



# **2017 Disparity Study**

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**Idaho Transportation Department**

**FINAL REPORT**

**Final Report**

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# **2017 Disparity Study**

**Prepared for**

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# CHAPTER ES.

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## Executive Summary

# CHAPTER ES.

## Executive Summary

The Idaho Transportation Department (ITD) 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. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of United States Department of Transportation (USDOT)-funded contracts. The program provides various measures to encourage the participation of minority- and woman-owned businesses including *race- and gender-neutral* measures—which are designed to encourage the participation of all businesses—and, potentially, *race- and gender-conscious* measures—which are designed to specifically encourage the participation of minority- and woman-owned businesses (e.g., using DBE contract goals).

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 construction and consulting contracts that ITD awarded between October 1, 2011 and September 30, 2015 (i.e., *utilization*);<sup>1</sup> and
- The percentage of construction and consulting contracting dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of ITD prime contracts and subcontracts (i.e., *availability*).

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

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

ITD could use information from the study to help refine its compliance with the Federal DBE Program including setting an overall goal for the participation of DBEs in ITD's Federal Highway Administration (FHWA)-funded contracting; determining which program measures to use to encourage the participation of minority- and woman-owned businesses and DBEs; and, if appropriate, determining which groups would be eligible for any race- or gender-conscious program measures. BBC summarizes key information from the 2017 ITD Disparity Study in four parts:

- A. Analyses in the disparity study;
- B. Availability analysis results;

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<sup>1</sup> The study team considered businesses as minority- or woman-owned regardless of whether they were certified as DBEs through the Idaho Unified Certification Program.



- C. Utilization and disparity analysis results;
- D. Overall DBE Goal; and
- E. Program implementation.

## **A. Analyses in the Disparity Study**

Along with measuring potential disparities between the participation and availability of minority- and woman-owned businesses in ITD contracts, BBC also examined other quantitative and qualitative information related to the agency's compliance with 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 minority- and woman-owned business programs including the Federal DBE Program (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of the success of minorities, women, and minority- and woman-owned businesses throughout Idaho. In addition, the study team 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 D, and Appendix E).
- BBC analyzed the percentage of relevant ITD 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 more than 817 Idaho businesses that work in industries related to the types of construction and consulting contracts that ITD awards (see Chapter 5 and Appendix C).
- BBC analyzed the dollars that minority- and woman-owned businesses received on more than 3,700 construction and consulting prime contracts and subcontracts that ITD awarded between October 1, 2011 and September 30, 2015 (i.e., 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 construction and consulting contracts that ITD awarded during the study period (see Chapter 7, Chapter 8, and Appendix F).
- BBC provided ITD with information from the availability analysis and other research that the agency might consider in setting its three-year overall DBE goal including the base figure and consideration of a "step-2" adjustment (see Chapter 9).
- BBC reviewed ITD's current contracting practices and DBE program measures and provided guidance related to additional program options and refinements to those practices and measures (see Chapter 10 and Chapter 11).

## B. Availability Analysis Results

BBC used a *custom census* approach to measure the availability of minority- and woman-owned businesses for construction and consulting prime contracts and subcontracts that ITD awarded during the study period. The analysis relied on information about the characteristics of potentially available businesses and the characteristics of each relevant ITD prime contract and subcontract. BBC then used a matching process to measure availability for each individual prime contract and subcontract and then dollar-weighted the results. Figure ES-1 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for all relevant ITD contracts.

**Figure ES-1.**  
**Overall dollar-weighted 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.

Race/Ethnicity and Gender	Utilization Benchmark (Availability %)
Black American-owned	0.2 %
Asian Pacific American-owned	0.3
Subcontinent Asian American-owned	0.0
Hispanic American-owned	0.7
Native American-owned	11.6
<b>Total minority-owned</b>	<b>12.9 %</b>
White woman-owned	5.0 %
<b>Total minority-/woman-owned</b>	<b>17.9 %</b>

Overall, the availability of minority- and woman-owned businesses for ITD construction and consulting contracts is 17.9 percent. In other words, one might expect 17.9 percent of ITD's contracting dollars to go to minority- and woman-owned businesses based on their availability for that work. White woman-owned businesses (5.0%) and Native American-owned businesses (11.6%) exhibited the highest availability percentages among all groups.

## C. Utilization and Disparity Analysis Results

Utilization and disparity analysis results, along with other information, are relevant to ITD's determination of which groups could be eligible for any race- or gender-conscious measures. Courts have considered the existence of substantial disparities between utilization and availability for particular groups as inferences of discrimination in the local marketplace against those groups and as support for using race- and gender-conscious program measures. In addition, that information is useful for ITD to examine the effectiveness of the measures that it is currently using to encourage the participation of minority- and woman-owned businesses.<sup>2</sup>

**Utilization results.** BBC measured the participation of minority- and woman-owned businesses in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on ITD prime contracts and subcontracts during the study period. Figure ES-1 presents the overall percentage of contracting dollars that

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<sup>2</sup> In 2014, ITD established an overall DBE goal of 7.6 percent. ITD indicated to FHWA that it planned to meet the goal through the use of race- and gender-neutral program measures.

minority- and woman-owned businesses received on construction and consulting contracts that ITD awarded during the study period. The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period. As shown in Figure ES-2, overall, minority- and woman-owned businesses received 7 percent of the relevant contracting dollars that ITD awarded during the study period. The darker portion of the bar shows that less than one-half of those contracting dollars—2.6 percent—went to certified DBEs.

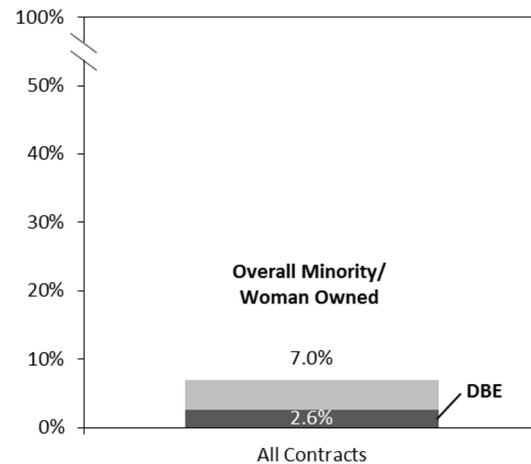
**Figure ES-2.**  
**Participation of minority- and woman-owned businesses**

**Notes:**

The study team analyzed 3,795 prime contracts and subcontracts.  
The darker portion of the bar represents participation of certified DBEs.  
For more detail, see Figure F-2 in Appendix F.

**Source:**

BBC Research & Consulting utilization analysis.



