construction-related firm said, “I signed up for mentor-protégé years ago and nothing ever happened with it. We are going to try and readdress it, but I do not think IDOT itself has a good mentor-protégé for construction... they do for services [though]....” [#58]
- The minority female owner of a WBE/DBE-certified professional consulting firm reported on her experiences with mentor-protégé programs. She said, “We have been using that... [with] the Tollway, but not with IDOT... IDOT never gave [us] chances with this.” [#15]

A male minority representative of the same firm commented that he would like to see the State implement the mentor-protégé program where you can go on more than one phase. [#15a]

- The non-Hispanic white female representative of a women’s business association stated, “Some [members]... have gone through [mentor-protégé programs]. Do they know about it? Yeah. I believe they know about it... I do not know [if] they have developed any long-term, reliable relationship [though]. It is almost [as if] they go through it and then [it is over].” [#16]
- The female representative of a Hispanic American male-owned MBE/DBE-certified specialty contracting firm said her firm applied for the program but did not receive a response. [#19a]

- The Black American owner of a MBE/DBE-certified specialty contracting firm reported that mentor protégé programs could be beneficial. However, he said, “It never happens I have already tried doing that.” [#55]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm reported that she has worked in a mentor-protégé relationship. [#60]
- The non-Hispanic white female owner of a WBE/DBE-certified construction firm said, “I believe I am on the list, but I have not used it.”

She added, “Maybe [IDOT’s] mentor-protégé program, which I have looked at... could say we are going to mentor-protégé you with somebody else that has done that type of work before, and also open up a little bit more on the bonding.” [#59]

Joint venture relationships. Only a few interviewees showed interest in joint venture relationships. [e.g., #2, #4, #59] For example, a non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm expressed positive sentiments about joint-venture relationships. He stated, “Sometimes we are in the category of really new projects where we don’t have manpower or expertise to do things. Those [joint ventures] are helpful for us, because it allows us to be part of things that we wouldn’t otherwise be part of.” [#25]

Many interviewees faced challenges with joint venture relationships, have not participated in them, or find no value in them. For example:

- The non-Hispanic white male owner of a SBE/DBVE/SDVOSB-certified consulting firm said he does not participate in joint ventures. He said, “I never do joint ventures. I don’t have partners, only my wife.” [#45a]
- The non-Hispanic white owner of an SBE-certified specialty contracting business stated that he has stopped pursuing joint venture relationships. He explained, “Everybody wants to try to take advantage of you. That’s what I’ve experienced with joint ventures.” He added, “[Potential partners] either want to ride off my reputation or my skills because they don’t have them, or they don’t have the license.” [#35]
- The non-Hispanic white female owner of a WBE/DBE/SBE-certified specialty contracting firm said that joint ventures do not work well for DBE subcontractors. She said, “The first thing that happens is... if I carry a subcontractor under my name, [prime contractors] get 100 percent of the contract value for the DBE quota. If I’m the joint venture, [the prime contractors] only get the percentage that I represent in the joint venture.” [#38]
- A Black American male owner of a MBE/DBE-certified specialty contracting firm stated, “I try not to do [joint ventures].” He explained, “[It’s] because a lot of the bigger [specialty] contractors that I would do business with are like the prime contractor. So, let us say I do a joint venture with them, with [Company B]. If [Company B] is the prime [specialty] contractor on that joint venture, I still have to wait for him to get paid, and then I have to follow him and he is getting paid right away from the general contractor because he is in [affiliation] with this guy.” [#8]

- The non-Hispanic white female representative of a women’s business association commented on legal issues with joint venture relationships. She said, “Some of the better-established companies have done [joint venture] partnerships. You are getting into a lot of legal issues with that, and sometimes it is not very advantageous for the minority partner. But, some folks have gone through it.” [#16]

Financing assistance. Interviewees discussed financing assistance and related programs. [e.g., #2, #53] For example:

- The non-Hispanic white female representative of a women’s business association reported that members have utilized financing assistance. [#16]
- The Black American female owner of a specialty services firm reported knowledge of business loan programs through Accion. She commented, “Accion was a great step forward because it helped grow the business. We could not get a traditional line of credit, so we got a line of credit through them. Interest rates were a lot higher, but it definitely helped. When we started with Accion, we were down to four vehicles, and since getting the Accion money, we were able to increase ourselves to the ten vehicles that we have now. So, it is definitely a great benefit that is there and a resource for us to use. But again, the rates are just high, so you do have to deal with that.” [#5]
- The Hispanic American male owner of a MBE/DBE-certified construction firm said he did not utilize financial assistance. However, he noted, “I looked into it. For that one you have to be denied by your bank in order to qualify.” [#56]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm commented, “I tried it one time because I was having an issue with my bank... You have to apply and it is treacherous. It is as bad as DBE [certification]... filling out the certification... so much paperwork.” [#33]
- Regarding his ability to secure financing for his firm, the Black American owner of a MBE/DBE-certified specialty contracting firm reported, “Actually, I had all of my paperwork in... [but] I was not qualified to get it based upon my credit.” [#55]
- The non-Hispanic white female representative of a women’s business association reported that members have utilized financing assistance. [#16]

Bonding assistance. Business owners and managers reported on bonding assistance as helpful. [e.g., #2, #18, #19a] Other experiences include:

- The Black American male owner of a MBE/DBE-certified specialty contracting firm reported, “I have not had to [bond].” [#55]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm reported that bonding assistance requires too much paperwork. [#33]

- The Hispanic American male owner of a MBE/DBE-certified construction firm stated, “I do not really bond... [but] I bonded one job for IDOT... By the time I see a payment from my contractors, they owe me a crap load of money, so why should I bond?” [#56]
- The representative of a non-Hispanic white male-owned construction firm stated that he was not having a lot of issues with bonding, though he also attributed that to working mostly as a subcontractor. He added, “As we get bigger, bonding—additional help on that would be nice, even to learn more about it. Because we’ve got a project that I’m bidding right now and there’s so much red tape that you’ve got to follow guidelines and everything. I don’t know if the states got some kind of program to where they help assist with learning that more or what.” [#47]

Assistance in obtaining business insurance. A few business owners and managers interviewed said that assistance obtaining business insurance would be helpful to small businesses. [e.g., #2, #19a]

Assistance in using emerging technology. Many business owners said that assistance using emerging technology would be helpful. Others expressed no need for emerging technology assistance. Examples of comments from the in-depth personal interviews include:

- The Black American owner of a MBE/DBE-certified specialty contracting firm reported that assistance with using emerging technology helped him get his website “up and running.” [#55]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm said that assistance with emerging technology was helpful to her. She commented, “I used it. I got a website.” [#33]
- The Hispanic American male owner of a MBE/DBE-certified construction firm reported that his firm does not need assistance using emerging technology. He said he can do it on his own. [#56]

J. Insights Regarding Contracting Processes

Insights discussed include the following topics:

- Contract compliance and enforcement (*page 92*);
- Solicitations and procurements (*page 93*);
- Information on public agency contracting procedures and bidding opportunities (*page 94*);
- Perceptions of electronic bidding, registration and online directory of potential subcontractors (*page 95*);
- Pre-bid conferences where subcontractors can meet prime contractors (*page 95*);
- Distribution of lists of plan holders or other lists of possible prime bidders to potential subcontractors (*page 96*);

- Other agency outreach such as vendor fairs and events (*page 97*);
- Streamlining or simplification of bidding procedures (*page 98*);
- Breaking up large contracts into smaller pieces (unbundling) (*page 98*);
- Price or evaluation preferences for small businesses (*page 100*);
- Small business set-asides (*page 100*);
- Mandatory subcontracting minimums (*page 102*);
- Small business subcontracting goals (*page 102*); and
- Formal complaint and grievance procedures (*page 102*).

Contract compliance and enforcement. Some public agency representatives discussed compliance and enforcement of IDOT contracts. Comments from the in-depth personal interviews include:

- When asked about her responsibilities for public sector contract compliance, the non-Hispanic white female representative of a public agency replied that she does the interview and makes sure “the DBE employees are working for them and no other contractors or the prime contractor are out there working... just making sure everything is legit.”

The same representative, when asked if she is involved in enforcement, replied, “Yes... if I go out and do an interview and I see something that should not be going on... [for example, that the prime contractor is using the employees and they are working for the prime contractor, not the DBE] Have I seen that? Yes.” She added, “I need to make my supervisor aware....” [#51]

- The Black American female representative of a public agency reported, “I go out to every construction contract and count the numbers by trade and then by race with that trade.” [#36]
- When asked to describe his responsibilities at IDOT, a Black American male representative of a public agency reported, “As far as contracts are concerned, number one is the DBE goal that we enforce in the district. We make sure we assign DBE goals to qualify contracts. [We] go out and make sure... that the DBE assigned to whatever the line items are, are fulfilling their portion of the contract. We make sure that they perform the commercial function.”

He added, “We make sure that the prime contractors are working with them... and not trying to set them up for failure... We make sure that the DBEs are performing independently from the prime contractors, to make sure the issues of [payments]... are getting resolved... If there are performance issues out there, we make sure that we step in to try to provide assistance. We also rely on the ‘REs’ to [assist] with getting the issues resolved. We also rely upon our supportive services consultants to assist with getting issues resolved... We make sure that the employees are paid the prevailing wage of the contract, whether it is a state-funded or federally-funded contract. We make sure to diversify the

specification of the contract. Meaning that minorities and females are getting the employment opportunities.”

When asked if IDOT has mechanisms to hold prime contractors accountable, he responded, “To my knowledge, not that I am aware of... The subs have the right to sue these prime contractors for breach of contract. If I had a contract with you... and you did not call me in, you owe me as far as I am concerned. I have the right to take you to court and sue you for that.” When asked if that is effective, he replied, “Having a prime get dinged for not meeting the DBE goal was a rare event... making sure that there was a good faith effort performed and to meet the DBE goal that the prime contractors are held liable for the shortage in the goals. I think that is a phenomenal thing.” [#20]

- The Black American male representative of a public entity reported that his major responsibilities include setting DBE goals, monitoring the program, and ensuring that there is adequate minority and women representation in the workforce. He said “the powers” get “pissed off” if he rates a contractor poorly. He said, “I do not give a damn if you do not like what I am doing... I am doing my job. I am not going to be complicit and discriminate against these poor people for these primes.” [#42]
- Regarding IDOT’s mechanisms to hold prime contractors accountable, a non-Hispanic white American male representative of a public agency stated that primes are accountable on the DBE goals. He said, “If they don’t meet the DBE goal then they have to pay basically whatever they miss, or however, short they are of the goal, they have to pay the damages... these damages have to be paid to the State.” When asked whether he thinks that is effective, the same representative responded, “In practice, not really.” [#32]

Solicitations and procurements. Some interviewees reported on their experiences with the solicitations and procurement processes.

Comments related to solicitations and procurements are broad. For example:

- The Black American male representative of a public agency commented, “Periodically... we have DBEs say that they would prefer to get the contracts directly from IDOT, but that is not quite possible... We dictate who gets contracts... [so] that is not going to happen. That would interfere with your business and that is not possible... We have also had DBEs say that they want to get paid directly from IDOT instead of getting paid from the primes on their contracts, and again, that is... not a doable thing.”

When asked if he receives feedback from vendors regarding IDOT’s solicitation and procurement processes, a Black American male representative of a public agency responded, “We receive that from prime contractors as well as from subcontractors.” He elaborated, “Typically primes are looking for subcontractors to fulfill the DBE goals... We do not give one contractor... this is the DBE that can perform the work, because that is conflict of interest... that... we do not do. Sometimes the primes are looking for assistance in helping them to, again, try to find DBEs to help meet that goal. Sometimes they make inquiries pertaining to looking for assistance in how to meet DBE goals.” [#20]

- When asked about her responsibilities in public sector solicitations and procurement, the non-Hispanic white female representative of a public agency replied, “I set all the goals for the DBE contracts, and of course, when I do set the goals it does vary from location... I do employee interviews on the job, which are called CUFs.” [#51]

Suggestions for improvement of solicitation and procurement processes. Some interviewees discussed ways to improve solicitation and procurement practices. For example:

- When asked whether anyone had ever been given him any feedback on ways to improve the solicitation or procurement process, the non-Hispanic white male representing a public agency stated that he had not really received any feedback on how to improve it. He reported, “I do not deal too much in procurement. By the time it gets to me, I am just enforcing the policy. I don’t have much to do with even the bidding process.” [#32]
- When asked if he has any suggestions for improvements, the Black American representative of a public agency said, “The process that we have right now is not exactly the best process as far as DBEs getting work from primes. Primes now have five days to... look to see which DBE they want... I have heard sometimes the primes are asking the DBEs to reduce their prices so they can get the contracts... [That is] not exactly a good thing for DBEs because I think that could potentially put them in a [harmful] situation, [and they may] ultimately go out of business... I have a problem with that, because we are trying to build up a capacity with the DBEs, and I do not want to lose DBEs to some improper practices by some primes. At the same time, the process that we had where everything was to be submitted just before the letting... I think that was a better process, but nevertheless primes still tried to shop around and get the lowest rates from the DBEs.” [#20]

Information on public agency contracting procedures and bidding opportunities.

Some interviewees reported on how well information is disseminated regarding public agency contracting procedures and bidding opportunities. For example:

- A non-Hispanic white female representative of a public agency remarked, “I think it is all on the website... They have the bulletin list and... can access the plans [from there].” [#14]
- The non-Hispanic white male representing a public agency remarked that the contracting procedure is “a little difficult [and] a little hard to deal with.” He went on to say that he has received feedback that many bureaucratic requirements exist. When asked if he is able to assist people or help with the challenges, he said he does not think he is supposed to do a lot of that. [#32]
- The non-Hispanic white male owner of a construction firm stated that having all the information available when it is first advertised rather than waiting several weeks would be a nice improvement. [#4]

Perceptions of electronic bidding, registration, and online directory of potential subcontractors. Most owners and managers of companies said that online services are helpful, or “okay.” [e.g., #5, #19a, #59, #60] For example:

- The non-Hispanic white male representative of an industry association stated that efficiency and cost savings require streamlining the processes. He remarked, “The internet and electronics are not going away.” [#17]
- The Black American male owner of a MBE/DBE-certified specialty contracting firm reported, “I do both. If I can submit a bid online, I do, but many bids because they are doing bid openings, you have to give them a hardcopy, which can be on a CD, which is what they prefer... I would prefer electronically... but I like to submit a hardcopy just for back up.” [#8]
- The non-Hispanic white owner of a construction remarked, “The bid submittal process now with the electronic bidding has been a big benefit to us... a lot easier... easier with the electronic bidding. I mean you still have the issue with the paper plans versus the PDF plans and getting them printed off... I think it is the best process available.”

The same owner added that an electronic directory of potential subcontractors would be helpful. [#4]

- Regarding electronic directories, a non-Hispanic white female representative of a public agency said, “I do think that it probably was a good thing that we did that... I think we just need to move forward with technology... I do see where it could be difficult for small contractors to obtain those documents.” [#14]
- A Black American male owner of a MBE/DBE certified consulting firm stated that he prefers electronic. [#12]
- The non-Hispanic white female representative of a women’s business association expressed her members’ preference for electronic directories. [#16]
- The Black American owner of a DBE/MBE-certified specialty contracting firm reported preferring electronic copies to hardcopy. [#55]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm mentioned, “It is okay. I am learning all this new stuff and this technology. I am a hardcopy guy... it is easier.” [#11]

Pre-bid conferences where subcontractors can meet prime contractors. Some business owners and managers supported holding pre-bid conferences. [e.g., #11, #55]

Some business owners saw the advantages of pre-bids, but reported on room for improvement. For example:

- A Black American male owner of a MBE/DBE certified consulting firm wanted information “well even before the pre-bid.” He suggested, “Probably quarterly because by the time you

are at a pre-submittal or pre-proposal those teams are set.” He added, “That is a huge disadvantage to someone new breaking in to the agency. Those teams are set well in advanced.” [#12]

- The Black American male owner of a MBE/DBE-certified specialty contracting firm commented, “CTA [has] everybody lit... not only do they have a pre-bid meeting, they will have a pre-bid meet and greet. People do not do that... CTA has stepped it up and say following this pre-bid meeting, we are going to have a meet and greet with all the prime contractors. [Therefore], if you just stick around for another half-hour, you can meet everyone who might be bidding on this job, give them your card, and have them talk back and forth to you. I would hope that other agencies would move toward that.” [#8]

Some interviewees indicated that pre-bid conferences are not helpful, not available, or they choose not to attend them. Examples include:

- The Hispanic American male owner of a MBE/DBE certified construction firm commented, “I have gone to some, I do not think it matters.” [#56]
- When asked if the meet and greet conferences made it easier in bidding on a contract, a non-Hispanic white American owner of a construction company, commented “I do not know if it has really made it easier, we are familiar with most of the subcontractors, whether they are subcontractors or DBE subcontractors that do work in this area. I guess we have a relationship with most of them so as far as going to meetings...” He added, “... Our problem is here that we have a limited geographic area that there is not a lot of DBE subcontractors in this area and it is very difficult to have enough DBE subcontractors to meet the goals.” [#4]
- The non-Hispanic white American female owner of a WBE/DBE- certified construction-related firm commented, “We are not really invited... Other agencies will pick a project and tell you when the pre-bid is. I do not think I see it as much with IDOT, where they are inviting subs to pre-bids, but I do like the networking events that IDOT puts on...” [#58]

Distribution of lists of plan holders or other lists of possible prime bidders to potential subcontractors. Most of the business owners and managers interviewed supported the distribution of plan holders lists. Examples of comments from the in-depth interviews include:

- The Hispanic American male owner of a MBE/DBE-certified construction firm appreciated when public agencies list the sub or the DBE used on the contract, “It is good for bid-tracking so you know what is going on.” [#56]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that he loves the bidders list. He commented that they get “floods of bid requests.” He remarked, “As a subcontractor or new contractors... going on the website to find out whose bidding is important... this gives them the opportunity to call them up.” [#18]

- The Black American owner of a DBE/MBE-certified specialty contracting firm recommended, “I think that the finals for bid list should be earlier instead of later. They do it a day before the bid... I think the cutoff for the bid list should be cut off earlier that week... they should have no more bids accepted by Wednesday.” [#55]

Other agency outreach such as vendor fairs and events. Some business representatives reported that they could not attend outreach events for many reasons including time constraints, limited staff size, and location. Some attended, but had recommendations for improvements.