**Disparity analysis results.** Although information about the participation of minority- and woman-owned businesses in ITD contracts is instructive on its own, it is even more instructive when it is compared with the level of participation that might be expected based on the availability of minority- and woman-owned businesses for ITD work. As part of the disparity analysis, BBC compared the participation of minority- and woman-owned businesses in ITD prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability. BBC expressed both participation and availability as percentages of the total dollars that a particular group received for a particular set of contracts. BBC then calculated a *disparity index* by dividing participation by availability and multiplying by 100.<sup>3</sup> A disparity index of 100 indicates an exact match between participation and availability for a particular group for a specific set of contracts (often referred to as *parity*). A disparity index of less than 100 may indicate a disparity between participation and availability, and disparities of less than 80 are described in this report as *substantial*.<sup>4</sup> Disparity analysis results for key contract sets are described below.

<sup>3</sup> For example, if actual participation of non-Hispanic white woman-owned businesses on a set of contracts was 2 percent and the availability of non-Hispanic white woman-owned businesses for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20.

<sup>4</sup> Several courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse conditions for minority- and woman-owned businesses. For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *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.

**All contracts.** Figure ES-3 presents disparity analysis results for all in-scope construction and consulting contracts that ITD awarded during the study period. The line down the center of the graph shows a disparity index of 100, which indicates parity between participation and availability. For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity. As shown in Figure ES-2, overall, the participation of minority- and woman-owned businesses in contracts that ITD 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 39 indicates that minority- and woman-owned businesses considered together received approximately \$0.39 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that ITD awarded during the study period. Disparity analysis results by individual group showed that:

- Five groups exhibited substantial disparities—Black American-owned businesses (disparity index of 2), Asian-Pacific American-owned businesses (disparity index of 24), Subcontinent-Asian American-owned businesses (disparity index of 9), Native American-owned businesses (disparity index of 20), and white woman-owned businesses (disparity index of 74).
- Hispanic American-owned businesses were the only group to exhibit a disparity index above parity (disparity index of 124).

**Figure ES-3.**  
**Disparity indices by group**

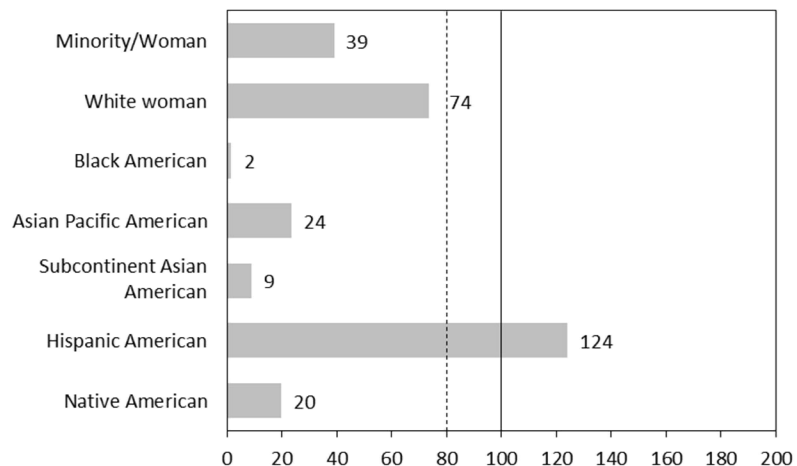
Note:

The study team analyzed 3,795 prime contracts/subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



## D. Overall DBE Goal

According to 49 Code of Federal Regulations (CFR) Part 26, an agency is required to develop and submit an overall goal for DBE participation. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate in the agency's USDOT-funded contracts. The agency must try to meet the goal using race- and gender-neutral means and, if necessary, race- and gender-conscious means.<sup>5</sup> As specified in the Final Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every

<sup>5</sup> 49 CFR Sections 26.45, 26.51.

three years.<sup>6</sup> However, the overall DBE goal is an *annual* goal in that an 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 enable the agency to meet the goal in the next year.

ITD must prepare and submit an overall DBE goal that is supported by information about the steps that it used to develop the goal. ITD is required to next submit a goal for federal fiscal years (FFYs) 2017 through 2019. Federal regulations require ITD to establish its overall DBE goal using a two-step process:

1. Determining a base figure; and
2. Considering a “step-2” adjustment.

**1. Determining a base figure.** Establishing a base figure is the first step in calculating an overall DBE goal for ITD’s FHWA-funded contracts. BBC calculated the base figure by measuring the availability of *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 CFR Part 26. BBC examined the availability of potential DBEs for FHWA-funded prime contracts and subcontracts that ITD awarded during the study period. BBC’s approach to calculating ITD’s base figure is consistent with relevant court decisions, federal regulations, and USDOT guidance. BBC’s analysis indicates that the availability of potential DBEs for ITD’s FHWA-funded contracts is 13.3 percent. ITD might consider 13.3 percent as the base figure for its overall goal for DBE participation.<sup>7</sup>

**2. Considering a “step-2” adjustment.** The Federal DBE Program requires that an agency consider a step-2 adjustment to its base figure as part of determining its overall DBE goal. Factors that an agency should assess in determining whether to make a step-2 adjustment include:

- Current capacity of DBEs to perform agency 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.<sup>8</sup>

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<sup>6</sup> <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

<sup>7</sup> ITD should consider whether the types, sizes, and locations of FHWA-funded contracts that the agency anticipates awarding in the time period that the goal will cover will be similar to the types of FHWA-funded contracts that the agency awarded during the study period.

<sup>8</sup> 49 CFR Section 26.45.

Based on information from the disparity study, there are several reasons why ITD might consider adjusting the 13.3 percent base figure:

- ITD 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.”<sup>9</sup>
- Evidence of barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance as well as evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to ITD’s base figure.
- ITD must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. ITD’s utilization reports for FFYs 2011 through 2016 indicated median annual DBE participation of 1.9 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 ITD’s FHWA-funded contracts also indicates DBE participation (2.4%) that is lower than the base figure.

USDOT “Tips for Goal-Setting” states that an agency is not required to make a step-2 adjustment to its base figure as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

## **E. Program Implementation**

Chapter 11 reviews information relevant to ITD’s implementation of the Federal DBE Program. ITD should review study results and other relevant information in connection with making decisions concerning the program. Key areas of potential refinement include the following:

- ITD might consider working to increase awareness of the DBE directory so that prime contractors are better aware of qualified DBE subcontractors. In addition, ITD currently publicizes bid and solicitation information on its website. ITD should consider linking that information to information about qualified DBEs, so that when prime contractors become aware of contracts in which they might be interested, they are also notified of qualified DBEs who might be interested in participating in those contracts as subcontractors.
- ITD should continue to communicate with certified DBEs to ensure that its Business Development Programs (BDPs) provide the most relevant specialized assistance that is tailored to the needs of developing businesses in the Idaho marketplace. ITD might explore additional partnerships to implement other BDPs including implementing a mentor-protégé program. Such programs could provide specialized assistance that would be tailored to the needs of developing businesses.