A number of business owners indicated that they faced challenges in attending outreach events, do not support their usefulness, or are unaware of their existence. Examples of comments include:

- The non-Hispanic white female representative of a public agency reported on IDOT’s attempt to offer outreach events at more convenient times for firms to attend. She commented, “Here they have been during work hours except recently we have had... ones four to six... outside of work hours... we have never had one on the weekend.” [#14]
- The Black American female representative of a public agency commented that she hasn’t planned any workshops in her district because she’s having a hard time getting the DBEs to show up. She explained, “Part of the reason is timing because they may still be working. Another problem is that the DBEs may have a substantial workforce but not management, so a lot of times it’s just a husband and wife and babysitting becomes an issue, balancing home, and it isn’t conducive for them to come out.” [#44]
- The Hispanic American male representative of an industry trade association stated that he has sent some of his staff to check out the classes and that they were mostly empty. He stated, “I think the last two years of no budget does not help....” [#13]
- The minority female owner of a DBE/WBE-certified professional consulting firm reported, “Basically all these events have a lot in common. They introduce you to the person who arranged the gathering. Now they have a habit of inviting everybody to the same event. If you go to an IDOT event, you will see a Tollway person, a CDOT person, and a county person, and [vice-versa].” [#15]
- The female representative of a trade association recommended IDOT provide training and/or workshops specifically related to opportunities, available resources, bidding processes, and pre-qualification. [#40]

A few interviewees supported agency outreach such as training seminars, conferences, networking events and vendor fairs and attend them. Examples of positive comments about agency outreach events include the following:

- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm commented, “I have been to all the events and they are nice. I like [them].” [#11]

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that he attends DBE conferences and seminars when offered. He added, “DBE-certified firms must attend, participate and bid for the work.” [#18]
- The Black American owner of a DBE/MBE-certified specialty contracting firm commented, “The Tollway helps the business [through these events]; the Tollway is good.” [#55]

Streamlining or simplification of bidding procedures. Some interviewees indicated that streamlining or simplification of bidding procedures would be helpful. Others suggested that shortening the time it takes to bid would be an improvement for small businesses trying to manage their time efficiently. For example:

- The non-Hispanic white male representative of a majority-owned construction firm supported the streamlining of as many IDOT processes as possible, including bidding protocols. [#21]
- Regarding the streamlining of bidding procedures, the non-Hispanic white male owner of a specialty contracting firm said, “If we go to bid a project, some of these government projects have so much paperwork to fill out, it will take you two-to-three hours to fill your bid out. It is so much repetitious information that goes on these forms.” [#3]
- A Black American male veteran owner of a MBE/DBE-certified specialty contracting firm reported, “It is already easy, it is just that you need the time to work on it. That is the only thing.” [#11]

Breaking up large contracts into smaller pieces (unbundling). The size of contracts and unbundling of contracts were topics of interest to many interviewees.

Most business owners and managers interviewed indicated that breaking up large contracts into smaller components would be helpful. [e.g., #11, #19a, #55, #57, #59, #60] Examples of interviewee comments include:

- The non-Hispanic white male owner of a specialty contracting firm commented, “If the [materials] part was [broken] up and bid strictly as just [materials], [our company] could bid it.” [#3]
- The Black American male owner of a DBE-certified construction firm commented that unbundling “would help an awful lot.” [#54]
- The non-Hispanic white female owner of a DBE- WBE-certified construction firm remarked, “We would like to see projects unbundled. I think that the road builders and the AGC have a straight line into DOT and these large contracts are by design. They know very well it is a rare DBE that can bid those jobs.” [#53]
- A non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm expressed support for the approach of breaking up large contracts into smaller pieces to encourage more small business participation. He explained, “That could

probably be helpful for small businesses to get in the door [on larger contracts]. Sometimes getting in the door is how smaller businesses become larger businesses where they can deal with larger contracts. I don't know how that works administratively for them ...if that makes things more challenging or whatever, [but] I can see from a small business perspective [how] that could be helpful." [#25]

- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white woman-owned construction firm explained that they have trouble with the size of projects. They explained, "Most of the projects [we] would like to get involved with are too large. They should be opened up to groups of companies." [AS#31]
- The Subcontinent Asian American male owner of a DBE/MBE/MWRD-certified engineering firm commented, "The changes I would like to see [are that]... they can divide the work between large firms and small firms...." He suggested, "Unbundle some of the projects...." [#7]
- When asked to comment on experiences with or opinions regarding breaking up large contracts into smaller pieces unbundling, the non-Hispanic white female co-owner of an electrical company, expressed that she thought this was a good idea, "...because it gets people to be able to bid within their union area, within the district." [#23]

More business owners reported both positive and negative aspects of unbundling contracts, or that it sets up subcontractors to perform jobs they are not equipped to do. For example, some reported the value in unbundling for small and minority- and women-owned firms, but also stated that unbundling would require additional management and staffing:

- The non-Hispanic white representative of a supply firm said that breaking up large contracts into smaller pieces had benefits and drawbacks for small businesses. He remarked, "There are advantages and disadvantages... if you are going to unbundle, then somebody at the state level is going to have to be responsible for a lot of individual areas." He added, "... Probably a little bit more transparent, but also a lot more labor intensive from the state level to have expertise in five areas rather than one area which is finding the right prime contractor and let them deal with the details." [#6]
- A Black American male owner of a MBE/DBE certified consulting firm stated, "That actually might work... [however,] I think that could be cumbersome for that agency to manage those different contracts. They are probably going to have to have more field people checking up on that. Then you have to [consider] performance of the work, liability, finger pointing... it could get messy without having an 'umbrella of responsibility.' But it could also be a huge win for the smaller contractors because that umbrella could be the problem." [#12]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported stated that he was in favor of unbundling contracts. He remarked, "I actually like it, but some things are better off bundled... it depends on the project." [#18]

- The Hispanic American male owner of a DBE/MBE-certified specialty contracting firm commented, “I do not think it would make much of a difference... Breaking down the contract, you need another layer of employees.” However, he added, “... it would be great... because I would get more contractors to do the work.” [#19]
- The non-Hispanic white male representative of an industry association stated that he is not a fan of unbundling because it serves to let subcontractors bid for jobs that they are not ready to handle. He also commented that bidding as a prime entails risks, capitalization, union issues, and other subcontractors. [#17]

A public agency representative reported on unbundling opportunities for state-funded projects. The non-Hispanic white female representative of a public agency commented regarding unbundling of large contracts. She said, “We do have... [a program]... on 100 percent state-funded projects... There are not many that are 100 percent state-funded, so that kind of knocks a lot of projects out. But if we do have projects, they have to be [fewer than] a \$1,000,000 and 100 percent state-funded; they can [apply] the [program] put on them and it also has to be something where we have enough small contractors that can bid on it so it is not a complete set-aside for one contractor.” [#14]

Price or evaluation preferences for small businesses. Comments on price or evaluation preferences include:

- One non-Hispanic white male owner of a specialty contracting firm liked price or evaluation preferences for small businesses. [#3]
- One Black American male veteran owner of a MBE/DBE-certified specialty contracting company stated that price/evaluation preferences are unfair. [#11]

Small business set-asides. Interviewees discussed the concept of small business set-asides, which limit the bidding of certain contracts to firms qualifying as small businesses.

Some business owners and managers supported small business set-asides. [e.g., #11, #18, #55] Examples of interviewee comments include the following:

- The non-Hispanic white male owner of a specialty contracting firm commented, “There are a lot of small businesses that would go after [small business set-asides]... but a lot of them do not because of the restrictions. [#3]
- A non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm expressed positive support for small business set-asides. He explained, “We’re probably for them. That’s another thing that helps small businesses get in the door [for public contracts], because I could see where it would be easy to go with larger businesses on a lot of things just because [of] simplicity of administration. It’s similar to the programs [that provide] work for minority businesses. That’s one of the things you need to shake up the perceptions a little bit and get people in the door, so you can see that this [program] does work.” [#25]

- The male representative of an MBE/DBE-certified construction firm stated, “The target market, the set-asides, you know, that’s something that I think would help strengthen...or give us the opportunity in [this district] to be able to perform work and create diversity. Because we are not able to create any diversity. We are not able to bring any minorities or females or, you know, give them the training or whatever, you know, hiring them out of college because there is no work there for us.” [PM5#1]
- The non-Hispanic white female owner of a DBE- WBE-certified construction firm commented, “I think the set-aside program in theory is very good. The [qualification] limits are too high... We have occasionally bid on those.” [#53]
- The Subcontinent Asian American male owner of a DBE/MBE/MWRD-certified engineering firm remarked, “We are always competing with larger firms, so we end up being a sub on any job... the set aside work for smaller firms is what I am looking for.” He added, “Set-asides that will help us grow, otherwise there are all these teams that are already preset, the larger firms decide who is going to be on the team; they decide everything before the job is even awarded. It is hard for me to get on any of the large teams. I always submit my qualifications, but I rarely get selected.” [#7]
- The representative of a non-Hispanic white male-owned trucking firm stated, “It would be nice for small businesses to get first dibs over the bigger corporations.” [AS#94]

Two interviewees expressed frustration with the fact that small business set-aside practices can differ between districts. For example:

- The representative of a construction firm expressed frustration with the minimal amounts of small business set-asides in his district, saying, “The types of set-asides that are being let in [this district] result in contractors from other districts traveling long distances to bid and perform this work.” [WT#4]
- The male representative of an MBE/DBE-certified construction firm questioned why different practices occur in different districts. He explained, “For example, there [are] some small business set-aside projects... done in, I believe, in District 3, and so when I asked ‘How come this is not being done in District 5?’ You know, I get a lot of different, you know, excuses. Well, if it’s being done in one district, why can it not be done in another district? So that’s a concern.” [PM5#1]

Some business owners expressed concerns regarding small business set-asides and did not support them, or were not familiar with them. [e.g., #6] Examples of those comments include the following:

- The Hispanic American male owner of a MBE/DBE certified construction firm stated that it does not apply to his line of work. [#56]
- The non-Hispanic white female owner of a DBE/WBE-certified construction firm expressed her mixed feelings by saying, “The set-asides, you do not have to be an IDOT prequalified firm, which sometime I do not know how I feel about that.” [#59]

- The non-Hispanic white female owner of a DBE-certified specialty contracting firm commented, “I did not know there was such a thing as set-asides.” [#33]

Mandatory subcontracting minimums. Some interviewees supported a minimum level of subcontracting on projects, indicating it would be helpful to their firm. Other interviewees disagreed. Examples follow:

- When asked about mandatory subcontracting minimums, the Black American male veteran owner of a MBE/DBE-certified specialty contracting company commented, “[That] needs to happen.” [#11]
- The Hispanic American male owner of a MBE/DBE certified construction firm stated, “I do not think that [mandatory subcontracting minimums] would be fair to [the sub or the prime], because there could be a new guy that comes up and he is actually good, and it could hurt him. There are people that have been around a long time who are not good... they could... say, ‘I have been here longer, so I am good.’ I do not think that would be good on both levels. [#56]

Small business subcontracting goals. Interviewees discussed the concept of setting contract goals for small business participation in public contracts.

Several business owners and managers voiced approval for small business subcontracting goals and some expressed that goals be set or expanded; one business owner voiced his disapproval. Examples include positive and negative statements:

- The White female owner of a DBE/WBE-certified construction firm mentioned, “Obviously we want to see the goals be as high as they can be just because that is what we do and... it at least forces those big guys [to utilize other people]. That is the only way they are going to sub people out... is to put those quotas out there....” [#59]
- The non-Hispanic white female representative of a women’s business association remarked that subcontracting goals have been a benefit [to the membership]. [#16]
- The non-Hispanic white owner of a specialty contracting firm stated, “I think [the State] should put a percentage toward small businesses, because [the State implements a] percentage [for] the DBE, or the women or the veteran... and sometimes it is hard for a contractor to make those goals.” He added, “If the small business had a percentage as well, they could mix that in to meet total requirement.” [#3]

Formal complaint and grievance procedures. There were a number of wide-ranging comments, including by those who support procedures to resolve complaints and grievances.

Some business owners did not find complaint procedures helpful, had no experience with the procedures, or feared retribution. [e.g., #11, #56] Examples of such comments include:

- The non-Hispanic white owner of a construction company said regarding formal complaint and grievance procedures, “We would be very skeptical in doing that because we... would

not want someone to... have 'retribution' on us just because we filed a complaint against someone." [#4]

- The non-Hispanic white female owner of a DBE/WBE-certified construction firm remarked, "We never had an opportunity to... I voice my opinion on things, but I am not aware of any procedure that would allow me to criticize their practices." [#53]
- The minority female owner of a DBE/WBE-certified professional consulting firm commented. "No... I respect the company; I respect the people, so I do not want lose [the relationship]." [#15]
- The Black American male partial owner of a DBE-certified construction firm reported on his experience with formal complaints. He stated that his company had good relationships with IDOT employees and prime contractors until 2015, when they filed formal complaints about late payments from prime contractors with IDOT.

He added that the firm contacted, "The Governor, the Secretary, wrote to congress... wrote on behalf of ourselves, wrote on behalf of the DBE association...." He commented that the firm also met with IDOT lawyers. He added, "Issues intensified" due to the complaints IDOT held responsible by the prime. [#1]

- The non-Hispanic white female owner of a DBE/WBE-certified construction firm stated, "It was pretty beneficial, but you do not always want to be the complainer when there is a problem." [#59]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm remarked, "There is somebody, somewhere in DBE that handles this... I do not know anything about it... I do not know who it is... I do not know how to contact them... Nothing." [#33]
- The non-Hispanic white owner of a construction company mentioned that there were no special meetings to discuss issues with IDOT personally. He commented, "The annual evaluation that is about it. They do not have special meetings just to sit down and talk with them." [#4]
- The Hispanic American male owner of a MBE/DBE certified construction company commented that IDOT and other public agencies need anonymous reporting for issues that arise in the MBE/DBE/WBE programs. [#56]
- The female representative of an Hispanic American male owned DBE/MBE-certified specialty contracting firm commented, "Maybe if all the MBE/DBE/WBE's could get sectioned off, maybe a certain person from a certain agency could go ahead and check on them. Maybe one 'supporter' and see if they are having any problems on the job site." [#19a]

K. Insights Regarding the Federal DBE Program or any other Race-/Gender-Conscious Program

Interviewees, participants in public hearings, and other individuals made a number of comments about race- and gender-based measures that public agencies use, including MBE/WBE and DBE contract goals and comments regarding:

- Federal DBE Program at IDOT, and other race- and gender-based programs (*page 104*);
- Any issues regarding IDOT or other public agency monitoring and enforcement of its programs (*page 106*); and
- Any negative effects of the programs on businesses not eligible (*page 113*).

Federal DBE Program at IDOT, and other race- and gender-based programs.