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<sup>9</sup> 49 CFR Section 26.45 (b).

- ITD should consider developing internal reports for the participation of all minority- and woman-owned businesses (based on race/ethnicity and gender of ownership; annual revenue; and other factors such as whether the business has been denied DBE certification in the past) in USDOT-funded contracts.
- In addition to tracking the participation of certified DBEs, ITD has developed procedures and databases to consistently track participation of uncertified minority- and woman-owned businesses and potential DBEs in the contracts that it awards. ITD should ensure that it is effectively using that information and evaluating participation of DBE-certified and non-certified minority- and woman-owned businesses. Such measures will help the agency track the effectiveness of its efforts to encourage DBE participation. If applicable, ITD 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).
- ITD should consider continuing its efforts to network with minority- and woman-owned businesses. ITD might also consider broadening its efforts to establish a local consortium that hosts quarterly outreach and networking events and training sessions for businesses seeking public sector contracts.
- ITD could consider exploring ways to increase prime contracting opportunities for small businesses including many minority- and woman-owned businesses. For example, ITD might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. It is likely that this would require changes to the Idaho Statutes.<sup>10</sup>
- ITD should also explore ways to increase subcontracting opportunities for small, minority-, and woman-owned businesses. ITD could consider implementing a program that requires prime contractors to include certain minimum levels of subcontracting as part of their bids and proposals. 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.
- Disparity analysis results indicated that most racial/ethnic and gender groups showed disparities on contracts. ITD should consider using 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).

As part of the disparity study, BBC 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. ITD should review the full disparity study report, as well as other information it may have, in determining whether it needs to use any race- or gender-conscious measures as part of its efforts to comply with the Federal DBE Program, and if so, what groups might be considered eligible to participate in such measures.

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<sup>10</sup> Idaho Code § 67-2805

# CHAPTER 1.

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## Introduction



# CHAPTER 1.

## Introduction

The Idaho Transportation Department (ITD) is responsible for the planning, construction, operation, and maintenance of highways and bridges throughout the entire state of Idaho. As a United States Department of Transportation (USDOT) fund recipient, ITD 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.

ITD 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. A disparity study examines whether there are any disparities between:

- The percentage of prime contract and subcontract dollars that an agency spent with minority- and woman-owned businesses during a particular time period (i.e., *utilization*); and
- The percentage of prime contract and subcontract dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of contracts that the agency awards (i.e., *availability*).

Disparity studies also examine other quantitative and qualitative information related to:

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

There are several reasons why a disparity study is useful to an agency that implements the Federal DBE Program:

- The types of research that are conducted as part of a disparity study provide information that is useful to an agency that is implementing the program (e.g., setting an overall DBE goal);
- A disparity study often provides insights into how to improve contracting opportunities for local small businesses including many minority- and woman-owned businesses;
- An independent, objective review of the participation of minority- and woman-owned businesses in an agency's contracting is valuable to agency leadership and to external groups that may be monitoring the agency'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 ITD 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, ITD 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.<sup>1</sup> 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 goal for DBE participation through the use of *race- and gender-neutral program measures*.<sup>2</sup> 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).

Every three years, 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

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

<sup>2</sup> 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.<sup>3</sup>

ITD last developed an overall DBE goal for FHWA-funded contracts for federal fiscal years (FFYs) 2014 through 2016. The agency established an overall DBE goal of 7.6 percent. ITD indicated to FHWA that it planned to meet the goal through the use of race- and gender-neutral program measures.

**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 ITD continue to encourage the participation of minority- and woman-owned businesses in federally-funded contracts. In addition, information from the study will help ITD 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 through ITD. 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-owned businesses;
- Black American-owned businesses;
- Hispanic American-owned businesses;
- Native American-owned businesses;
- Subcontinent Asian American-owned businesses; and
- Woman-owned businesses.

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

The study team analyzed the possibility that race- or gender-based discrimination affected the participation of minority- and woman-owned businesses in ITD work based specifically on the race/ethnicity and gender of business ownership. That is, the study team considered businesses as minority- or woman-owned regardless of whether they were or could be certified as DBEs through ITD. 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 ITD. A determination of DBE eligibility includes assessing business' 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 of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the certification requirements in 49 CFR Part 26.

Businesses seeking DBE certification in Idaho are required to submit an application to ITD. The forms needed for the application are 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. The certifying agency reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required 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.<sup>4</sup>

**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 consider businesses that have been decertified or have graduated from the DBE Program as potential DBEs in the study. BBC examined the availability of potential DBEs as part of helping ITD calculate the base figure of its overall DBE goal. Figure 1-1 provides further explanation of BBC's definition 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

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<sup>4</sup> If discrimination exists, it will exist regardless of DBE status.

- Classifying minority woman-owned businesses with their corresponding minority groups.

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 difficult to interpret study 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.** BBC examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on ITD contracts. The study focused on transportation-related construction contracts and consulting agreements (For simplicity, the term “contract” will be used to include both construction contracts and consulting agreements.) that ITD and subrecipient local agencies awarded between October 1, 2011 through September 30, 2015 (i.e., the study period)

#### Figure 1-1. Definition of potential DBEs

To help ITD 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 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 \$23,980,000 based on a three-year average of gross receipts. There were lower revenue limits for specific subindustries according to the U.S. 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. The revenue categories that the study team used to classify businesses reflect recent changes to the Table of Small Business Size Standards published by the SBA.

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.

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

- A review of legal issues surrounding ITD's implementation of the Federal DBE Program;
- An analysis of local marketplace conditions for minority- and woman-owned businesses;
- An assessment of ITD's contracting practices and business assistance programs; and
- Other information for ITD 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 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 Idaho through in-depth interviews and public forums. Information about marketplace conditions is presented in **Chapter 3, Appendix D, and Appendix E**.

**Data collection and analysis.** BBC examined data from multiple sources to complete the utilization and availability analyses including telephone surveys that the study team conducted with hundreds of businesses throughout Idaho. 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.** As part of the availability analysis, BBC estimated the percentage of ITD's prime contract and subcontract dollars that minority- and woman-owned businesses are *ready, willing, and able* to perform. That analysis was based on ITD data and on telephone surveys that the study team conducted with hundreds of businesses within the ITD study area that work in industries related to the types of contracting dollars that ITD awards. BBC analyzed availability separately for businesses owned by specific minority groups and white women and for different types of contracts. Results from the availability analysis are presented in **Chapter 5 and Appendix C**.