Interviewees provided insights on IDOT's implementation of the Federal DBE Program. Examples include:

- The non-Hispanic white male representative of an industry association stated that the DBE Program is a positive force in his industry. He remarked that without the DBE Program, there would be tension and litigation between primes, DBEs, subcontractors, and agencies. [#17]
- The non-Hispanic white female owner of a DBE-certified construction reported, "The DBE Program helps to get a start. It helps us get our foot in the door." [#35]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm remarked, "It is obviously positive, just for the mere fact... we have gotten jobs... to meet goals...." [#33]
- The representative of a construction firm stated, "With the help of the DBE program and the state trying their best to ensure that the participation goals are met helps small companies like [mine] succeed in a tough field. I know all programs have flaws, and the DBE program is no exception. Just like on a construction site not everything goes as planned, not everything works out the way you thought it would. The best we can do is move forward and learn from our mistakes and try to improve on what we think is wrong. I personally think the program is trying to move forward and is getting better." [WT#2]
- The Black American male representative of a public entity reported, "A DBE is what they are; they are Disadvantaged Business Enterprises. You cannot compare them with the prime... we are trying to train them to be better... they are disadvantaged for a lot of reasons." He then added, "Had it not been for discrimination, who says they would not be bigger?" [#42]
- The Black American female representative of a public agency stated that she really hasn't received much feedback from businesses. She explained, "I have gotten feedback where some of the DBEs don't feel like goals are being high enough. I have gotten feedback from

the primes where initially they were saying that they thought the goals were too high.”
[#44]

- The Black American male veteran owner of a MBE/DBE-certified specialty contracting company mentioned, “The Program is good. It is just that I need to apply myself to it. In the very near future, that is what I am going to do.” [#11]
- This Hispanic American male owner of a MBE/DBE certified construction firm reported, “The goals are the biggest things that help the company. To be honest, if they did not have the DBE or MBE program, there would be just a few companies doing all the work.” [#56]
- The female representative of a construction firm stated, “I think the DBE program lacks teeth. In a lot of ways, women may be more discriminated against than the minorities. And I know African-American women that would agree with that... We survive because we’re very aggressive. We’re very good at what we do. And even though we continue to bid, the law of averages says that occasionally we hit. [But] we don’t.” [PM1#1]
- “DBE programs by design create marketplaces where general contractors are generally non-DBE’s and subcontractors DBE’s. Non-DBE subcontractors who have not yet been driven out of the market are humiliatingly reduced to odd men out attempting to survive as square pegs trying to fit in round holes. Until non-DBE subcontractors are respected and accepted by society, IDOT and the Tollway’s DBE programs will continue to resemble third world dictatorships where it is common to confiscate assets from one group and bestow them upon ones politically favored by the state. DBE programs in Illinois are deeply flawed and in need of serious reforms.” [WT#1]
- The representative of a landscaping firm commented, “I cannot remember the last job that I got that did not have a goal on it. Basically the IDOT jobs now, when they come out, if there's no participation goal on it, there's really no point in bidding it. The contractors self-perform as much as they possibly can and if they don't have to give the work away, they don't. So it doesn't matter, you know, MBE, WBE. It doesn't matter. If they're not forced to give the work away, they don't. They'll self-perform so it makes it difficult to have any business at all if there's no DBE goal.” [PM6#10]
- The male representative of an engineering firm commented on the beneficial nature of agency goals for minorities, saying, “We as minority people have to insist at the agency level that these goals stay together. And I could only state this in because I've seen it happen in city after city after city where Hispanics and Asians and African-American folk start to try to get their own piece of the pie and are competing for smaller pieces of the pie and they're all shooting us off one by one. [PM6#9]

Several interviewees reported having trouble complying with SBE/MBE/WBE requirements.

For example:

- The female representative of a non-Hispanic male-owned professional services firm expressed frustration with certain minority requirements, explaining, “As a strictly union

company, we can't call the union hall and order laborers or operators based off of their race. We don't have that option, and female employees are not counted. So the boss stopped doing work for the city of Decatur under his own overhead last year, because it was impossible for us to comply with [the city's] minimum [minority] requirements.... [The owner] has gone to at least two if not three of these bid meetings and the village meeting and voiced that this is literally closing out the small businesses in town. Not because we're against diversity in the workplace, but they're putting us in a position that we can't do. It was something to the effect of a minimum of 15% of your total hours worked, no, 18% of your total hours worked and 20% of your total job cost, had to go to a race-based minority, and it specified that there was no consideration given to females or disabled people. That closed us out as well as many other small companies here in town that had always at least put bids in for that city work that kept us going. That's when he started subcontracting for [a private developer] instead." [#29]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned construction firm responded, "The DBE percentages. The DBE subcontractors know that you need them, which then inflates the costs. The taxpayers end up paying that. It makes it very hard to be competitive without DBE." [AS#66]
- The representative of a construction firm expressed frustration with low DBE goals and competition with prime contractors, saying, "In 2016, [a project] was bid... this project had a 3% DBE goal. There are two DBE contractors in [my county] that perform [this type of work]." He went on to explain that his prices were competitive with the prime low bidder, adding, "I have expressed my concerns to IDOT about the low DBE goals and prime contractors not accepting the sub-contractors bid no matter how competitive our prices are. The prime contractors have indicated to me on several occasions that they see sub-consultants as their competitor." [WT#4]
- The representative of a specialty construction firm expressed frustration about pricing for DBE subcontracts, saying, "DBE's are allowed to charge excessive prices because IDOT and The Tollway do not allow bid waivers for subcontractor price differences. Contract goals have become quotas because contractors almost never seek waivers in favor of a lower price non-DBE like ourselves. They do so only rarely when prices differences are clearly absurd. Requesting a bid waiver for a price difference runs the risk of bid rejection for non-conformance. There are many examples of contractors seeking a bid waiver in order to use a non-DBE because of a price difference only to get their bid rejected in favor of a second place bidder with full DBE participation at prices several hundred thousand dollars or more higher. The general contractors in Illinois have received the tacit message loud and clear: do not ask for a bid waiver." [WT#1]

Any issues regarding IDOT or other public agency monitoring and enforcement of its programs. Some interviewees had comments regarding the implementation of the DBE Program or other race- and gender-based programs, including reporting by prime contractors or abuse of "good faith efforts" processes, "fronts" and "pass-throughs."

Businesses reported their insights, both positive and negative, regarding monitoring and enforcement of race- and gender-based programs. For example:

- The non-Hispanic white female owner of a WBE/DBE-certified construction-related firm commented on IDOT's monitoring and enforcing programs. She said, "The primes do not want the DBE Program... We bid the job and then they did not like the pricing so [the primes] just decided not to use us that way. [The primes]... have used other companies and we do not find out until afterwards.... There is no backup; [the primes] get a 'slap on the wrist.' [The prime] pays the fine but that does not get us paid... or we plan on that work force for those jobs and then when there is no job, we lose our work forces." [#58]
- A non-Hispanic white male administrator at a non-Hispanic white male-owned civil engineering firm did not express any comments or concerns about abuse of "good faith efforts" measures for hiring minority- or women- owned firms, but he acknowledged potential challenges about satisfying "good faith efforts" in his firm's geographic area. He explained, "From our perspective, I know [that] when we say we can't find a business like that... it's usually some particular niche [line of business]. There's just nobody out there in a particular [line of business]... and sometimes it doesn't have to do with the fact that there are no women or minority owned business. Sometimes it's that there are no women or minority owned businesses in our geographical area. If we're looking at a two-hour radius of us, you could probably make a one-page list of all the companies in that radius, and none of them would be women or minority owned businesses." He added, "We could find a Chicago-based firm, [but]... the cost and frustration involved with dealing with them would be beyond what we are willing to do." [#25]
- The non-Hispanic white male representative of a public agency reported that his responsibilities for monitoring and enforcement include going out and doing the contractor specialty reports, where he checks to make sure that the contractors are meeting the minority and the gender goals by county on a contract. He added that he also makes sure that they are submitting the survey of payrolls and the EEO reports. He stated, "There are some issues with DBE trucking that are hard to stay on top of. But a lot of that enforcement is basically making sure that we're trying — and I don't think it's hard to do — but trying to make sure that when a project contractor says they're using a DBE trucker, to make sure they're actually doing that, and it's not just on paper." [#32]
- The representative of a Black American male-owned architecture firm said, "Sometimes we are under the impression that the minority ownership qualifications are just a dog and pony show, and getting the participation is just to satisfy a goal." [AS#49]
- The male representative of a DBE-certified electrical firm commented "As far as IDOT, I questioned my code compliance officer and she told me 'You know, it's not fair for me to enforce this issue in District 8', and I said, 'Why is that?' She said, 'You know, you're the only black electrical union contractor south of Chicago.' Well, you know what? That's not my fault. I earned that." [PM6#1]

- The Black American owner of a DBE/MBE-certified specialty contracting firm stated, “I think that consulting companies hire DBE’s to meet their quota and they do not look at the qualifications ... their past experiences, their financial situation ... they are just trying to meet their quota.” [#55]
- The representative of a construction firm stated, “I have not received any assistance from IDOT to build capacity. In order to successfully transition out of the program and to competitively compete, IDOT needs to unbundle contracts, add target markets, and increase goals in [this district/county]”. [WT#4]
- The Black American female representative of a public agency noted that ideally, the DBE program is designed to level the playing field so that the DBEs can graduate and become viable construction partners; however, she does not believe that is currently possible. She explained, “I think what happens is it’s that game again. Okay, you have to work with this prime, but if you get too big—because I have had a situation where one of my DBEs bid on some work that a prime bid on, and the DBE got the work. So then the prime was upset, so basically said, ‘Guess what, we’re not going to give you any more contracts for a while to teach you a lesson.’ So, that can keep the DBE from wanting to grow and it’s a huge issue.” [#44]
- The male representative of an engineering firm expressed frustration with the District 8 system, saying, “I agree that the District 8 officer here, for lack of a better term, is a little compromised based on who he has to answer to. Well, you know, it's not neutral. It's not, it's not a position where he has much authority to really set the goals, as opposed to working in Chicago where there is a strong minority community there, both African-American and Hispanic that are politically powerful and can make changes and work independently. [PM6#9]
- The representative of an excavation firm commented on perceived conflict of interest by the EEO office in District 8. She stated, “How can we [make] our EEO office independent of District 8? Because it seems as if he makes goals, [but then] the generals come and complain to District 8, and they end up lowering the goals. So if he's to do his job, his job that they're paying him to do, why can't he be independent of District 8?... He can't do his job when he's working for IDOT, who's trying to basically suppress it, for lack of a better word” [PM6#6]
- The non-Hispanic white male representative of a public agency stated that his responsibilities include going out to the projects and seeing how many minorities and females are working. He explained, “Then, if they’re not, then I ask them why and see if we can get somebody on that project or that contract. Then, I check the bulletin boards for the equal rights posters and stuff like that. Then, I check on all the subcontractors that I have to see if they’re using their own equipment, and doing their own work.” [#45]
- The male representative of a DBE-certified electrical firm commented on compliance officers, saying, “It’s making the compliance officer do their job. They never come out to the job and that’s very bad... If you’re not gonna do your job, you have to go. And that’s my major concern with the IDOT. Just somebody needs to start doing their job.” [PM6#1]

- The representative of an MBE-certified construction firm commented on IDOT enforcement, saying, “It’s almost like there’s a collective conspiracy going on here... You have these contractors who have these IDOT contracts. When they get paid by IDOT, they want to hold onto the money... You know, if they hold all the money and we have to make payroll, then we have problems with the union because they want their money and they want to start suing and all that. So minorities have a lot of problems being in the construction business because I guess you know that there’s a lot of money involved there... And there has to be a way that IDOT has to or will enforce these general contractors to pay the minority contractors because of the situation the minority contractors are in, and I don’t think IDOT enforces that enough.”

He went on to add, “If they don’t enforce it, then some consequences or repercussions need to be brought about to that contractor to let them know that we’re not playing around here. You need to do your job. They really need to make sure that the general contractor is in compliance with the federal regulations... You know, they want minorities to be in compliance with federal regulations when they certify us. So I mean, it’s only fair... that everybody be in compliance. That would avoid a lot of problems.” [PM6#2]

- The male representative of a trucking firm suggested higher goals in District 8, saying “There’s a percentage of minorities in the district that includes the St. Louis area. You know, I think that the participation number should be a higher goal in District 8. Projects that are located within the east St. Louis area [should be] as high as 30 percent or higher, up to 35 percent.” [PM6#5]

Many business owners commented on false reporting of MBE/WBE/DBE participation, “fronts,” negative issues with or falsifying “good faith efforts.” Some also reported negative perceptions or knowledge of “good faith efforts.” Interviewee comments included:

- The non-Hispanic white female representative of a women’s business association remarked, “With any type of program there are abuses.” [#16]
- Regarding “fronts,” the non-Hispanic white American male owner of a specialty contracting firm reported that the process should include stopping husbands [from] setting up companies with their wives as owners where the wives only work in the offices doing other work. [#3]
- The non-Hispanic white female owner of a DBE- WBE- certified construction firm reported, “oh yeah, we know who the ‘fronts’ are.” [#53]
- The Hispanic American male owner of a MBE/DBE certified construction firm mentioned that he is aware of a few instances where a larger company prompts a smaller up in order to get them more work. He said, “There is a lot of people who get started up by larger companies because the need is there and [the larger companies] do all [the minorities] work.”

He added that he is aware of “fronts” but because reporting is not anonymous it makes it harder and you could be blackballed, so he does not say anything. [#56]

- The Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm, reported awareness of “fronts” by saying, “The majority man trying to give business to his DBE wife.” [#10]
- A non-Hispanic white female representative of a public agency reported, “We had one [“fronts”] case before, but we found out and were able to decertify [the firm] and took care of that issue. But I do not feel we have too big of an issue.” [#14]
- The male representative of an engineering firm commented on perceived lack of accountability and frustration with bid shopping. He stated, “At our submittal we're required to set aside the percentages that we're committing to on the contract to our subcontractors. And then the agency follows up with that to make sure that that requirement is done... I used to work with a contractor. We kept our word about our minority participation because we wanted to partner with people and we tried to do that and I think we did it very successfully. But I can't tell you the litany of people that, that I know personally, that have gone into a bid and, sure enough, two or three days later gotta sharpen [their price], gotta sharpen it. I won't talk about a Chicago firm that came down to beat everybody up but I know one specifically. So it would be a really great thing if the agencies stood their ground and said, ‘Our requirements for these contracts are that you commit to your percentages.’” [PM6#9]
- When asked about his knowledge of false reporting of certified firms, the Black American veteran owner of a MBE/DBE-certified specialty contracting company responded, “Yes” and that he had seen it himself. [#11]
- The non-Hispanic white female owner of a DBE-certified woman-owned construction reported, “Oh, I guarantee it... they just basically run stuff through the books....” [#35]
- The non-Hispanic white male representative of an industry association stated that there are variations of false MBE/WBE/DBE reporting in existence. The same representative remarked that the definition of “good faith efforts” should be defined so compliance with goals is clear. [#17]
- The Black American female owner of a DBE/MBE/WBE-certified specialty services firm commented, “I would say abuse, like with an old veteran as a prime... I tried to establish a relationship with an old veteran as a DBE/WBE, and he stated to me, ‘Oh we already have a DBE/WBE company that does exactly what you do, maybe you should go and work with her’ ... That is not fair to me. I do not want to go work for her or with her, what I want to do is establish my own relationship [with the prime]... I should be able to even bid against her for [that] work, not somebody that [the veteran prime] already worked with.” [#52]
- The male representative of a DBE-certified electrical firm expressed frustration with reports of no available firms, saying, “My question to IDOT is your contracts and your reps, there's no teeth... So if you get a million-dollar project and your goal is 23 percent minority and you slide this by and say there's no available workforce, then how are you getting this

money? And it happens all the time... that's my major concern... We have this study going on because there's a problem." [PM6#1]

- The non-Hispanic white owner of a construction firm recommended that IDOT become more flexible regarding good faith efforts. He said, "IDOT... needs to... be more flexible on the good faith efforts... the good faith efforts are very subjective."

He continued that it would be helpful to have a clear understanding of what IDOT considers a good faith effort, saying, "What one person thinks is a good faith effort, somebody else may not think it is a good faith effort." He also added, "... IDOT really needs to look at who is actually available to do the work in each area." [#4]

- The non-Hispanic white male co-owner of an engineering firm did not indicate any direct experience with abuse of "good faith efforts" contracting provisions, but he did acknowledge concerns that they might exist in the marketplace. He explained, "As to whether those shenanigans go on, I'm sure they do. You see a [newspaper] solicitation for a DBE or an MBE, [but] I have no idea if the firm asking for that solicitation has managed to get an MBE or DBE through it. It seems like in the past you go through that process to advertise and then you don't follow through. And then you show in your paperwork that you know I had this advertisement out there and I just didn't get any – any acceptable candidates ...whatever an acceptable candidate is." [#26]

- When asked about experiences with abuse of MBE, WBE, or DBE certification by firms, the non-Hispanic white female co-owner of an electrical company expressed frustration with perceived fronts among DBE-certified subcontractors. She explained, "The people that were here...they work out of their house, they [only] have a PO Box, and CMS certified them. She's not done one day of work in that business, [but] all of a sudden I see her [name] on a pre-bid and I'm like, 'what is she doing here?' Then, I see her name is on the sheet of all the people we're supposed to be hiring...So then, I sit here and say, 'you know what? ...it's all a racket.'" [#23]

- Regarding false reporting of certified firms, a non-Hispanic white female owner of a DBE/WBE-certified construction firm commented, "Yeah, I think you get a lot of that. [On the other hand], one thing I will say is that... with IDOT, sometimes they do not want to hear that I have a husband that is with the business... They automatically assume that ... he is the 'brains' and you are in the office answering the phones just so you can keep that DBE."

Although the same non-Hispanic white female owner stated, "I think most of the primes utilize [good faith efforts] in the way it should be utilized." She added, "The biggest thing is ... [primes] only want to give out the crap stuff." [#59]

- A non-Hispanic white female owner of a DBE- WBE-certified construction firm reported that primes are not using "good faith efforts" properly. [#53]

- The Black American male owner of a MBE/DBE-certified construction firm stated that he did not perceive that [IDOT] was doing a good job with their good faith efforts. He commented, "...good faith effort... is not you try. You have to do it..." [#57]
- The female representative of a woman-owned business relayed an anecdote in reference to subcontractor outreach and good faith efforts. She stated, "I'm a construction attorney. Most of my clients are minority and female owned companies... And without going overboard, I can tell you that the big complaint that [the primes] are always saying is, 'We can't find a legitimate woman or minority-owned company. We only find fronts and champs.' And when I indicate to them the legitimate trade associations... you know, [I ask] 'Do you ever talk to them', and the answer is, 'Well, no.' Usually, they will go to whatever book is put out by let's say the public agency. The City of Chicago has a listing, a book of minority and female-owned companies, certified companies. The problem is that these books are out of date. And it's true – so when a contractor says, 'I called so and so and there was no answer. The phone was disconnected.' And so they figured that's the end of their obligation."

She added, "So we have the double whammy of those companies that don't want to use women to begin with, and then they go through the motions by saying, 'Well, I looked in the book. I didn't find anybody. Therefore, I'm now going to put in a waiver because they don't exist.' So we've got an entire industry that operates under the pretense that 'if I don't see them, they're not out there.' So it's both. It's they don't want to use women, and they don't even try to use women if they're obligated to do so. It's easier for them to go for a waiver or to pay a penalty. [For] some of the larger general contractors, it is so much easier to pay the penalty than to go out and to hire a woman-owned company." [TA1 #2]

- The male representative of a DBE-certified electrical firm commented on problems related to IDOT reaching out to woman- or minority-owned businesses through SIU. He explained, "[I'm] a union contractor, and I used to be a rep at our local union. I do know that whenever IDOT goes to SIU and they say 'I need a woman-owned business whether it's dump truck or hauling or minority business to do the work'. And then they'll call the Building Trades Council and [that Council] says, 'Well, we don't have any qualified', [but] a lot of times they do. You know, it's just they won't give them that opportunity because...the local union won't let them be a part of that and I've seen it happen."

He went on to add, "So what happens is the local rep of that union will sign an affidavit saying 'We actually pursued but we couldn't find one.' So then the paperwork is pushed through and we get our federal money." [PM6#1]

- The male representative of an engineering firm expressed frustration with good faith efforts and closed networks, saying, "Everybody knows the good faith effort is a bunch of bullshit... How many times have you guys gotten bids two hours before a bid was due or... you get a fax machine, a robofax that comes out and then you can't get your bid in and then they're like, 'I tried. I reached them.' I mean that happens. It's common. It's not something that's an aberration. It happens constantly, all the time, and it happens to a lot of small businesses. It doesn't necessarily have to be the minority business. It's just contractors are

mitigating risk so they want known commodities. You apparently do great work, you know. I would have no issue with giving you work and saying go ahead and do it. But the problem with that is it's really hard to break into those networks, not unlike the political networks... and the labor unions and the teamsters and all these other groups. You know, it's very difficult to get in on the inside and it's a fallacy to believe that just because you do hard work and good work that you're gonna get the opportunity." [PM6#9]

One interviewee reported that with “big brother watching,” there is limited room for misrepresentation of business ownership. The Black American male owner of a DBE/MBE-certified specialty contracting firm commented, “I think because the feds are in, I think [people] try to stay within those boundaries, it is like ‘big brother is watching.’” [#8]

Any negative effects of the programs on businesses not eligible. Several interviewees provided commentary regarding their experiences. Examples from in-depth interviews include:

- The non-Hispanic white male co-owner of an engineering firm stated, “I’ve lost jobs to women- and minority-owned businesses because they were women- and minority-owned businesses and we’re not. Even though...we probably employ more women engineers as a percentage than most firms do.” [#30]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned professional services firm expressed frustration with perceived discrimination due to lack of minority status. The representative said, “I had a call from IDOT one year, but they asked if I was minority-owned and I wasn’t, and they said, ‘We’re sorry we can’t’, so I felt that was discriminating. I don’t think that was fair.” [AS#23]
- When asked about any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned demolition firm said, “IDOT grossly discriminates against small businesses owned by white men. They force contractors to hire higher [priced] bidders.” [AS#24]
- When asked about any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned electrical contracting firm said, “I’m discriminated against, because I am a white male. I’m losing work for not being minority-owned or woman-owned. I’m discriminated against by IDOT.” [AS#25]
- The representative of a non-Hispanic white male-owned landscape architecture firm said, “It’s harder for white males to get work. Most people look for women or minorities to fulfill contracts. They seem to have an upper hand.” [AS#26]
- The representative of a non-Hispanic white male-owned landscape architecture firm said, “Not being a minority or woman makes it hard to get work.” [AS#27]
- When asked about barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm expressed frustration with minority

participation, adding, "They push minority participation for these bigger contractors... which I do not think is fair." [AS#28]

- The representative of a non-Hispanic white male-owned professional services firm said, "We are basically shut out of projects because we are not a minority-owned business." [AS#29]
- The representative of a non-Hispanic white male-owned professional services firm said, "We're having a hard time competing with minority-owned firms in our industry. I feel we are getting not considered because of that reason." [AS#30]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned engineering firm responded, "We're not a DBE, and it's hard to get into [certain projects]... Not getting calls for these types of jobs, and not qualifying as minority- or woman-owned. Small business administration does not have programs for small business, they seem to only have programs of minority- and woman-owned businesses." [AS#78]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned specialty construction firm stated, "We are not minority or female. It affects us finding work." [AS#87]
- The representative of a non-Hispanic white female-owned engineering firm stated, "It's hard for small business owners to get jobs when they go to minority-owned businesses. We were not recognized as a woman-owned business or WBE. We were denied for WBE." [AS#88]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned construction firm stated "They give our work away to minorities and women and out of state contractors." [AS#91]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned trucking firm expressed frustration with DBE quotas, saying, "[I] have been told by general contractors that in order to achieve their 25% quota, trucking is the easiest way to hire minority. [I was] told not to apply as I wouldn't be awarded the contract." [AS#92]
- The representative of a specialty construction firm stated, "[We] have continuously suffered the wrath of reverse discrimination at the hands of IDOT's and the Tollway's DBE programs. If something is not done to reform and moderate these programs so that only the truly disenfranchised are allowed to benefit from them, the third generation owners of [my company] will be forced to endure discrimination in the highway marketplace every single day of [our] working careers."

He went on to explain that their particular construction specialty is "a 'go to item' to meet a [DBE] job goal", adding, "We are told numerous times each letting by the general contractors that our low bid has to be rejected in favor of a DBE with a higher bid in order

to meet the required job contract goal... Please take a moment and try to appreciate just how hard it is to compete and survive when your competitors are consistently allowed to charge a higher price than you." [WT#1]

L. MBE and DBE Certification

Business owners and representatives discussed the process for MBE/WBE/DBE certification and other certifications, including comments related to:

- Knowledge of certification opportunities (*page 115*);
- Ease or difficulty of becoming certified (*page 115*);
- Advantages and disadvantages of certification (*page 118*); and
- Experience regarding the certification process and any recommendations for improvement (*page 121*).

Knowledge of certification opportunities. Some interviewees reported awareness, or that learning about certification was relatively easy. A number of their comments follow:

- The Black American male veteran owner of a MBE/DBE-certified specialty contracting company mentioned, regarding his knowledge of certification programs, "I like all of them; I just need to get the work." [#11]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm reported that he has extensive knowledge of certification opportunities and was asked to participate in the development of the MBE and DBE certification programs. [#18]
- The non-Hispanic white male owner of a construction firm remarked, "I think in some ways [certification] helps smaller contractors get their name out so you can find out who they are. The biggest thing is they still have to be qualified and capable of doing the work. Just because someone can say they are a DBE subcontractor, if they cannot do the work, it does not help the situation out." [#4]
- The non-Hispanic white female representative of a public agency reported, "I think that the word is out. We have had numerous certification workshops. We have reached out to local cities and business and churches trying to get the word out about the program... maybe we just do not have enough companies that meet the qualifications." [#14]

Ease or difficulty of becoming certified. A number of interviewees commented on how easy or difficult it was to become certified.

Many interviewees reported difficulties with the DBE and MBE/WBE certification and/or renewal process. Some interviewees indicated that the certification process was difficult, time consuming or problematic. Comments included:

- The non-Hispanic white female representative of a public agency reported, "I know I have heard a lot of time issues with companies trying to become certified 'it takes a long time and

the process is grueling,' but I do not know if there is really any way to go around that process." [#14]

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm commented that the certification takes more effort now than in the past. He remarked that "[certification] takes effort... regulations are so hard, probably because of the fronts." [#18]
- The Black American male owner of a DBE/MBE-certified specialty contracting firm reported, "It took me two years to get certified because the City of Chicago outsources the certification program... it took forever to get certified... it took almost two years to get certified." [#8]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male-owned architecture firm stated, "We have this budget crisis, so it's hard to get jobs. [And] the certification process is hard, [there's] too much to prove." [AS#45]
- The Black American male partial owner of a DBE-certified construction firm remarked, "I was unemployed for two years before I could get DBE status." He commented, "They had restrictions on us, that if we were to get our DBE status, we couldn't have a job working anywhere else." [#1]

A Black American female partial owner of the same firm also stated, "You can't just go and work anywhere else, you have to be solely, 100 percent invested in them." [#1a]

- The female representative of a Native American woman-owned specialty services firm reported that after a long certification process, the firm received a denial of their IDOT DBE certification application. She indicated that IDOT told them that they needed "more experience" for registration as a DBE.

She added that the process was "pretty discouraging" and she felt that IDOT wanted them to "drop it" and not proceed with the certification process. [#41]

- The non-Hispanic white male representative of an industry association reported on the need for more transparency in assessing DBE qualifications. He said, "There have been very curious instances of firms that would instantly be qualified when a college graduate has started it and then their competitors, who've been doing it for 20 years, have a hard time getting qualified... that seems odd to me... who, from IDOT, is watching the other people from IDOT?" [#17]
- When asked to comment on the ease or difficulty of becoming MBE, WBE, or DBE certified, the non-Hispanic white female co-owner of an electrical company relayed an anecdote about past failed WBE certification attempts through the Illinois Central Management System [CMS]. She explained that she was encouraged by CMS to apply, but her application ended up sitting on a desk for six months, after which point she was accused of being fraudulent and subsequently denied. She said, "I tried to call [the CMS representative]

myself. I'm like, 'Is there something wrong?' ... I didn't know what to do. And in the end, it was like, well, I'm never gonna get certified, so I'm not going through this racket again." She then added, "With CMS, [they] have to send back [the reason] why you were denied. Basically [the CMS representative] said, 'You meet all the requirements, but we just think that...you just did that to get certified.'"

She went on to say that she had experienced similar problems with the IDOT certification process, specifically regarding unhelpful employees. [#23]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white woman-owned professional services firm expressed frustration with the certification process, explaining, "I think it's hard to get certified. I met with someone from IDOT, and she had no clue on how to do the paperwork." [AS#4]
- The non-Hispanic white male representative of a WBE-certified construction company referenced negative past experience with attempts at certification. He stated, "Twelve years ago, probably, we tried to get [WBE] through the state, the Illinois certification. I don't remember what that was called at the time but we got nowhere in the state of Illinois. They did not give us the time of day. We felt the whole process was very rude. We weren't treated very friendly, I don't think because the people that were doing that accreditation came from the city and had to come all the way down here. So I don't feel like they got a real fair shake on that process. Just a little dig of our own state here on that process but that's been years and years ago." [#43]

Some interviewees indicated that a major issue with the certification process is that it is labor intensive and time-consuming; for some, the paperwork was also a barrier. For example, a number reported lengthy information gathering and paperwork:

- The Black American male owner of a DBE-certified construction firm commented, "The paperwork was very extensive. A lot of paperwork involved." [#54]
- The Subcontinent Asian American male owner of a DBE/MBE/MWRD-certified engineering firm reported, "It is different because the DBE was more with IDOT and MBE was with City of Chicago... I think MBE was a little harder than DBE... I had to provide more information." [#7]
- The minority female owner of a DBE/WBE-certified professional consulting firm said, "With IDOT it is okay, it is not easy, but it is okay." She added, "The paperwork that we submitted when we tried to be certified [had] many questions... for example [with] the City of Chicago... [They] have the paperwork and they ask for the same paper and ask if we are DBE and it is as if they did not even look at the paperwork even when I submitted my certification as DBE to them." [#15]
- The representative of a Hispanic American female-owned trucking firm said, "We need help to obtain certifications, [and] we need help filling out the forms." [AS#46]

- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white female-owned architecture firm referenced the certification process as a barrier. They explained, "One of the barriers to pursuing IDOT work is the cost of becoming certified as a women-owned business when your starting cost is an issue. The cost of the application is excessive, because the application requires three years of financial, and by the time you have three years, you're probably not interested in doing IDOT work." [AS#47]
- When asked for recommendations, the Black American female representative of a public agency stated, "I'm going to throw this out there, they're probably not going to like it, but we need to eliminate the paper. The paper work, it's a killer... I've heard from several of my DBEs why they don't do work with the state is because it's so much paperwork." [#44]
- The Hispanic American male owner of a DBE/MBE-certified specialty contracting firm suggested, "... Maybe to streamline it... just the five-year one... there is too much paperwork, too many questions... Maybe something that could be done in five pages and... maybe just the vital information." [#19]
- The Black American female owner of a specialty services firm, when asked if the DBE program would be helpful to her business, stated, "I would love to, and would like to know how... we started some of the paperwork but we are stuck, so how to move forward in that process." [#5]

A few interviewees said that the MBE/WBE/SBE or DBE certification process was easy, or they reported that they received assistance with the process. [e.g., #11, #56]

Advantages and disadvantages of certification. Interviews included broad discussion of whether and how DBE certification helped subcontractors obtain work from prime contractors.

Many of the owners and managers of certified firms indicated that certification is advantageous. Examples of interviewee comments include:

- The Black American male owner of a DBE-certified construction firm remarked that the advantage to certification is "I can bid on work." [#54]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm reported that certification is advantageous. He said, "You got opportunity if you know how to do the work." [#11]
- The non-Hispanic white male representative of an industry association indicated that there are advantages to being certified DBE because certified firms are almost guaranteed work without competition. [#17]
- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm indicated that there are advantages of certification by commenting, "[Certification] doesn't get you more money... you still have to have a low bid... what it does is help close your deal quick." [#18]

- The Black American owner of a DBE/MBE-certified specialty contracting firm indicated that certification helps him secure opportunities. He added that all DBEs should be well qualified prior to entry into the program. [#55]
- The non-Hispanic white American female owner of a WBE/DBE- certified construction-related firm stated, “It is keeping me working. It is giving me work I cannot get otherwise. We are not doing any work that is without certification.” [#58]
- The female representative of a woman-owned business referenced that she has difficulty being included on non-goal projects. She explained, “Unless there are mandatory requirements, contractors tell me all the time when I call about jobs... ‘You know, well, we don't have any requirements here. We're not doing this. [TA1 #3]
- The non-Hispanic white male representative of a WBE-certified construction company commented that he does not see being a woman-owned business as a barrier. He explained, “Actually, it’s encouraged the little companies we do work with. As a matter of fact, they’re the ones that kind of pushed us to try to get the certification.” [#43]

Some interviews expressed mixed feelings, indicated that there are limited advantages, or even disadvantages, to certification. Some reported on stereotyping of certified businesses or the “stigma” associated with certification. Examples of interviewee comments include:

- The non-Hispanic white female owner of a DBE- WBE certified construction firm said, “I do not feel that in our case it has been a huge advantage. If I had to make a living on the work that we do as a DBE, we would have been gone a long time ago. Now having said that, during the downturn, I think it did give us a tad bit of an advantage We did not get that much work, but we got asked.”

She added, “I am not in favor of the ‘labeling.’ I think that there is an automatic assumption on the part of the prime. The minute they see that DBE label, you are ‘stupid’ and cannot possibly have any money and certainly, you are not going to produce a quality product... ‘Is it true? Not at all!’” [#53]
- The Hispanic American male owner of a MBE/DBE certified construction firm reported mixed feelings regarding certification. He commented, “Stereotypes... I would say as much as the DBE and MBE program helps us get work, it also hurts us because there is a ‘stigma’ to it....” [#56]
- The Black American owner of a DBE/MBE-certified specialty contracting firm reported that a prime “stereotyped” him since he owned a certified firm. [#55]
- The non-Hispanic white female representative of a women’s business association remarked, “There is not blatant discrimination. [However], even the public entities... when a woman goes in to apply for certification, they are automatically [stereotyped]... that they are a ‘front company’” [#16]

- The Hispanic American male representative of an industry trade association reported, “I do not like how they do [certification] at IDOT. I think the interpretation of DBE/ACDBE ... in my experience they do not apply the rules... as they should... A certification for IDOT is something we should not be doing” [#13]
- The non-Hispanic white male representative of an industry association stated that there could be disadvantages to being certified DBE because of the stereotype of not being as qualified as your competitor is. [#17]
- The non-Hispanic white female owner of a DBE- WBE- certified construction firm reported, “I do not think it is designed to build contractors. I think quite to the contrary. I think it is designed to keep the DBE in [their] place... We never intended to stay in this program... we have been kept there.”