**Utilization analysis.** BBC analyzed prime contract and subcontract dollars that ITD spent with minority- and woman-owned businesses on contracts that the agency and subrecipient local agencies awarded between October 1, 2011 and September 30, 2015. Those data included information about associated subcontracts. BBC analyzed participation separately for businesses owned by specific minority groups and white 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 participation of minority- and woman-owned businesses on contracts that ITD 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 white women and for different types of contracts. The study team also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 7** and **Appendix F**.

**Further exploration of disparities.** BBC explored any additional disparities between the participation and availability of minority- and woman-owned businesses on contracts that ITD awarded during the study period. Those analyses included comparisons of results for different subsets of ITD contracts and examinations of bids for a sample of contracts. BBC presents the results of those analyses in **Chapter 8**.

**Overall DBE goal.** Based on information from the availability analysis and other research, BBC provided ITD 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 ITD's overall DBE goal is presented in **Chapter 9**.

**Race- and gender-neutral measures.** BBC reviewed information regarding evidence of discrimination in the Idaho contracting marketplace; analyzed ITD's experience with meeting its overall DBE goal in the past; and provided information about ITD's past performance in encouraging the participation of minority- and woman-owned businesses using race- and gender-neutral measures. Information from those analyses is presented in **Chapter 10**.

**Implementation of the Federal DBE Program.** BBC reviewed ITD's contracting practices and the program measures that it uses as part of its implementation of the Federal DBE Program. BBC provided guidance related to additional program options and changes to current contracting practices. The study team's review and guidance is presented in **Chapter 11**.

## **C. Study Team Members**

The BBC study team was made up of five 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.

**Christiansen Communications.** Christiansen Communication is an Idaho DBE certified and woman-owned public outreach firm and was responsible for conducting in-depth interviews with businesses throughout Idaho as part of the study team's qualitative analyses of marketplace conditions.

**Lynda Friesz Public Relations.** Lynda Friesz Public Relations is a Idaho DBE certified and woman-owned public relations, marketing, and public involvement firm and was responsible for conducting in-depth interviews with businesses throughout Idaho as part of the study team's qualitative analyses of marketplace conditions.

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

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



# CHAPTER 2.

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## Legal Framework

# CHAPTER 2.

## Legal Framework

As a United States Department of Transportation (USDOT) fund recipient, the Idaho Transportation Department (ITD) 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 Framework for the 2017 ITD Disparity Study in two parts:

- A. Federal DBE Program; and
- B. Legal standards.

Additional information on the legal framework for the disparity study is provided in Appendix B.

### A. Federal DBE Program

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.<sup>1</sup> 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.<sup>2</sup> 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. This is accomplished through the submission of two semi-annual uniform reports of DBE commitments/awards and payments along with an annual summary report. 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 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.

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<sup>1</sup> BBC considers a contract as USDOT-funded if it includes at least \$1 of USDOT funding.

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

A determination of economic disadvantage also includes assessing business' 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 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 Idaho are required to submit an application to the ITD Unified Certification Program, which is operated by ITD's Civil Rights Office. The application is available online and requires businesses to submit a variety of information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. The certifying agency 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.<sup>3</sup> If an agency cannot meet its overall DBE goal solely through race- and gender-neutral means, then it is permitted to use race- and gender-conscious measures—such as using DBE contract goals on individual USDOT-funded contracts—as part of its implementation of the Federal DBE Program. Prime contractors can meet DBE contract goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by submitting a waiver showing that they made all reasonable good faith efforts to meet the goals but could not do so.

Given that context, there are several approaches that government 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 certified 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. 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. 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 the race- and gender-conscious measures.

**2. Using a combination of race- and gender-neutral and race- and gender-conscious measures with only certain groups of certified 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' relevant geographic market areas (*underutilized DBEs, or UDBEs*). For example, in the past the California Department of Transportation (Caltrans) has set DBE contract goals for which only UDBEs—

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<sup>3</sup> 49 CFR Section 26.51.

which does not include all DBE groups—are considered eligible. During that time period, Caltrans counted the participation of all DBEs toward meeting its overall DBE goal, but only UDBE participation counted toward prime contractors meeting DBE contract goals on individual contracts. Caltrans determined which DBE groups were UDBEs in large part by examining disparity study results 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. Using a combination of race- and gender-neutral and more aggressive race- and gender-conscious measures in extreme circumstances.** The Federal DBE Program provides that a recipient 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.<sup>4</sup> However, specific quotas for DBE participation are strictly prohibited under the Federal DBE Program.

**4. Using only race- and gender-neutral measures.** 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 implements the Federal DBE Program using only race- and gender-neutral program measures.<sup>5</sup>

## B. Legal Standards

ITD's use of DBE contract goals on certain contracts is considered to be race- and gender-conscious. The U.S. Supreme Court has established that government programs that include race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.<sup>6</sup> 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;<sup>7</sup> and
- The 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.<sup>8</sup>

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<sup>4</sup> 49 CFR Section 26.43.

<sup>5</sup> Florida's current proposed DBE goal is 9.91%. Median DBE participation from FFY 2009 to FFY 2013 was 8.50%.

<sup>6</sup> Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

<sup>7</sup> *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

<sup>8</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

The strict scrutiny standard is extremely difficult for a governmental entity to meet. It presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, a governmental entity must:

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

A governmental entity 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.

**Compelling governmental interest.** A governmental entity must demonstrate a *compelling governmental interest* in remedying past identified discrimination in order to implement race- or gender-conscious measures. A governmental entity 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. 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. Rather, they must assess discrimination within their own relevant geographic market areas.<sup>9</sup>

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. Note that it is not necessary for a governmental entity 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.”

Several minority- and woman-owned business programs that have used race- and gender-conscious measures have been challenged in court and have been found to be unconstitutional, because the evidence that the governmental entity produced was not sufficient to show a compelling governmental interest. For discussion of those and other cases, see Appendix B.

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<sup>9</sup> See *e.g.*, *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

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

- The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.<sup>10</sup>

Several minority- and woman-owned business programs that have used race- and gender-conscious measures have been challenged in court and have been found to be unconstitutional, because the evidence that the governmental entity produced was not sufficient to meet the narrow tailoring requirement. For discussion of those and other cases, see Appendix B.

**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 those cases as well.

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<sup>10</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted).

# **CHAPTER 3.**

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## **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 socioeconomic 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.<sup>1,2,3,4</sup> Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.<sup>5</sup>

Minorities and women in Idaho faced similar barriers. In the 19<sup>th</sup> and early 20<sup>th</sup> centuries, discriminatory treatment was common for minorities and women in Idaho. American Indian peoples in Idaho such as the Coeur d'Alene, Nez Perce, Shoshone, Bannock, Northern Paiute, Kalispel, and Kootenai were targets of military campaigns and forced assimilation programs that took indigenous land and attempted to end traditional cultural practices.<sup>6</sup> Black Americans, Chinese Americans, Japanese Americans, and Hispanic Americans in Idaho were barred from using the same theaters, restaurants, and churches as Non-Hispanic white Americans and often lived in racially-segregated neighborhoods.<sup>7,8</sup> In addition, it was illegal for Black Americans or Chinese Americans to leave their residences after dark in a number of towns including Ashton and Wallace.<sup>9</sup> Disparate treatment extended into the labor market as well. Black Americans, Chinese Americans, Japanese Americans, and Hispanic Americans were concentrated in low paying jobs in the agriculture, extraction, railroad, and service industries and routinely experienced poor working conditions and discriminatory treatment.<sup>10,11</sup> Women also experienced barriers in the labor market. Most women were restricted to service industry jobs as domestic servants or store clerks and were excluded from positions of political and economic power.<sup>12</sup>

In the middle of the 20<sup>th</sup> 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.<sup>13</sup> Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women<sup>14,15,16,17</sup> However, despite those improvements, minorities and women continue to face barriers in various areas—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.<sup>18,19,20</sup>



Federal Courts and the United States Congress have considered any barriers that minorities, women, and minority- and woman-owned businesses face in a local marketplace as evidence for the existence of race- and gender-based discrimination in that marketplace.<sup>21, 22, 23</sup> 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.<sup>24, 25, 26</sup>

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the ITD Study Area<sup>1</sup> 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 Idaho Transportation Department 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 D and Appendix E, respectively.

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<sup>1</sup> As discussed in Chapter 4, the relevant geographic for ITD's contracting includes Idaho; Asotin County, Washington; and Spokane County, Washington. For marketplace analyses using Census data, the study team chose the geography most closely approximating ITD's relevant geographic market area. As a result for the marketplace analyses, the ITD Study Area includes the state of Idaho and Spokane County in Washington.

## A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Human capital factors such as education, business experience, and managerial experience have been shown to be related to business success.<sup>27, 28, 29, 30</sup> 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, and some occupations—such as occupations in professional services—often 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.<sup>31, 32</sup> Nationally, minorities lag behind non-Hispanic white Americans in terms of both educational attainment and the quality of education that they receive.<sup>33, 34</sup> Minorities are far more likely than non-Hispanic white Americans to attend schools that do not provide access to core classes in science and math.<sup>35</sup> In addition, Black American students are more than three times more likely than non-Hispanic white Americans to be expelled or suspended from high school.<sup>36</sup> For those and other reasons, minorities are far less likely than non-Hispanic white Americans to attend college; enroll at highly- or moderately selective four-year institutions; or earn college degrees.<sup>37</sup>

Educational outcomes for minorities in the ITD Study Area are similar to those for minorities nationwide. In Idaho public schools, Black Americans; Hispanic Americans; and American Indian and Alaska Natives exhibit substantially higher dropout rates than non-Hispanic white Americans.<sup>38</sup> In addition, the study team's analyses of the ITD Study Area labor force indicates that certain minority groups are far less likely than non-Hispanic white Americans to earn a college degree. Figure 3-1 presents the percentage of ITD Study Area workers that have earned a four-year college degree by racial/ethnic and gender group. As shown in Figure 3-1, Hispanic American and Native American workers in the ITD Study Area 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, ITD Study**  
**Area, 2010-2014**

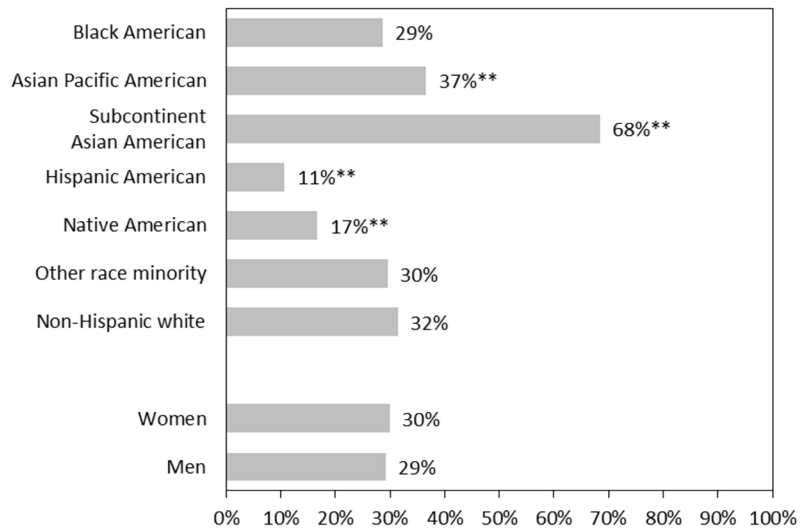
Note:

\*\* 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.

The ITD Study Area includes the state of Idaho and Spokane County in Washington.

Source:

BBC Research & Consulting from 2010-2014 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 for business ownership and success. However, minorities and women are often unable to acquire relevant work experience. Minorities and women are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.<sup>39, 40, 41</sup> When employed, minorities and women are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.<sup>42, 43, 44, 45, 46</sup> In addition, minorities are incarcerated at a higher rate than non-Hispanic white Americans in Idaho and nationwide, which contributes to a number of labor difficulties including difficulties findings jobs and relatively slow wage growth.<sup>47, 48, 49, 50</sup>

The study team's analyses of the labor force in the ITD Study Area is largely consistent with those findings. Figures 3-2 and 3-3 present the representations of minority and women workers in various ITD Study Area industries. As shown in Figures 3-2, the ITD Study Area industries with the highest representations of minority workers are extraction and agriculture; manufacturing, and other services. The ITD Study Area industries with the lowest representations of minority workers are transportation, warehousing, utilities, and communications; professional services; and education.