She continued, “I think the main issue is that program evolved because of federal laws and they had to do it. I think it was designed in such a way that you have a thumb on the DBE or WBE and it has never changed. I do not see it changing in this state.” [#53]

- The Black American male owner of a DBE/MBE-certified specialty contracting firm commented, “People only look at you for the certification. Big contractors only care about the certification. They really do not care. They just want to know if you are certified... so then they can say to the agency that they solicited to all these DBE’s and none of them were qualified... so [they] now [can ask], ‘Can we do this with no-minority participation, can we do this with no-DBE participation....’” [#8]
- The Black American male partial owner of a DBE-certified construction firm stated that he did not see any advantages in getting the DBE, saying, “There’s not enough work. Records show that more than half of the DBE-certified never get a contract and the other half who do get a contract are not in business more than one year. There is almost less than a ten percent chance of you getting a contract a second year.” [#1]
- The Black American female owner of a DBE/MBE/WBE-certified specialty services firm reported, “The work that I do have and I currently have been getting, I do now think I would have gotten it without the certification process... I do not see any forefront disadvantages, but on the backside, when companies treat you differently because they know you are here because they had to ‘fulfill a quota.’” [#52]
- The Subcontinent Asian American male owner of a DBE/MBE/MWRD-certified engineering firm reported, “The only disadvantage that I heard that with being certified is [that] the larger firms sometimes think that just because you have this MBE/WBE we [must] to hire you; but that is not the case, hire us because we are qualified. Do not hire just because we are certified DBE/MBE, we want our qualifications to speak.” [#7]
- The female representative of a construction firm stated, “I think the label is harmful. There’s an automatic assumption if you wear the DBE or WBE label, that you could not

possibly be competent. You will see it on nothing that I have in my company. [I] don't put it in there. It's not a benefit." [PM1#1]

Experience regarding the certification process and any recommendations for improvement. Interviewees made recommendations for a number of improvements to the certification process. Examples of interviewee comments include:

- The Black American female owner of a DBE/MBE/WBE-certified specialty services firm reported, "I like the program... [However], I think it needs to be governed better... in regards to the outreach, the community involvement. When you see IDOT work, you should see more people from the community working on those projects instead of all those people other than the folks that live here." [#52]
- The minority male representative of a DBE/WBE-certified professional consulting firm would like if they unified the certification programs. He commented, "MBE/DBE/WBE are by different state agencies, entities, and they all have similar programs.

He added, "The main concern... is that if a WBE person is qualified by the City of Chicago, why can't [they] get a job with IDOT WBE or Cook County WBE? He further said, "... and also, I want to be able to submit my paperwork on one of those agencies as a WBE regardless of if I have ever worked with those agencies or not." [#15a]

- The Black American male partial owner of a DBE-certified construction firm recommended that the DBE certification process be online. [#1]
- The Black American male owner of a MBE/DBE/SBE/VOSB-certified specialty contracting firm commented, "We have grown past that now because we have everything that they require and it just took time and doing the business to get it. I think if the eliminate too much stuff it is going to water down the program too much...." [#10]
- The Black American female representative of a public agency commented that it's also important to have personable people. She stated, "I think we have to just be careful that the people that are there to assist the DBEs are not uppity, because the DBEs in and of themselves have to trust whoever they're talking to be able to open up and share. If it's not somebody who can actually be on their level, then they are more likely not to come and get the help, not to get the supportive services." [#44]
- An attendee of a public meeting questioned the timeline of certification, saying, "I know it takes around 120 days to get certified as a DBE in Illinois, and I am just curious... why does it take that long? Because if you are a new company and you expect to rely solely on work from IDOT, that could make or break companies starting out." [PM5#2]

Several interviewees commented that the lack of goals for veteran-owned businesses has been a barrier for their firm. Examples include:

- The representative of a non-Hispanic white male veteran-owned surveying firm said, "I'm a veteran-owned business. I've been trying to expand but there are no participation goals [for veteran-owned businesses], and that's become a barrier." [AS#5]
- The representative of a non-Hispanic white male veteran-owned architecture firm said that his primary concern is that "there are no opportunities for a disabled veteran in small business in Illinois." [AS#112]
- When asked whether there are any barriers to starting or expanding their business, the representative of a non-Hispanic white male veteran-owned engineering firm responded, "We are veteran-owned, we are certified by CMS. We'd like to see that opportunity opened up." [AS#113]
- The Black American male veteran owner of a MBE/DBE-certified specialty contracting firm recommended, "... the only thing I [suggest] is for the veteran-owned companies, more opportunities. That is what we need." [#11]

Two interviewees commented on challenges with IDOT's BEP program. For example:

- The male representative of an MBE/DBE-certified construction firm commented on the BEP program, saying, "I'm also in this new BEP program with IDOT. It is a very new program, and I have also been expressing my concerns about... what's going to be the policy, what you guys expect... what are we going to get out of the program. From what I read... this program was initiated was to remove some of the barriers and help us as a DBE to compete, you know, on a competitive level with the prime. That's the ultimate goal of the program. So at this point I'm still trying to figure out how we going to get to this program if there are still no opportunities for us to bid jobs within [this district]." [PM5#1]
- The representative of a construction firm expressed frustration with the BEP program, saying, "[We] completed [the] business plan... and the action plan was completed [seven months ago]. I emailed [four months ago] to find out the next step, and as of today I have not received a response... I have spent a lot of time and hours trying to participate in the program, but it appears there is no program to participate in." [WT#4]

M. Any Other Insights and Recommendations

Interviewees provided other suggestions for IDOT and other public agencies to improve their small business or DBE and MBE/WBE programs, or any other insights or recommendations. For example:

- The Black American female owner of a DBE/MBE/WBE-certified specialty services firm recommended that IDOT "have a stronger presence in the community." [#52]

- The non-Hispanic white male owner of a specialty contracting firm suggested that IDOT provide more knowledge and information to bidders related to specifications pertaining to restrictions, materials, and equipment. [#3]
- The non-Hispanic white male representative of a public agency noted that travel costs are a significant barrier for small businesses to compete, win, and participate in IDOT work, especially for firms that apply for work significantly outside their local area. He added, “They don’t figure that [in] I guess. They just figure ‘get the job’... I don’t want them to go broke.” [#45]
- The male representative of a government office provided a recommendation related to prime contractor fines. He explained, “In the past, [this city] has had several prime contractors that inhibited fines for using minority fronts... So, millions of dollars I think kind of went out of this region because of those fines. But where did it go? I don’t know. But it would be good if that money could be used for educational training or technical assistance to help us address that problem that it is assessed for.” [PM4#2]
- The Hispanic American male representative of an industry trade association commented that training for certification for employees and going through ACCA [America Contract Compliance Association] could be helpful. He said, “They definitely do a very good job explaining... it is a week-long, very intense training.”

The same representative added, “Definitely work on the outreach and that outreach spills into the culture of working with IDOT.” He further added that IDOT should include the association in their long-range planning. [#13]

- The non-Hispanic white male co-owner of an engineering firm explained, “I just wish that [IDOT] would actually...look at qualifications, rather than just a name. They don’t seem to pay attention to the people who can actually do the best job. Rather...they look more to whose turn it is to get the job. They’ll vehemently deny that, I know, but that’s always a tendency by any bureaucratic organization to not do their job.” [#30]
- When asked for any other insights, the Black American male representative of a non-profit minority business association stated, “I think people need to have transparency and they need to be clear that [there] are two biggest issues is, one, separation of goals and the EEO Officer needs to be separate from the district, are the two big issues.” [#37]
- The non-Hispanic white female owner of a DBE-certified specialty contracting firm said, “My number one recommendation would be somehow putting it out there how a DBE is being utilized.” [#34]
- The representative of a Black American woman-owned environmental consulting firm specified that “Grant funding has always been an issue with expanding.” [AS#12]
- The female representative of a woman-owned business commented, “We’re going through yet a third Supreme Court battle over our DBE program. This is the fifth lawsuit in 10, 15 years. There hasn’t been a victory yet by the other side. Yet they’re – they continue to

persist. And again, if that doesn't suggest that they have real issues with this program, and they really don't want us there, I'm not sure what does." [TA1 #3]

- The non-Hispanic white male representative of a DBE-certified woman-owned construction firm indicated that his "biggest beef" with IDOT is that the NAICS codes are incorrect and need updating. He added a recommendation that the SB51 Bill be amended to allow for open dialogue again. [#18]
- The non-Hispanic white male representative of a majority-owned construction firm recommends an established graduation date for the DBE program. [#21]
- The non-Hispanic white American owner of a construction company stated that it is difficult to work with IDOT's specifications and how they conduct tests. He commented, "Sometimes it is difficult to work with [IDOT's] specifications; some of them are very vague and they seem like they are one-sided."

He added, "For instance, some of their asphalt specifications, and their testing requirements, as far as PFP jobs or pay for performance jobs versus QCQA jobs, it seems like they are going from one extreme to the other, where the contractor is in charge of all his testing and his test results... Then all of a sudden on some of the projects where you have a pay for performance, the contractor still has to do the testing, but you are relying on the states test results and you cannot contest the states test results, so you do not have any fallback to find out if there was a problem with the test, is the state doing it wrong versus what the contractor is getting. So, I think some of [IDOT's] specifications are very one-sided."

He further stated that he thought IDOT was putting too much money into the DBE programs to try to attain the DBE goal. He said, "I think the DBE program is costing IDOT a lot of money because... in order to meet the DBE goal, we have to use a higher priced subcontractor just to meet the DBE goals when we could submit a lower bid to the State and save the State of Illinois and all the tax payers additional money." He added, "Money is tight right now anyway; we have to inflate our price just because we have to use an inflated price from a DBE subcontractor rather than a lower priced non-DBE subcontractor." [#4]

- The Black American male owner of a MBE/DBE-certified construction firm suggested that IDOT "give contractors a bigger percentage." [#57]
- When asked if she has received feedback from the DBEs regarding prime contractors, the Black American representative of a public agency stated, "Particularly in my area, there is a major prime, and so the majority of the feedback that I hear from my DBEs is you have to be in good with this prime to get work. So, you don't want to step on that prime's toes." She explained that things can get challenging in her district because even if another prime contractor comes in, it's hard for DBEs to get work with them because they don't want to step on the main prime contractor's toes. [#44]

- The Black American male owner of a DBE-certified construction firm commented that he feels some programs should target just Black American men. [#54]
- The non-Hispanic white male co-owner of an engineering firm highlighted concern related to government regulation of business and public assistance. He explained, “There are government regulations all the time that are continuously changing. The requirements of the federal government and the state government concerning what we have to do for our employees can become burdensome... Recently, we have received our estimate for our health insurance [costs] next year...and [the cost] is going to go up 19 percent. If you continue that out every four years it would double. And so that’s going to be...a burden. Basically the federal government and the state government have completely... bollixed their job to be encouraging of industry. In fact, industry has become a bad word, and so therefore we discourage it, and that’s basically their attitude. Now, we try very hard to get by without any loans. Several years ago, we went in to borrow some working capital. We had several projects that were from...a state agency, because we had done a couple of jobs for the state, which we don’t usually do, but they were slowing in paying us. So as a result we had to borrow the working capital. Well, the banks were very hesitant to loan us any money even against that type of... accounts receivable asset... But at the same time, they were falling all over themselves to give out bad loans to people borrowing for houses they couldn’t afford. It really pissed me off having to beg for money at the same time people like that were getting money without any real thought of how they were going to pay it back. So at that time, we decided we would try very hard to go self-financing. We’ve been trying to be self-financed ever since.” [#30]
- When asked for any other suggestions the non-Hispanic white male representative of a trade association reported, “IDOT’s got to get healthy, and they’re trying to... They have done a phenomenal job trying to bring people back in. They had to stop hiring because of the budget... their operations budget first before they came after jobs. However, to continue to keep people on the in-house pipeline is crucial. Actually, it depends on where you are at, the wall you hit with that. It depends on what district and what area of the central office. There’s a big gap coming in there where they didn’t hire for those years, but clearly below 2,000 on technical staff isn’t healthy.” [#38]
- The female representative of a construction firm stated, “Government money should be disbursed in a fair and equitable way. If there is a percentage on a project, they should be required to meet it with legitimate business. Not phony business. Legitimate business. And, you know, I realize that it's not going to happen that there could be a requirement that local people get a first opportunity. That's not going to happen. I mean, there are some areas where they do - they have local rules on that. But we still should be looking at seeing to it that when these projects are let with a percentage, that those percentages are in fact met. And we need to monitor the payments. People are afraid to speak up. There are ramifications if you rattle the cage.” [PM1#1]
- The male representative of an MBE/DBE-certified construction firm stated, “The target market, the set-asides, you know, that's something that I think would help strengthen...or give us the opportunity in [this district] to be able to perform work and create diversity.

Because we are not able to create any diversity. We are not able to bring any minorities or females or, you know, give them the training or whatever, you know, hiring them out of college because there is no work there for us.” [PM5#1]

- The representative of a majority-owned engineering firm expressed that she would like to see more goals lower on the workforce. She stated, “One of my issues with this is it seems like we always talk about the ownership... I'd like to see goals further down on the workforce. I know they do that on the other side of the river with MSD-related work. Our firm tries really hard to hire a mix of people. I mean, we feel that's important and I feel like whether you're a minority-owned firm or a [majority-owned firm], we ought to be looking at what we're bringing up from the lowest tiers of work to the owner of the company top to bottom. And I'd like to see IDOT consider that within their goals, too, is let's have a goal that lets people rise to different levels... I think that's important and I'd like to see more of that taken into account.” [PM6#8]

APPENDIX E.

Availability Analysis Approach

APPENDIX E.

Availability Analysis Approach

The study team used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for transportation-related construction and professional services prime contracts and subcontracts that the Illinois Department of Transportation (IDOT) awarded between October 1, 2012 and September 30, 2016. Appendix E expands on the information presented in Chapter 6 to describe the study team's:

- A. General approach to collecting availability information;
- B. Development of the availability phone book;
- C. Development of the survey instrument;
- D. Execution of surveys; and
- E. Additional considerations related to measuring availability.

A. General Approach to Collecting Availability Information

BBC Research & Consulting (BBC) contracted with Customer Research International (CRI) to conduct telephone surveys with thousands of business establishments throughout the entire state of Illinois, which BBC identified as the *relevant geographic market area* for IDOT contracting. Business establishments that CRI surveyed were businesses with locations in Illinois that the study team identified as doing work in fields closely related to the types of contracts and procurements that IDOT awarded during the study period. The study team began the survey process by determining the work specializations, or *subindustries*, for each relevant IDOT prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries.¹ The study team then compiled a comprehensive and unbiased *phone book* of all types of Illinois businesses—that is, not only those businesses that are minority- and woman-owned but *all* businesses—whose primary lines of work fall within those subindustries. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace and other sources.²

As part of the telephone survey effort, the study team attempted to contact 16,358 business establishments in the local marketplace that do work that is relevant to IDOT contracting. That total included 11,155 construction establishments and 5,203 professional services establishments. The study team was able to successfully contact 6,048 of those establishments—43 percent of the establishments with valid phone listings. (2,203 business establishments did not have valid phone listings.) Of business establishments that the study team contacted successfully, 2,042 establishments completed availability surveys.

¹ D&B has developed 8-digit industry codes that provide more precise definitions of business specializations than the 4-digit Standard Industrial Classification codes or North American Industry Classification System codes.

² D&B Marketplace is accepted as the most comprehensive and unbiased source of business listings in the nation.

B. Development of the Availability Phone Book

The study team did not expect every business establishment that it contacted to be potentially available for IDOT work. The study team’s goal was to develop—with a high degree of precision—unbiased estimates of the availability of minority- and woman-owned businesses for the types of contracts that IDOT awarded during the study period. In fact, for some subindustries, BBC anticipated that relatively few businesses would be available to perform that type of work for IDOT. In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing transportation-related construction and professional services work. To do so would have required the study team to include subindustries that are only marginally related or unrelated to the types of contracts that IDOT awarded during the study period. Moreover, some business establishments working in relevant subindustries may have been missing from corresponding listings.

BBC determined the types of work involved in IDOT 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 and professional services that BBC determined were most related to the contract dollars that IDOT 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. Development of the Survey Instrument

BBC drafted an availability survey instrument to collect business information from relevant business establishments in Illinois. 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 professional services in order to reflect terms more commonly used in the industry (e.g., the study team substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying professional services establishments).³

Survey structure. The availability survey included 15 sections, and CRI attempted to cover all sections with each business establishment that the firm successfully contacted and that was willing to complete a survey. Surveyors did not know the race/ethnicity or gender of business owners when calling business establishments.

1. Identification of purpose. The surveys began by identifying IDOT as the survey sponsors and describing the purpose of the study (i.e., “IDOT is conducting a survey to develop a list of companies interested in construction, maintenance, or design on a wide range of highway and other state or local government transportation-related projects.”).