**Figure 3-2.**  
**Percent representation of minorities in various industries in the ITD Study Area, 2010-2014**



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

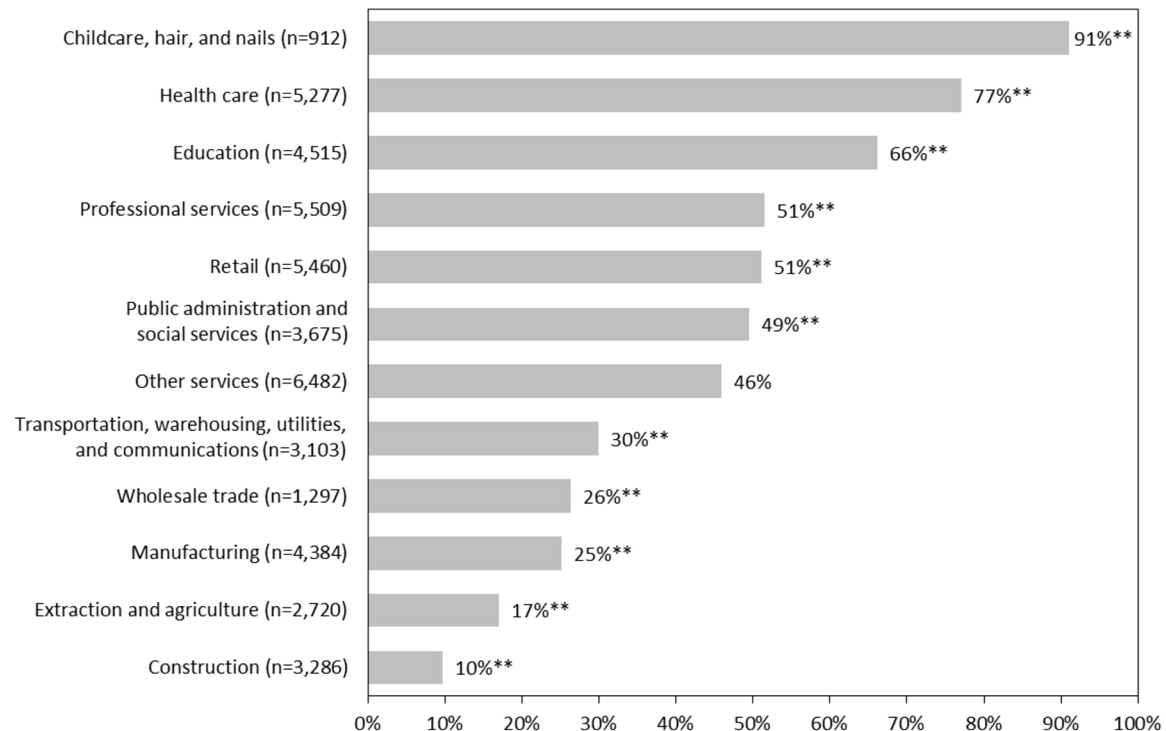
The representation of minorities among all ITD Study Area workers is 9% for Hispanic Americans, 5% for other race minorities, and 15% for all minorities considered together.

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

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

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

**Figure 3-3.**  
**Percent representation of women in various industries in the ITD Study Area, 2010-2014**



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

The representation of women among all ITD Study Area workers is 46%.

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 2010-2014 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.<sup>51, 52, 53</sup> Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.<sup>54, 55</sup> Similar outcomes appear to exist for minorities and women in the ITD Study Area. The study team examined the concentration of minorities and women in management positions in the ITD Study Area construction and professional services industries. As shown in Figures 3-4 and 3-5:

- Compared to non-Hispanic white Americans, a smaller percentage of Hispanic Americans work as managers in the ITD Study Area construction industry. In addition, a smaller percentage of women than men work as managers in the ITD Study Area construction industry.
- Compared to men, a smaller percentage women work as managers in the ITD Study Area professional services industry.

**Figure 3-4.**  
**Percentage of ITD Study Area workers who**  
**worked as a manager in the construction**  
**industry, 2010-2014**

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.

The variable for Subcontinent Asian Americans does not appear in this analysis, because there were no observations in the construction industry.

Source:

BBC Research & Consulting from 2010-2014 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/>.

Construction	
Race/ethnicity	
Black American	2.9 %
Asian Pacific American	3.0
Hispanic American	2.7 **
Native American	9.9
Other race minority	26.8
Non-Hispanic white	8.2
Gender	
Women	3.3 % **
Men	8.2
<b>All individuals</b>	<b>7.7 %</b>

**Figure 3-5.**  
**Percentage of ITD Study Area workers who**  
**worked as a manager in the professional services**  
**industry, 2010-2014<sup>2</sup>**

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.

Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and Other race minorities were combined into the single category of "Minority" due to limited sample size.

Source:

BBC Research & Consulting from 2010-2014 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/>.

Professional Services	
Race/ethnicity	
Minority	0.0 %
Non-Hispanic white	3.7
Gender	
Women	0.0 % **
Men	4.6
<b>All individuals</b>	<b>3.5 %</b>

**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.<sup>56,57</sup> That lack of experience makes it more difficult for minorities and women to subsequently start their own businesses and operate them successfully.

<sup>2</sup> The estimate of 0 percent of women and minorities working in the local engineering industry who are managers indicates that no women or minorities in the survey sample reported working in the local engineering industry as a manager. The adjusted standard error for the estimate of women is 4.6 percent, which means that there is a 95 percent probability that the true percentage of women working in the local engineering industry who are managers is somewhere between 0 percent and 4.6 percent. The adjusted standard error for the estimate of minorities is 2 percent, which means that there is a 95 percent probability that the true percentage of minorities working in the local engineering industry who are managers is somewhere between 0 percent and 2 percent.

## B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.<sup>58,59,60</sup> Individuals can acquire financial capital through a variety of 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 white Americans 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.<sup>61, 62, 63</sup> 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 white Americans.<sup>64, 65</sup> 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.<sup>66</sup> Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

The study team observed wage gaps in the ITD Study Area that are consistent with those that researchers have observed nationally. Figure 3-6 presents mean annual wages for ITD Study Area workers by race/ethnicity and gender. As shown in Figure 3-6, Hispanic Americans, Native Americans, and other race minorities in the ITD Study Area earn substantially less than non-Hispanic white Americans. In addition, women workers earn substantially less in wages than men. The study team also conducted regression analyses to determine whether those wage disparities 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 being Black American, Hispanic American, or Native American was associated with substantially lower earnings than being non-Hispanic white, even after accounting for various race- and gender-neutral factors. Similarly, being a woman was associated with lower earnings than being a man (for details, see Figure D-11 in Appendix D).

**Figure 3-6.**  
**Mean annual wages among**  
**ITD Study Area workers,**  
**2010-2014**

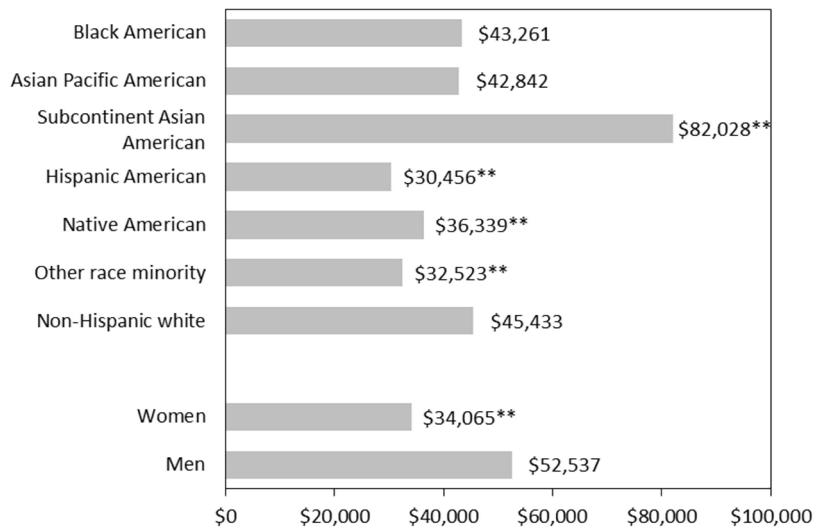
Note:

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 2010-2014 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 white Americans and between women and men in terms of personal wealth.<sup>67, 68</sup> For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent, respectively, that of non-Hispanic white Americans. In Idaho and nationwide, approximately one-fifth of Hispanic Americans are living in poverty, approximately double the comparable rates for non-Hispanic white Americans.<sup>69</sup> 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.<sup>70</sup>

**Homeownership.** Homeownership and home equity have been shown to be key sources of business capital.<sup>71, 72</sup> 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 white Americans.<sup>73</sup> 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.<sup>74, 75</sup> Minorities who own homes tend to own homes that are worth substantially less than those of non-Hispanic white Americans and also tend to accrue substantially less equity.<sup>76, 77</sup> Differences in home values and equity between minorities and non-Hispanic white Americans can be attributed—at least, in part—to the depressed property values that tend to exist in racially-segregated neighborhoods.<sup>78, 79</sup>

Minorities appear to face homeownership barriers in The ITD Study Area that are similar to those observed at the national level. The study team examined homeownership rates in ITD Study Area for relevant racial/ethnic groups. As shown in Figure 3-7, Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and other race minorities in the ITD Study Area exhibit homeownership rates that are significantly lower than that of non-Hispanic white Americans.



**Figure 3-7.**  
**Home Ownership Rates in**  
**the ITD Study Area,**  
**2010-2014**

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 2010-2014 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/>.

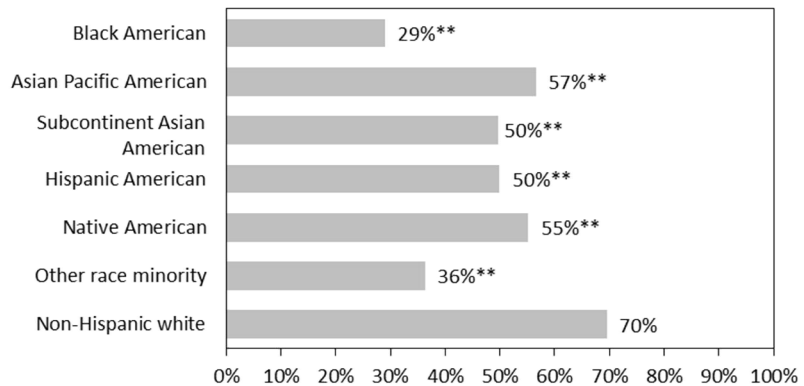


Figure 3-8 presents median home values among homeowners of different racial/ethnic groups in the ITD Study Area. Consistent with national trends, homeowners of certain minority groups—Hispanic Americans, Native Americans, and other race minorities—own homes that, on average, are worth substantially less than those of non-Hispanic white Americans.

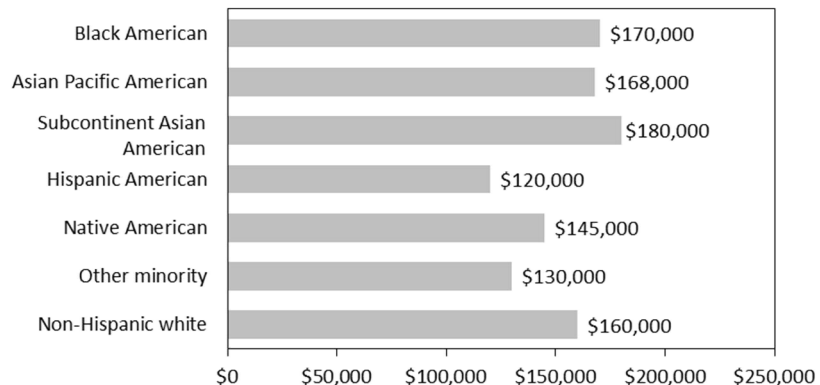
**Figure 3-8.**  
**Median home values in the**  
**ITD Study Area, 2010-2014**

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2010-2014 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.<sup>80, 81, 82, 83, 84, 85</sup> 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.<sup>86, 87, 88, 89, 90</sup> 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.<sup>91, 92, 93, 94</sup>

To examine how minorities fare in the home credit market relative to non-Hispanic white Americans, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for the ITD Study Area and the United States as a whole. As shown in Figure 3-9, all relevant groups exhibit higher home loan denial rates

than non-Hispanic white Americans when considering the United States or the ITD Study Area. In addition, the study team’s analyses indicate that certain minority groups in the ITD Study Area are more likely than non-Hispanic white Americans to receive subprime mortgages (for details, see Figure D-16 in Appendix D).

**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 asked for more information related to their credit history, and are offered less support than their non-Hispanic white peers.<sup>95</sup> Researchers have shown that Black American-owned and Hispanic American-owned businesses are more likely to forego submitting a business loan application and be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.<sup>96, 97, 98</sup> In addition, women are less likely to apply for credit and receive loans of less value when they do.<sup>99, 100</sup> Without equal access to business capital, minority- and woman-owned businesses must operate businesses with less capital than their non-Hispanic white male contemporaries and rely more on their personal finances.<sup>101, 102, 103, 104</sup>

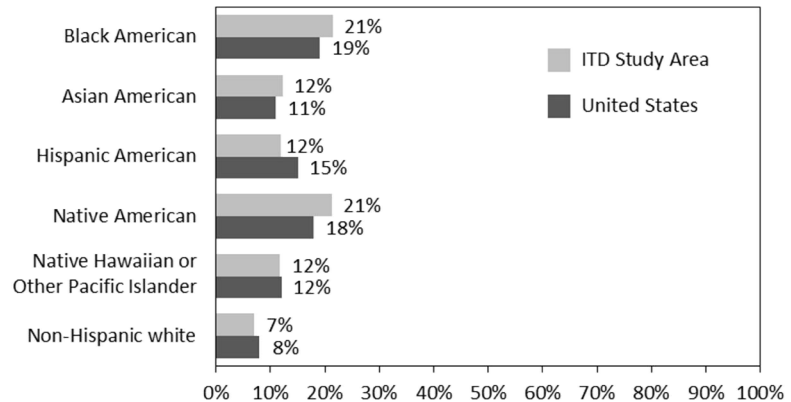
**Figure 3-9.**  
**Denial rates of conventional purchase loans for high-income households, ITD Study Area and the United States, 2014**

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 2014. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explorable>.