³ BBC also developed a fax and e-mail version of the survey instrument for business establishments that reported a preference to complete the survey in those formats.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		Electrical work, lighting, and signal systems	
15420000	Nonresidential construction, nec	17310000	Electrical work
15420100	Commercial and office building contractors	17310100	Electric power systems contractors
15420101	Commercial and office building, new construction	17310103	Standby or emergency power specialization
15420102	Commercial and office buildings, prefabricated erection	17310200	Electronic controls installation
15420103	Commercial and office buildings, renovation and repair	17310201	Computerized controls installation
15420400	Specialized public building contractors	17310202	Energy management controls
15429901	Custom builders, non-residential	17310203	Environmental system control installation
15429902	Design and erection, combined: non-residential	17319903	General electrical contractor
17710101	Exterior concrete stucco contractor	17319904	Lighting contractor
17919904	Exterior wall system installation	36690206	Traffic signals, electric
Concrete and asphalt work		Excavation, grading, drainage, drilling, and demoliton	
16110202	Concrete construction: roads, highways, sidewalks,	16290101	Caisson drilling
17410100	Foundation and retaining wall construction	16290105	Drainage system construction
17410101	Foundation building	16290106	Dredging contractor
17419908	Tuckpointing or restoration	16290108	Irrigation system construction
17419909	Unit paver installation	16290201	Cutting of right-of-way
17710000	Concrete work	16290400	Land preparation construction
17710200	Curb and sidewalk contractors	16290403	Rock removal
17710201	Curb construction	16299901	Blasting contractor, except building demolition
17710202	Sidewalk contractor	16299902	Earthmoving contractor
17710301	Blacktop (asphalt) work	16299903	Land clearing contractor
17719901	Concrete pumping	16299904	Pile driving contractor
17719902	Concrete repair	17410102	Retaining wall construction
17919902	Concrete reinforcement, placing of	17719904	Foundation and footing contractor
17959901	Concrete breaking for streets and highways	17940000	Excavation work
Concrete, asphalt, sand, and gravel products		17949901	Excavation and grading, building construction
17419906	Refractory or acid brick masonry	17950000	Wrecking and demolition work
29510000	Asphalt paving mixtures and blocks	17959902	Demolition, buildings and other structures
29510200	Paving mixtures		
29510201	Asphalt and asphaltic paving mixtures (not from refineries)		
29520000	Asphalt felts and coatings		

Figure E-1.
Subindustries included in the availability analysis (continued)

Construction (cont.)			
Fencing, guardrails, barriers, and signs		Other construction services	
16110100	Highway signs and guardrails	16299906	Trenching contractor
16110101	Guardrail construction, highways	17410000	Masonry and other stonework
17999912	Fence construction	17419901	Bricklaying
52119907	Fencing	17419903	Concrete block masonry laying
Flagging services		17419904	Drain tile installation
73599912	Work zone traffic equipment (flags, cones, barrels, etc.)	17419905	Marble masonry, exterior construction
Highway, street, and bridge construction		17419907	Stone masonry
16110000	Highway and street construction	17710100	Stucco, gunite, and grouting contractors
16110200	Surfacing and paving	17710103	Guniting contractor
16110204	Highway and street paving contractor	17719903	Flooring contractor
16110205	Resurfacing contractor	17990209	Waterproofing
16119901	General contractor, highway and street construction	17990500	Exterior cleaning, including sandblasting
16119902	Highway and street maintenance	49590101	Snowplowing
16220000	Bridge, tunnel, and elevated highway construction	49590102	Sweeping service: road, airport, parking lot, etc.
16229901	Bridge construction	Painting, striping, and marking	
16290000	Heavy construction, nec	17210300	Industrial painting
17710300	Driveway, parking lot, and blacktop contractors	17210302	Bridge painting
17710302	Driveway contractor	17210303	Pavement marking contractor
17710303	Parking lot construction	Railroad and subway construction	
17990702	Parking lot maintenance	16290200	Railroad and subway construction
49590100	Road, airport, and parking lot maintenance service	16290202	Railroad and railway roadbed construction
Other construction materials		16290203	Subway construction
34460301	Fences or posts, ornamental iron or steel	Rebar and reinforcing steel	
		17919907	Precast concrete structural framing or panels, placing of
		Structural steel erection	
		17910000	Structural steel erection
		17919901	Building front installation, metal
		17919905	Iron work, structural

Figure E-1.
Subindustries included in the availability analysis (continued)

Construction (cont.)			
Trucking, hauling, and storage		Water, sewer, and utility lines	
42120000	Local trucking, without storage	16230000	Water, sewer, and utility lines
42129904	Draying, local: without storage	16230103	Oil and gas pipeline construction
42129905	Dump truck haulage	16230104	Pipeline wrapping
42129906	Garbage collection and transport, no disposal	16230200	Communication line and transmission tower construction
42129907	Hazardous waste transport	16230201	Cable laying construction
42129908	Heavy machinery transport, local	16230203	Telephone and communication line construction
42129909	Light haulage and cartage, local	16230300	Water and sewer line construction
42129912	Steel hauling, local	16230302	Sewer line construction
42129913	Truck rental with drivers	16230303	Water main construction
42139902	Building materials transport	16239901	Electric power line construction
		16239903	Pipe laying construction
		16239904	Pipeline construction, nec
		16239906	Underground utilities contractor
		17310302	Fiber optic cable installation
Professional Services			
Architectural and design services		Engineering	
87120000	Architectural services	87110000	Engineering services
		87110200	Industrial engineers
		87110201	Machine tool design
		87110202	Mechanical engineering
		87110400	Construction and civil engineering
		87110401	Building construction consultant
		87110402	Civil engineering
		87110403	Heating and ventilation engineering
		87110404	Structural engineering
		87119901	Acoustical engineering
		87119902	Aviation and/or aeronautical engineering
		87119903	Consulting engineer
		87119905	Electrical or electronic engineering
		87119907	Fire protection engineering
		87119909	Professional engineer
		87120100	Architectural engineering
Construction management			
87419902	Construction management		
87420402	Construction project management consultant		

Figure E-1.
Subindustries included in the availability analysis (continued)

Professional Services (cont.)			
Environmental services		Testing and inspection	
87110100	Sanitary engineers	47850200	Transportation inspection services
87110101	Pollution control engineering	47850202	Inspection services connected with transportation
87310302	Environmental research	73890200	Inspection and testing services
87449904	Environmental remediation	73890201	Air pollution measuring service
87489905	Environmental consultant	73890203	Building inspection service
		73890207	Industrial and commercial equipment inspection service
		73890209	Pipeline and power line inspection service
		73890210	Safety inspection service
		73890211	Sewer inspection service
Landscape architecture		Transportation planning services	
07810201	Landscape architects	87420410	Transportation consultant
		87480200	Urban planning and consulting services
		87480201	City planning
		87480204	Traffic consultant
Surveying and mapmaking			
87130000	Surveying services		
87139901	Photogrammetric engineering		
87139902	Aerial digital imaging		

Source: BBC Research & Consulting.

2. Verification of correct business name. The surveyor verified that he or she had reached the correct business, and if not, inquired about the correct contact information for the correct business. When the business name was not correct, surveyors asked if the respondent knew how to contact the business. CRI then followed up with the desired company based on the new contact information (see areas “X” and “Y” of the availability survey instrument at the end of Appendix E).

3. Verification of work related to relevant projects. The surveyor asked whether the organization does work or provides materials related to construction, maintenance, or design (Question A1). Surveyors continued the survey with businesses that responded “yes” to that question.

4. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit entity (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

5. 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 then described their main lines of business (Questions 3b and A3c). After the survey was complete, as necessary, BBC coded new information on main lines of business into appropriate 8-digit D&B work specialization codes.

6. Locations and affiliates. Because the study team surveyed business establishments and not businesses or firms, the surveyor asked business owners or managers if their businesses had other locations (Question A4) and if their businesses were subsidiaries or affiliates of other businesses (Questions A5 and A6).

7. 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. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B1 and B2).

8. Qualifications and interest in future work. The surveyor asked about businesses’ interest in future work with IDOT or other local government agencies. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B3 and B4).

9. Geographic areas. The surveyor asked whether businesses perform work or serve customers in different IDOT districts across the entire state of Illinois (Questions C1a through C1i).

10. Year established. The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

11. Largest contracts. The study team asked businesses to identify the value of the largest contracts on which they had bid or had been awarded during the past five years. CRI asked those questions for both prime contracts and subcontracts (Questions D2).⁴

12. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by women and/or minorities (Questions E1 and E2). If businesses indicated that they

⁴ Goods and commodities and non-professional services business establishments were not asked questions about subcontract work.

were minority-owned, they were also asked about the race/ethnicity of the business owners (Question E3). BBC confirmed that information through several other data sources including:

- IDOT's directory of certified Disadvantaged Business Enterprises (DBEs);
- IDOT vendor data;
- IDOT review; and
- Information from D&B and other sources.

When information about race/ethnicity or gender of ownership conflicted between sources, the study team reconciled that information through follow-up telephone calls with the businesses and other efforts.

13. Business revenue. The surveyor asked several questions about the size of businesses in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey section also asked about their revenues and number of employees across all locations (Questions F1 through F3).

14. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning general insights about conditions in the local marketplace (Question G1). 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).

15. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

D. Execution of Surveys

BBC held planning sessions with CRI prior to conducting the availability surveys. CRI conducted all surveys in 2017. The firm was responsible for programming the surveys, conducting them via telephone, and providing BBC with weekly data reports. To minimize non-response, CRI made up to five attempts during different times of the day and on different days of the week to successfully reach each business establishment. CRI attempted to survey an available 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 16,358 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 6,048 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 CRI attempted to contact were:

- Duplicate phone numbers (107 listings);
- Non-working phone numbers (1,721 listings); or
- Wrong numbers for the desired businesses (375 listings).

**Figure E-2.
Disposition of
attempts to survey
business
establishments**

Source:
2017 availability analysis.

Disposition	Number of listings	Percent of business listings
Beginning list	16,358	
Less duplicate phone numbers	107	
Less non-working phone numbers	1,721	
Less wrong number/business	375	
Unique business listings with working phone numbers	14,155	100.0 %
Less no answer	7,048	49.8
Less could not reach responsible staff member	1,034	7.3
Less language barrier	25	0.2
Establishments successfully contacted	6,048	42.7 %

Some non-working phone numbers or wrong numbers resulted from businesses going out of business or changing their names or phone numbers before the study team contacted them.

Working phone numbers. As shown in Figure E-2, there were 14,155 business establishments with working phone numbers that CRI attempted to contact. CRI was unsuccessful in contacting many of those businesses for various reasons:

- CRI could not reach anyone after five attempts at different times of the day and on different days of the week for 7,048 establishments.
- CRI could not reach a responsible staff member after five attempts at different times of the day on different days of the week for 1,034 establishments.
- CRI could not conduct the availability survey due to language barriers for 25 establishments.

After taking those unsuccessful attempts into account, CRI was able to successfully contact 6,048 business establishments, or about 43 percent of establishments with valid phone listings.

Establishments included in the availability database. Figure E-3 presents the disposition of the 6,048 business establishments that CRI successfully contacted and how that number resulted in the 705 businesses that the study team included in the availability database and that the study team considered potentially available for IDOT work.

Establishments not interested in discussing availability for IDOT work. Of the 6,048 business establishments that the study team successfully contacted, 3,767 establishments were not interested in discussing their availability for IDOT work. Another 239 establishments requested fax or e-mail availability surveys but did not return completed surveys. In total, 2,042 (34%) successfully-contacted business establishments completed availability surveys.

Establishments available for IDOT work. BBC only deemed a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that IDOT awarded during the study period. BBC excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 371 establishments that indicated that their businesses were not involved in relevant contracting work.

Figure E-3.
Disposition of successfully contacted business establishments

Disposition	Number of listings
Establishments successfully contacted	6,048
Less establishments not interested in discussing availability for IDOT work	3,767
Less unreturned fax/email surveys	239
Establishments that completed availability surveys	2,042
Less no relevant work	371
Less not a for-profit business	69
Less line of work outside scope	154
Less no past bid/award	619
Less no interest in future work	69
Less established after study period	3
Less multiple establishments	52
Establishments potentially available for entity work	705

Source: 2017 availability analysis.

- BBC excluded 69 establishments that indicated that their organizations were not for-profit businesses.
- BBC excluded 154 establishments that indicated that their businesses were involved in relevant work but reported that their main lines of business were outside of the study scope.
- BBC excluded 619 establishments that reported not having bid or been awarded contracts within the past five years.
- BBC excluded 69 establishments that reported not being interested in either prime contracting or subcontracting opportunities with IDOT or other local government agencies.
- BBC excluded 3 business establishments that reported being established in 2017 or later. Those business establishments would not have been available for contract elements that IDOT awarded during the study period.
- Fifty-two 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 705 businesses that were considered potentially available for IDOT 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, BBC considered the business to have bid or worked on a contract in that subindustry.

- The study team combined the different roles of work that establishments of the same business reported (i.e., prime contractor or subcontractor) 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.
- Except when there were large discrepancies among individual responses regarding establishment dates, BBC used the earliest founding date that establishments of the same business provided. In cases of large discrepancies, BBC followed up with the business establishments to obtain accurate establishment date information.
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the largest contract for which the business could be considered available (i.e., the business' relative capacity).
- BBC considered the largest revenue total that any establishments of the same business reported as the business' revenue cap (for purposes of determining status as a potential DBE).
- BBC determined the number of employees for businesses by calculating the mode or the mean of responses from its establishments.
- BBC coded businesses as minority- or woman-owned if the majority of its establishments reported such status.

E. Additional Considerations Related to Measuring Availability

BBC made several additional considerations related to its approach to measuring availability to ensure that estimates of the availability of minority- and woman-owned businesses for IDOT work were as accurate as possible.

Not providing a count of all businesses available for IDOT work. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of IDOT contracting dollars for which minority- and woman-owned businesses are available. The availability analysis did not provide a comprehensive listing of every business that could be available for IDOT work and should not be used in that way. Federal courts have approved BBC's use of that approach to measuring availability. In addition, federal regulations recommend similar approaches to measuring availability for agencies implementing minority- and woman-owned owned business programs.

Not basing the availability analysis on MBE/WBE or DBE directories, prequalification lists, or bidders lists. Federal guidance recommends dividing the number of businesses in an agency's certification directory by the total number of businesses in the marketplace, for example, as reported in United States Census data. As another option, agencies could use a list of prequalified businesses or a bidders list to estimate the availability of minority- or woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when measuring the availability of minority- and woman-owned businesses for IDOT work is that dividing a simple count of certified businesses by the total number of businesses does not account for business characteristics that are crucial to estimating availability as accurately as

possible. 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 head count approach. For example, the availability telephone surveys that the study team conducted provided data on qualifications, relative capacity, and interest in IDOT 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.⁵

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 Illinois.

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 main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed many of the work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

Non-response bias. An analysis of non-response bias 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 bias due to:

- Research sponsorship;
- Subindustries; and
- Language barriers.

Research sponsorship. Surveyors introduced themselves by identifying IDOT 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 studies—BBC has found that identifying the sponsor substantially increases response rates.

Subindustries. 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

⁵ BBC used IDOT's DBE certification directory and other sources of information to confirm information about the race/ethnicity and gender of business owners that the study team obtained from availability surveys.

subindustry. Simply counting all surveyed businesses across subindustries to estimate the availability of minority- and woman-owned 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 less, because the availability analysis examines businesses within particular subindustries 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. Subindustry 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.

Language barriers. IDOT contracting documents are in English and are not in other languages. For that reason, the study team made the decision to only include businesses able to complete the availability survey in English in the availability analysis. Businesses unable to complete the survey due to language barriers represented 0.2 percent of contacted businesses.

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. For example:

- BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from IDOT. For example, IDOT's certification data include information on the race/ethnicity and gender of the owners of DBE-certified businesses. The study team compared survey responses concerning business ownership with such information.
- BBC examined IDOT contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing relative capacity. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual IDOT contract data.
- IDOT reviewed contract and vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.

APPENDIX F.

Disparity Tables

Table	Characteristics									Potential DBEs
	Time period	Type	Role	Prime contract	System	Region	Funding source	Race-conscious goals		
F-2	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal and state	Goals and no-goals	No	
F-3	10/01/12 - 09/30/2014	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal and state	Goals and no-goals	No	
F-4	10/01/14 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal and state	Goals and no-goals	No	
F-5	10/01/12 - 09/30/2016	Construction	Prime contracts and subcontracts	N/A	Highway	All	Federal and state	Goals and no-goals	No	
F-6	10/01/12 - 09/30/2016	Professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal and state	Goals and no-goals	No	
F-7	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts	N/A	Highway	All	Federal and state	Goals and no-goals	No	
F-8	10/01/12 - 09/30/2016	Construction and professional services	Subcontracts	N/A	Highway	All	Federal and state	Goals and no-goals	No	
F-9	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	1	Federal and state	Goals and no-goals	No	
F-10	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	2	Federal and state	Goals and no-goals	No	
F-11	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	3	Federal and state	Goals and no-goals	No	
F-12	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	4	Federal and state	Goals and no-goals	No	
F-13	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	5	Federal and state	Goals and no-goals	No	
F-14	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts	Large	Highway	All	Federal and state	Goals and no-goals	No	
F-15	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts	Small	Highway	All	Federal and state	Goals and no-goals	No	
F-16	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal	Goals and no-goals	No	
F-17	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	State	Goals and no-goals	No	
F-18	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal and state	Goals	No	
F-19	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal and state	No-goals	No	
F-20	10/01/12 - 09/30/2016	Construction and professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal	Goals and no-goals	Yes	
F-21	10/01/12 - 09/30/2016	Construction	Prime contracts and subcontracts	N/A	Highway	All	Federal	Goals and no-goals	Yes	
F-22	10/01/12 - 09/30/2016	Professional services	Prime contracts and subcontracts	N/A	Highway	All	Federal	Goals and no-goals	Yes	

Figure F-2.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	17,426	\$8,049,012	\$8,049,012				
(2) All minority- and woman-owned	7,369	\$1,250,271	\$1,250,271	15.5	19.9	-4.3	78.2
(3) White woman-owned	4,120	\$558,672	\$558,672	6.9	13.6	-6.6	51.1
(4) Minority-owned	3,249	\$691,600	\$691,600	8.6	6.3	2.3	136.5
(5) Asian Pacific American-owned	200	\$41,902	\$41,960	0.5	0.5	0.1	114.5
(6) Black American-owned	431	\$135,760	\$135,948	1.7	1.5	0.2	113.9
(7) Hispanic American-owned	2,255	\$421,601	\$422,184	5.2	2.9	2.3	178.5
(8) Native American-owned	206	\$12,103	\$12,120	0.2	0.0	0.1	200+
(9) Subcontinent Asian American-owned	142	\$79,279	\$79,389	1.0	1.4	-0.4	70.2
(10) Unknown minority-owned	15	\$955					
(11) DBE-certified	6,453	\$1,057,319	\$1,057,319	13.1			
(12) White woman-owned DBE	3,319	\$396,527	\$396,790	4.9			
(13) Minority-owned DBE	3,133	\$660,092	\$660,530	8.2			
(14) Asian Pacific American-owned DBE	185	\$40,265	\$40,292	0.5			
(15) Black American-owned DBE	419	\$134,601	\$134,690	1.7			
(16) Hispanic American-owned DBE	2,210	\$417,324	\$417,601	5.2			
(17) Native American-owned DBE	189	\$11,262	\$11,270	0.1			
(18) Subcontinent Asian American-owned DBE	130	\$56,640	\$56,678	0.7			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.

Time period: 10/01/12 - 09/30/2014

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	9,569	\$4,197,876	\$4,197,876				
(2) All minority- and woman-owned	3,986	\$664,574	\$664,574	15.8	20.6	-4.7	77.0
(3) White woman-owned	2,299	\$284,776	\$284,776	6.8	14.2	-7.4	47.9
(4) Minority-owned	1,687	\$379,798	\$379,798	9.0	6.4	2.6	141.1
(5) Asian Pacific American-owned	113	\$28,793	\$28,861	0.7	0.5	0.2	135.8
(6) Black American-owned	247	\$92,075	\$92,290	2.2	1.5	0.7	142.1
(7) Hispanic American-owned	1,162	\$211,055	\$211,549	5.0	3.0	2.1	168.8
(8) Native American-owned	76	\$4,618	\$4,629	0.1	0.0	0.1	200+
(9) Subcontinent Asian American-owned	80	\$42,371	\$42,470	1.0	1.4	-0.3	74.4
(10) Unknown minority-owned	9	\$885					
(11) DBE-certified	3,474	\$573,869	\$573,869	13.7			
(12) White woman-owned DBE	1,852	\$209,439	\$209,694	5.0			
(13) Minority-owned DBE	1,621	\$363,730	\$364,175	8.7			
(14) Asian Pacific American-owned DBE	106	\$28,088	\$28,122	0.7			
(15) Black American-owned DBE	236	\$90,927	\$91,038	2.2			
(16) Hispanic American-owned DBE	1,141	\$208,401	\$208,656	5.0			
(17) Native American-owned DBE	64	\$3,816	\$3,820	0.1			
(18) Subcontinent Asian American-owned DBE	74	\$32,499	\$32,538	0.8			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.

Time period: 10/01/14 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	7,857	\$3,851,136	\$3,851,136				
(2) All minority- and woman-owned	3,383	\$585,698	\$585,698	15.2	19.1	-3.9	79.6
(3) White woman-owned	1,821	\$273,896	\$273,896	7.1	13.0	-5.8	54.9
(4) Minority-owned	1,562	\$311,802	\$311,802	8.1	6.2	1.9	131.4
(5) Asian Pacific American-owned	87	\$13,108	\$13,111	0.3	0.4	-0.1	85.2
(6) Black American-owned	184	\$43,685	\$43,695	1.1	1.4	-0.3	80.3
(7) Hispanic American-owned	1,093	\$210,546	\$210,592	5.5	2.9	2.6	189.4
(8) Native American-owned	130	\$7,485	\$7,487	0.2	0.0	0.2	200+
(9) Subcontinent Asian American-owned	62	\$36,908	\$36,916	1.0	1.5	-0.5	65.8
(10) Unknown minority-owned	6	\$69					
(11) DBE-certified	2,979	\$483,451	\$483,451	12.6			
(12) White woman-owned DBE	1,467	\$187,088	\$187,088	4.9			
(13) Minority-owned DBE	1,512	\$296,362	\$296,362	7.7			
(14) Asian Pacific American-owned DBE	79	\$12,177	\$12,177	0.3			
(15) Black American-owned DBE	183	\$43,674	\$43,674	1.1			
(16) Hispanic American-owned DBE	1,069	\$208,923	\$208,923	5.4			
(17) Native American-owned DBE	125	\$7,446	\$7,446	0.2			
(18) Subcontinent Asian American-owned DBE	56	\$24,141	\$24,141	0.6			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	16,638	\$7,375,389	\$7,375,389				
(2) All minority- and woman-owned	6,976	\$1,052,189	\$1,052,189	14.3	18.9	-4.6	75.6
(3) White woman-owned	4,004	\$505,084	\$505,084	6.8	14.0	-7.2	48.9
(4) Minority-owned	2,972	\$547,105	\$547,105	7.4	4.9	2.6	152.5
(5) Asian Pacific American-owned	158	\$18,590	\$18,622	0.3	0.3	-0.1	80.6
(6) Black American-owned	353	\$96,223	\$96,391	1.3	0.6	0.7	200+
(7) Hispanic American-owned	2,183	\$392,204	\$392,890	5.3	3.0	2.3	177.6
(8) Native American-owned	204	\$11,603	\$11,623	0.2	0.0	0.2	200+
(9) Subcontinent Asian American-owned	59	\$27,531	\$27,579	0.4	1.0	-0.6	39.1
(10) Unknown minority-owned	15	\$955					
(11) DBE-certified	6,089	\$895,479	\$895,479	12.1			
(12) White woman-owned DBE	3,217	\$355,823	\$355,823	4.8			
(13) Minority-owned DBE	2,872	\$539,655	\$539,655	7.3			
(14) Asian Pacific American-owned DBE	148	\$18,297	\$18,297	0.2			
(15) Black American-owned DBE	341	\$95,063	\$95,063	1.3			
(16) Hispanic American-owned DBE	2,138	\$387,927	\$387,927	5.3			
(17) Native American-owned DBE	188	\$11,093	\$11,093	0.2			
(18) Subcontinent Asian American-owned DBE	57	\$27,275	\$27,275	0.4			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.

Time period: 10/01/12 - 09/30/2016

Contract type: Professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	788	\$673,623	\$673,623				
(2) All minority- and woman-owned	393	\$198,082	\$198,082	29.4	30.9	-1.4	95.3
(3) White woman-owned	116	\$53,588	\$53,588	8.0	8.9	-0.9	89.3
(4) Minority-owned	277	\$144,495	\$144,495	21.5	21.9	-0.5	97.7
(5) Asian Pacific American-owned	42	\$23,312	\$23,312	3.5	2.0	1.4	172.1
(6) Black American-owned	78	\$39,538	\$39,538	5.9	11.3	-5.4	52.1
(7) Hispanic American-owned	72	\$29,397	\$29,397	4.4	2.3	2.1	192.0
(8) Native American-owned	2	\$500	\$500	0.1	0.1	0.0	106.3
(9) Subcontinent Asian American-owned	83	\$51,748	\$51,748	7.7	6.3	1.4	121.3
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	364	\$161,841	\$161,841	24.0			
(12) White woman-owned DBE	102	\$40,704	\$40,881	6.1			
(13) Minority-owned DBE	261	\$120,437	\$120,960	18.0			
(14) Asian Pacific American-owned DBE	37	\$21,968	\$22,064	3.3			
(15) Black American-owned DBE	78	\$39,538	\$39,709	5.9			
(16) Hispanic American-owned DBE	72	\$29,397	\$29,525	4.4			
(17) Native American-owned DBE	1	\$169	\$170	0.0			
(18) Subcontinent Asian American-owned DBE	73	\$29,365	\$29,493	4.4			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	4,253	\$6,098,872	\$6,098,872				
(2) All minority- and woman-owned	429	\$316,447	\$316,447	5.2	15.2	-10.0	34.1
(3) White woman-owned	202	\$152,247	\$152,247	2.5	10.9	-8.4	23.0
(4) Minority-owned	227	\$164,200	\$164,200	2.7	4.4	-1.7	61.9
(5) Asian Pacific American-owned	22	\$17,926	\$17,926	0.3	0.2	0.1	174.9
(6) Black American-owned	82	\$37,646	\$37,646	0.6	1.5	-0.9	41.9
(7) Hispanic American-owned	78	\$56,723	\$56,723	0.9	1.5	-0.5	63.6
(8) Native American-owned	2	\$500	\$500	0.0	0.0	0.0	69.1
(9) Subcontinent Asian American-owned	43	\$51,405	\$51,405	0.8	1.2	-0.4	68.1
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	298	\$197,103	\$197,103	3.2			
(12) White woman-owned DBE	93	\$58,586	\$58,795	1.0			
(13) Minority-owned DBE	204	\$137,816	\$138,308	2.3			
(14) Asian Pacific American-owned DBE	16	\$16,514	\$16,573	0.3			
(15) Black American-owned DBE	77	\$36,629	\$36,760	0.6			
(16) Hispanic American-owned DBE	75	\$54,748	\$54,943	0.9			
(17) Native American-owned DBE	1	\$169	\$170	0.0			
(18) Subcontinent Asian American-owned DBE	35	\$29,757	\$29,863	0.5			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	13,173	\$1,950,140	\$1,950,140				
(2) All minority- and woman-owned	6,940	\$933,824	\$933,824	47.9	34.4	13.4	139.0
(3) White woman-owned	3,918	\$406,424	\$406,424	20.8	22.1	-1.2	94.4
(4) Minority-owned	3,022	\$527,400	\$527,400	27.0	12.4	14.7	200+
(5) Asian Pacific American-owned	178	\$23,976	\$24,019	1.2	1.4	-0.1	91.0
(6) Black American-owned	349	\$98,114	\$98,292	5.0	1.5	3.5	200+
(7) Hispanic American-owned	2,177	\$364,878	\$365,540	18.7	7.6	11.2	200+
(8) Native American-owned	204	\$11,603	\$11,624	0.6	0.0	0.6	200+
(9) Subcontinent Asian American-owned	99	\$27,874	\$27,925	1.4	1.9	-0.5	74.1
(10) Unknown minority-owned	15	\$955					
(11) DBE-certified	6,155	\$860,217	\$860,217	44.1			
(12) White woman-owned DBE	3,226	\$337,941	\$337,941	17.3			
(13) Minority-owned DBE	2,929	\$522,276	\$522,276	26.8			
(14) Asian Pacific American-owned DBE	169	\$23,751	\$23,751	1.2			
(15) Black American-owned DBE	342	\$97,972	\$97,972	5.0			
(16) Hispanic American-owned DBE	2,135	\$362,576	\$362,576	18.6			
(17) Native American-owned DBE	188	\$11,093	\$11,093	0.6			
(18) Subcontinent Asian American-owned DBE	95	\$26,883	\$26,883	1.4			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: 1

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 firms	7,552	\$3,661,838	\$3,661,838				
(2) All minority- and woman-owned	3,766	\$847,106	\$847,106	23.1	22.2	0.9	104.0
(3) White woman-owned	1,583	\$313,639	\$313,639	8.6	14.5	-5.9	59.1
(4) Minority-owned	2,183	\$533,467	\$533,467	14.6	7.7	6.8	188.2
(5) Asian Pacific American-owned	62	\$21,310	\$21,346	0.6	0.6	-0.1	89.9
(6) Black American-owned	193	\$100,337	\$100,510	2.7	1.8	0.9	150.5
(7) Hispanic American-owned	1,656	\$332,435	\$333,006	9.1	3.5	5.6	200+
(8) Native American-owned	126	\$7,675	\$7,688	0.2	0.0	0.2	200+
(9) Subcontinent Asian American-owned	135	\$70,795	\$70,916	1.9	1.8	0.1	107.2
(10) Unknown minority-owned	11	\$915					
(11) DBE-certified	3,187	\$700,471	\$700,471	19.1			
(12) White woman-owned DBE	1,085	\$193,489	\$193,489	5.3			
(13) Minority-owned DBE	2,102	\$506,982	\$506,982	13.8			
(14) Asian Pacific American-owned DBE	51	\$20,267	\$20,267	0.6			
(15) Black American-owned DBE	185	\$100,029	\$100,029	2.7			
(16) Hispanic American-owned DBE	1,622	\$328,544	\$328,544	9.0			
(17) Native American-owned DBE	120	\$7,136	\$7,136	0.2			
(18) Subcontinent Asian American-owned DBE	124	\$51,006	\$51,006	1.4			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: 2

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 firms	3,057	\$1,255,995	\$1,255,995				
(2) All minority- and woman-owned	1,002	\$105,419	\$105,419	8.4	17.9	-9.5	47.0
(3) White woman-owned	628	\$62,400	\$62,400	5.0	13.7	-8.7	36.3
(4) Minority-owned	374	\$43,019	\$43,019	3.4	4.2	-0.8	81.6
(5) Asian Pacific American-owned	6	\$2,468	\$2,469	0.2	0.3	-0.1	77.7
(6) Black American-owned	63	\$6,005	\$6,008	0.5	0.5	-0.1	88.2
(7) Hispanic American-owned	248	\$30,466	\$30,481	2.4	3.0	-0.6	80.8
(8) Native American-owned	52	\$2,073	\$2,074	0.2	0.0	0.2	200+
(9) Subcontinent Asian American-owned	2	\$1,986	\$1,987	0.2	0.4	-0.2	40.5
(10) Unknown minority-owned	3	\$22					
(11) DBE-certified	849	\$86,952	\$86,952	6.9			
(12) White woman-owned DBE	492	\$44,499	\$44,499	3.5			
(13) Minority-owned DBE	357	\$42,453	\$42,453	3.4			
(14) Asian Pacific American-owned DBE	6	\$2,468	\$2,468	0.2			
(15) Black American-owned DBE	63	\$6,005	\$6,005	0.5			
(16) Hispanic American-owned DBE	243	\$30,222	\$30,222	2.4			
(17) Native American-owned DBE	43	\$1,773	\$1,773	0.1			
(18) Subcontinent Asian American-owned DBE	2	\$1,986	\$1,986	0.2			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: 3

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 firms	2,125	\$804,042	\$804,042				
(2) All minority- and woman-owned	847	\$93,641	\$93,641	11.6	17.3	-5.7	67.3
(3) White woman-owned	654	\$59,022	\$59,022	7.3	12.3	-4.9	59.9
(4) Minority-owned	193	\$34,618	\$34,618	4.3	5.0	-0.7	85.4
(5) Asian Pacific American-owned	4	\$508	\$508	0.1	0.3	-0.3	19.5
(6) Black American-owned	66	\$6,482	\$6,482	0.8	0.7	0.1	111.3
(7) Hispanic American-owned	113	\$27,136	\$27,136	3.4	3.0	0.4	114.1
(8) Native American-owned	9	\$383	\$383	0.0	0.0	0.0	200+
(9) Subcontinent Asian American-owned	1	\$110	\$110	0.0	1.0	-1.0	1.3
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	755	\$83,082	\$83,082	10.3			
(12) White woman-owned DBE	566	\$48,844	\$48,844	6.1			
(13) Minority-owned DBE	189	\$34,238	\$34,238	4.3			
(14) Asian Pacific American-owned DBE	4	\$508	\$508	0.1			
(15) Black American-owned DBE	65	\$6,190	\$6,190	0.8			
(16) Hispanic American-owned DBE	112	\$27,049	\$27,049	3.4			
(17) Native American-owned DBE	7	\$381	\$381	0.0			
(18) Subcontinent Asian American-owned DBE	1	\$110	\$110	0.0			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: 4

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 firms	1,840	\$1,030,513	\$1,030,513				
(2) All minority- and woman-owned	625	\$53,990	\$53,990	5.2	13.8	-8.6	37.9
(3) White woman-owned	513	\$37,494	\$37,494	3.6	10.8	-7.1	33.8
(4) Minority-owned	112	\$16,496	\$16,496	1.6	3.1	-1.5	52.2
(5) Asian Pacific American-owned	3	\$148	\$148	0.0	0.1	-0.1	10.5
(6) Black American-owned	34	\$3,498	\$3,498	0.3	0.3	0.0	97.2
(7) Hispanic American-owned	72	\$12,780	\$12,780	1.2	2.0	-0.7	63.2
(8) Native American-owned	3	\$70	\$70	0.0	0.0	0.0	200+
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.6	-0.6	0.0
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	589	\$50,142	\$50,142	4.9			
(12) White woman-owned DBE	480	\$34,038	\$34,038	3.3			
(13) Minority-owned DBE	109	\$16,104	\$16,104	1.6			
(14) Asian Pacific American-owned DBE	2	\$67	\$67	0.0			
(15) Black American-owned DBE	32	\$3,187	\$3,187	0.3			
(16) Hispanic American-owned DBE	72	\$12,780	\$12,780	1.2			
(17) Native American-owned DBE	3	\$70	\$70	0.0			
(18) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: 5

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 firms	2,733	\$1,111,910	\$1,111,910				
(2) All minority- and woman-owned	1,091	\$110,508	\$110,508	9.9	19.8	-9.9	50.2
(3) White woman-owned	720	\$64,749	\$64,749	5.8	14.7	-8.9	39.6
(4) Minority-owned	371	\$45,759	\$45,759	4.1	5.1	-1.0	80.8
(5) Asian Pacific American-owned	122	\$13,008	\$13,013	1.2	0.3	0.9	200+
(6) Black American-owned	67	\$14,248	\$14,253	1.3	0.9	0.4	139.8
(7) Hispanic American-owned	163	\$15,785	\$15,791	1.4	2.1	-0.7	67.7
(8) Native American-owned	16	\$1,902	\$1,903	0.2	0.0	0.2	200+
(9) Subcontinent Asian American-owned	2	\$799	\$799	0.1	1.7	-1.7	4.1
(10) Unknown minority-owned	1	\$17					
(11) DBE-certified	1,041	\$108,017	\$108,017	9.7			
(12) White woman-owned DBE	680	\$63,092	\$63,092	5.7			
(13) Minority-owned DBE	361	\$44,924	\$44,924	4.0			
(14) Asian Pacific American-owned DBE	119	\$12,494	\$12,494	1.1			
(15) Black American-owned DBE	66	\$13,999	\$13,999	1.3			
(16) Hispanic American-owned DBE	158	\$15,730	\$15,730	1.4			
(17) Native American-owned DBE	16	\$1,902	\$1,902	0.2			
(18) Subcontinent Asian American-owned DBE	2	\$799	\$799	0.1			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.

Time period: 10/01/12 - 09/30/2016

Large prime contracts

Contract type: Construction and professional services

Contract role: Prime contracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	1,975	\$5,125,708	\$5,125,708				
(2) All minority- and woman-owned	101	\$139,507	\$139,507	2.7	12.9	-10.2	21.0
(3) White woman-owned	59	\$94,642	\$94,642	1.8	10.7	-8.9	17.2
(4) Minority-owned	42	\$44,865	\$44,865	0.9	2.2	-1.3	39.9
(5) Asian Pacific American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(6) Black American-owned	5	\$4,646	\$4,646	0.1	0.4	-0.3	23.6
(7) Hispanic American-owned	27	\$30,957	\$30,957	0.6	1.1	-0.5	56.9
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	10	\$9,262	\$9,262	0.2	0.7	-0.6	24.1
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	54	\$65,044	\$65,044	1.3			
(12) White woman-owned DBE	15	\$22,110	\$22,110	0.4			
(13) Minority-owned DBE	39	\$42,934	\$42,934	0.8			
(14) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(15) Black American-owned DBE	4	\$4,480	\$4,480	0.1			
(16) Hispanic American-owned DBE	25	\$29,192	\$29,192	0.6			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	10	\$9,262	\$9,262	0.2			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.

Time period: 10/01/12 - 09/30/2016

Small prime contracts

Contract type: Construction and professional services

Contract role: Prime contracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	1,828	\$389,200	\$389,200				
(2) All minority- and woman-owned	175	\$32,167	\$32,167	8.3	23.6	-15.3	35.0
(3) White woman-owned	93	\$16,033	\$16,033	4.1	15.7	-11.6	26.2
(4) Minority-owned	82	\$16,134	\$16,134	4.1	7.9	-3.7	52.5
(5) Asian Pacific American-owned	8	\$1,071	\$1,071	0.3	0.0	0.3	200+
(6) Black American-owned	40	\$7,887	\$7,887	2.0	0.8	1.2	200+
(7) Hispanic American-owned	27	\$5,533	\$5,533	1.4	5.7	-4.3	24.8
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Subcontinent Asian American-owned	7	\$1,642	\$1,642	0.4	1.3	-0.8	33.2
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	115	\$22,399	\$22,399	5.8			
(12) White woman-owned DBE	41	\$7,570	\$7,570	1.9			
(13) Minority-owned DBE	74	\$14,829	\$14,829	3.8			
(14) Asian Pacific American-owned DBE	5	\$827	\$827	0.2			
(15) Black American-owned DBE	36	\$7,036	\$7,036	1.8			
(16) Hispanic American-owned DBE	26	\$5,323	\$5,323	1.4			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	7	\$1,642	\$1,642	0.4			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal

Contract system: Highway

Contract region: Statewide

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 firms	11,869	\$5,941,684	\$5,941,684				
(2) All minority- and woman-owned	5,147	\$893,353	\$893,353	15.0	18.3	-3.2	82.3
(3) White woman-owned	2,907	\$430,428	\$430,428	7.2	13.4	-6.2	54.1
(4) Minority-owned	2,240	\$462,925	\$462,925	7.8	4.9	2.9	160.2
(5) Asian Pacific American-owned	126	\$26,459	\$26,514	0.4	0.4	0.1	113.0
(6) Black American-owned	263	\$86,872	\$87,051	1.5	0.9	0.6	172.3
(7) Hispanic American-owned	1,637	\$312,607	\$313,253	5.3	2.6	2.7	200+
(8) Native American-owned	142	\$8,338	\$8,355	0.1	0.0	0.1	200+
(9) Subcontinent Asian American-owned	57	\$27,694	\$27,752	0.5	1.0	-0.6	45.8
(10) Unknown minority-owned	15	\$955					
(11) DBE-certified	4,501	\$751,620	\$751,620	12.6			
(12) White woman-owned DBE	2,335	\$298,782	\$298,782	5.0			
(13) Minority-owned DBE	2,166	\$452,838	\$452,838	7.6			
(14) Asian Pacific American-owned DBE	121	\$26,249	\$26,249	0.4			
(15) Black American-owned DBE	257	\$86,378	\$86,378	1.5			
(16) Hispanic American-owned DBE	1,603	\$308,625	\$308,625	5.2			
(17) Native American-owned DBE	131	\$7,871	\$7,871	0.1			
(18) Subcontinent Asian American-owned DBE	54	\$23,716	\$23,716	0.4			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: State

Contract system: Highway

Contract region: Statewide

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 firms	5,557	\$2,107,328	\$2,107,328				
(2) All minority- and woman-owned	2,222	\$356,918	\$356,918	16.9	24.4	-7.5	69.4
(3) White woman-owned	1,213	\$128,244	\$128,244	6.1	14.1	-8.0	43.2
(4) Minority-owned	1,009	\$228,674	\$228,674	10.9	10.3	0.5	105.1
(5) Asian Pacific American-owned	74	\$15,442	\$15,442	0.7	0.6	0.1	117.1
(6) Black American-owned	168	\$48,888	\$48,888	2.3	3.3	-0.9	71.0
(7) Hispanic American-owned	618	\$108,994	\$108,994	5.2	3.9	1.3	132.5
(8) Native American-owned	64	\$3,765	\$3,765	0.2	0.0	0.1	200+
(9) Subcontinent Asian American-owned	85	\$51,585	\$51,585	2.4	2.5	0.0	98.1
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	1,952	\$305,699	\$305,699	14.5			
(12) White woman-owned DBE	984	\$97,745	\$97,969	4.6			
(13) Minority-owned DBE	967	\$207,254	\$207,730	9.9			
(14) Asian Pacific American-owned DBE	64	\$14,017	\$14,049	0.7			
(15) Black American-owned DBE	162	\$48,223	\$48,333	2.3			
(16) Hispanic American-owned DBE	607	\$108,699	\$108,949	5.2			
(17) Native American-owned DBE	58	\$3,391	\$3,399	0.2			
(18) Subcontinent Asian American-owned DBE	76	\$32,924	\$33,000	1.6			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

Goal 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 firms	14,903	\$7,434,925	\$7,434,925				
(2) All minority- and woman-owned	6,759	\$1,179,926	\$1,179,926	15.9	19.1	-3.2	83.2
(3) White woman-owned	3,706	\$517,543	\$517,543	7.0	13.2	-6.2	52.7
(4) Minority-owned	3,053	\$662,383	\$662,383	8.9	5.9	3.0	151.5
(5) Asian Pacific American-owned	173	\$40,622	\$40,679	0.5	0.5	0.1	114.7
(6) Black American-owned	389	\$129,661	\$129,845	1.7	1.5	0.3	119.9
(7) Hispanic American-owned	2,147	\$401,391	\$401,960	5.4	2.5	2.9	200+
(8) Native American-owned	193	\$11,891	\$11,908	0.2	0.0	0.2	200+
(9) Subcontinent Asian American-owned	137	\$77,881	\$77,991	1.0	1.4	-0.3	75.1
(10) Unknown minority-owned	14	\$937					
(11) DBE-certified	5,955	\$1,005,869	\$1,005,869	13.5			
(12) White woman-owned DBE	3,005	\$373,848	\$373,848	5.0			
(13) Minority-owned DBE	2,950	\$632,021	\$632,021	8.5			
(14) Asian Pacific American-owned DBE	161	\$39,229	\$39,229	0.5			
(15) Black American-owned DBE	381	\$129,353	\$129,353	1.7			
(16) Hispanic American-owned DBE	2,105	\$397,144	\$397,144	5.3			
(17) Native American-owned DBE	178	\$11,053	\$11,053	0.1			
(18) Subcontinent Asian American-owned DBE	125	\$55,242	\$55,242	0.7			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.

Time period: 10/01/12 - 09/30/2016

No-goal contracts

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal and state

Contract system: Highway

Contract region: Statewide

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 firms	2,523	\$614,086	\$614,086				
(2) All minority- and woman-owned	610	\$70,345	\$70,345	11.5	29.4	-18.0	38.9
(3) White woman-owned	414	\$41,128	\$41,128	6.7	18.1	-11.4	36.9
(4) Minority-owned	196	\$29,217	\$29,217	4.8	11.3	-6.5	42.1
(5) Asian Pacific American-owned	27	\$1,280	\$1,281	0.2	0.2	0.0	107.7
(6) Black American-owned	42	\$6,099	\$6,103	1.0	1.8	-0.8	55.3
(7) Hispanic American-owned	108	\$20,210	\$20,222	3.3	7.7	-4.4	42.7
(8) Native American-owned	13	\$212	\$212	0.0	0.1	0.0	48.9
(9) Subcontinent Asian American-owned	5	\$1,398	\$1,399	0.2	1.5	-1.3	15.0
(10) Unknown minority-owned	1	\$17					
(11) DBE-certified	498	\$51,451	\$51,451	8.4			
(12) White woman-owned DBE	314	\$22,679	\$22,992	3.7			
(13) Minority-owned DBE	183	\$28,072	\$28,459	4.6			
(14) Asian Pacific American-owned DBE	24	\$1,036	\$1,050	0.2			
(15) Black American-owned DBE	38	\$5,248	\$5,321	0.9			
(16) Hispanic American-owned DBE	105	\$20,180	\$20,459	3.3			
(17) Native American-owned DBE	11	\$209	\$212	0.0			
(18) Subcontinent Asian American-owned DBE	5	\$1,398	\$1,418	0.2			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction and professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal

Contract system: Highway

Contract region: Statewide

Analysis of potential DBEs

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 firms	11,869	\$5,941,684	\$5,941,684				
(2) All minority- and woman-owned	5,147	\$893,353	\$893,353	15.0	17.6	-2.5	85.6
(3) White woman-owned	2,907	\$430,428	\$430,428	7.2	12.7	-5.5	57.0
(4) Minority-owned	2,240	\$462,925	\$462,925	7.8	4.8	2.9	160.7
(5) Asian Pacific American-owned	126	\$26,459	\$26,514	0.4	0.4	0.1	113.0
(6) Black American-owned	263	\$86,872	\$87,051	1.5	0.9	0.6	172.3
(7) Hispanic American-owned	1,637	\$312,607	\$313,253	5.3	2.6	2.7	200+
(8) Native American-owned	142	\$8,338	\$8,355	0.1	0.0	0.1	200+
(9) Subcontinent Asian American-owned	57	\$27,694	\$27,752	0.5	1.0	-0.5	46.5
(10) Unknown minority-owned	15	\$955					
(11) DBE-certified	4,501	\$751,620	\$751,620	12.6			
(12) White woman-owned DBE	2,335	\$298,782	\$298,782	5.0			
(13) Minority-owned DBE	2,166	\$452,838	\$452,838	7.6			
(14) Asian Pacific American-owned DBE	121	\$26,249	\$26,249	0.4			
(15) Black American-owned DBE	257	\$86,378	\$86,378	1.5			
(16) Hispanic American-owned DBE	1,603	\$308,625	\$308,625	5.2			
(17) Native American-owned DBE	131	\$7,871	\$7,871	0.1			
(18) Subcontinent Asian American-owned DBE	54	\$23,716	\$23,716	0.4			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.

Time period: 10/01/12 - 09/30/2016

Contract type: Construction

Contract role: Prime contracts and subcontracts

Funding source: Federal

Contract system: Highway

Contract region: Statewide

Analysis of potential DBEs

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 firms	11,707	\$5,760,531	\$5,760,531				
(2) All minority- and woman-owned	5,080	\$849,168	\$849,168	14.7	17.3	-2.6	85.0
(3) White woman-owned	2,877	\$411,269	\$411,269	7.1	12.9	-5.7	55.5
(4) Minority-owned	2,203	\$437,899	\$437,899	7.6	4.5	3.1	170.1
(5) Asian Pacific American-owned	119	\$16,885	\$16,922	0.3	0.4	-0.1	83.1
(6) Black American-owned	255	\$81,485	\$81,663	1.4	0.6	0.8	200+
(7) Hispanic American-owned	1,629	\$310,139	\$310,816	5.4	2.6	2.8	200+
(8) Native American-owned	142	\$8,338	\$8,356	0.1	0.0	0.1	200+
(9) Subcontinent Asian American-owned	43	\$20,097	\$20,141	0.3	0.9	-0.5	39.1
(10) Unknown minority-owned	15	\$955					
(11) DBE-certified	4,441	\$718,344	\$718,344	12.5			
(12) White woman-owned DBE	2,309	\$286,615	\$286,615	5.0			
(13) Minority-owned DBE	2,132	\$431,729	\$431,729	7.5			
(14) Asian Pacific American-owned DBE	115	\$16,854	\$16,854	0.3			
(15) Black American-owned DBE	249	\$80,991	\$80,991	1.4			
(16) Hispanic American-owned DBE	1,595	\$306,156	\$306,156	5.3			
(17) Native American-owned DBE	131	\$7,871	\$7,871	0.1			
(18) Subcontinent Asian American-owned DBE	42	\$19,856	\$19,856	0.3			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-22.

Time period: 10/01/12 - 09/30/2016

Contract type: Professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal

Contract system: Highway

Contract region: Statewide

Analysis of potential DBEs

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 firms	162	\$181,153	\$181,153				
(2) All minority- and woman-owned	67	\$44,185	\$44,185	24.4	24.8	-0.4	98.3
(3) White woman-owned	30	\$19,159	\$19,159	10.6	7.9	2.7	133.8
(4) Minority-owned	37	\$25,027	\$25,027	13.8	16.9	-3.1	81.6
(5) Asian Pacific American-owned	7	\$9,574	\$9,574	5.3	1.7	3.6	200+
(6) Black American-owned	8	\$5,387	\$5,387	3.0	8.9	-5.9	33.5
(7) Hispanic American-owned	8	\$2,469	\$2,469	1.4	1.8	-0.5	74.3
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(9) Subcontinent Asian American-owned	14	\$7,597	\$7,597	4.2	4.5	-0.3	93.4
(10) Unknown minority-owned	0	\$0					
(11) DBE-certified	60	\$33,276	\$33,276	18.4			
(12) White woman-owned DBE	26	\$12,167	\$12,167	6.7			
(13) Minority-owned DBE	34	\$21,109	\$21,109	11.7			
(14) Asian Pacific American-owned DBE	6	\$9,394	\$9,394	5.2			
(15) Black American-owned DBE	8	\$5,387	\$5,387	3.0			
(16) Hispanic American-owned DBE	8	\$2,469	\$2,469	1.4			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	12	\$3,860	\$3,860	2.1			
(19) Unknown minority-owned DBE	0	\$0					
(20) Majority-owned DBE	0	\$0	\$0	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 DBEs were allocated to minority and DBE 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 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.