## C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses over the past 5 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.<sup>105</sup> Despite the progress that minorities and women have made with regard to 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.<sup>106, 107, 108, 109</sup> 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.<sup>110, 111, 112</sup>

The study team examined rates of business ownership in the ITD Study Area construction and professional services industries by race/ethnicity and gender. As shown in Figures 3-10 and 3-11:

- Hispanic Americans exhibit lower rates of business ownership than non-Hispanic white Americans in the ITD Study Area construction industry.
- Women exhibit lower rates of business ownership than men in the ITD Study Area professional services industry.

**Figure 3-10.**  
**Self-employment rates in the construction industry,**  
**ITD Study Area, 2010-2014**

Note:

\*, \*\* Denote 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.

The variable for Subcontinent Asian Americans does not appear in this analysis, because there were no observations in the construction industry.

Source:

BBC Research & Consulting from 2010-2014 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/>.

Construction	
Race/ethnicity	
Black American	5.5 %
Asian Pacific American	21.5
Hispanic American	12.2 **
Native American	29.4
Other race minority	64.8
Non-Hispanic white	26.1
Gender	
Women	21.8 %
Men	25.0
<b>All individuals</b>	<b>24.6 %</b>

**Figure 3-11.**  
**Self-employment rates in the professional services**  
**industry, ITD Study Area, 2010-2014**

Note:

\*, \*\* Denote 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.

Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and Other race minorities were combined into the single category of "Minority" due to limited sample size.

Source:

BBC Research & Consulting from 2010-2014 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/>.

Professional Services	
Race/ethnicity	
Minority	6.7
Non-Hispanic white	13.4
Gender	
Women	6.4 **
Men	15.1
<b>All individuals</b>	<b>13.0</b>

The study team also conducted regression analyses to determine whether differences in business ownership rates between minorities and non-Hispanic white Americans 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 3-12 presents the race/ethnicity and gender factors that were significantly related to business ownership for each relevant industry.

**Figure 3-12.**  
**Statistically significant relationships between**  
**race/ethnicity and gender and business ownership in**  
**study-related industries in the ITD Study Area, 2010-2014**

Industry and Group	Coefficient
<b>Construction</b>	
Women	-0.2694

Source:

BBC Research & Consulting from 2010-2014 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/>.

As shown in Figure 3-12, even after accounting for race- and gender-neutral factors:

- Being a woman was associated with lower rates of business ownership in the ITD Study Area construction industry.

Thus, disparities in business ownership rates between minorities and non-Hispanic white Americans 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 one group in the construction industry 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 moving from business ownership to unemployment than non-Hispanic white Americans and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic white Americans and men using a number of different indicators such as profits, closure rates, and business size (but also see Robb and Watson 2012).<sup>113, 114, 115</sup> 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 the ITD Study Area.

**Business closure.** The study team examined the rates of closure among Idaho businesses by the race/ethnicity and gender of the owners. Figure 3-13 presents those results. As shown in Figure 3-13, Black American-, Asian American-, and Hispanic American-owned businesses in Idaho appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses in Idaho 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 Idaho.

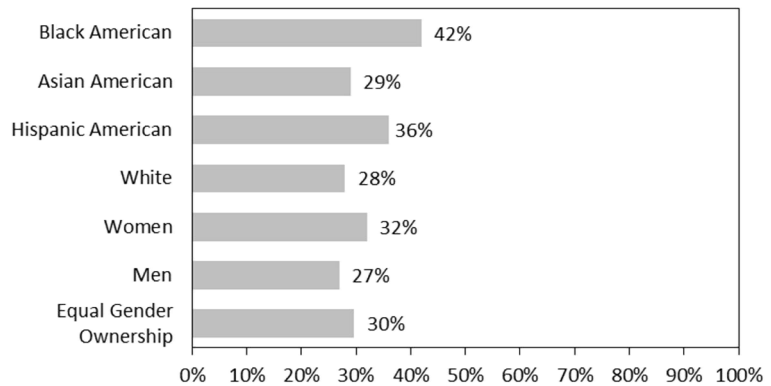
**Figure 3-13.**  
**Rates of business closure in**  
**Idaho, 2002-2006**

Note:

Data include only to non-publicly held businesses.

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

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



Source:

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

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

**Business receipts.** The study team also examined data on business receipts to assess whether minority- and woman-owned businesses in Idaho earn as much as businesses owned by non-Hispanic white Americans or business owned by men, respectively. Figure 3-14 shows mean annual receipts for Idaho business by the race/ethnicity and gender of owners. The data in Figure 3-14 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 Idaho showed lower mean annual business receipts than businesses owned by non-Hispanic white Americans. In addition, woman-owned businesses in Idaho showed lower mean annual business receipts than businesses owned by men.

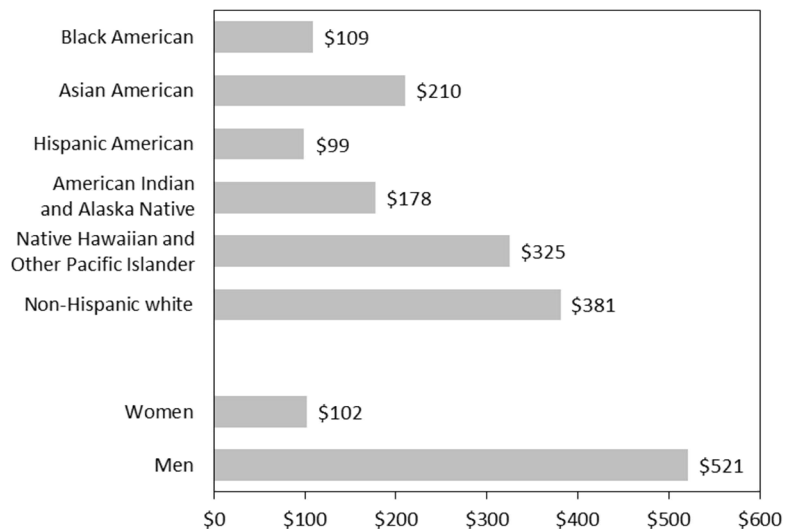
**Figure 3-14.**  
**Mean annual business**  
**receipts (in thousands) in**  
**Idaho, 2012**

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 the ITD Study Area earn as much from the businesses that they own as non-Hispanic white Americans and men do. As shown in Figure 3-15, women in the ITD Study Area earned less from their businesses than men earned from their businesses. The study team also conducted regression analyses to determine whether earnings disparities in the

ITD Study Area 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 being a woman was associated with substantially lower business owner earnings than being a man (for details, see Figure D-30 in Appendix D).

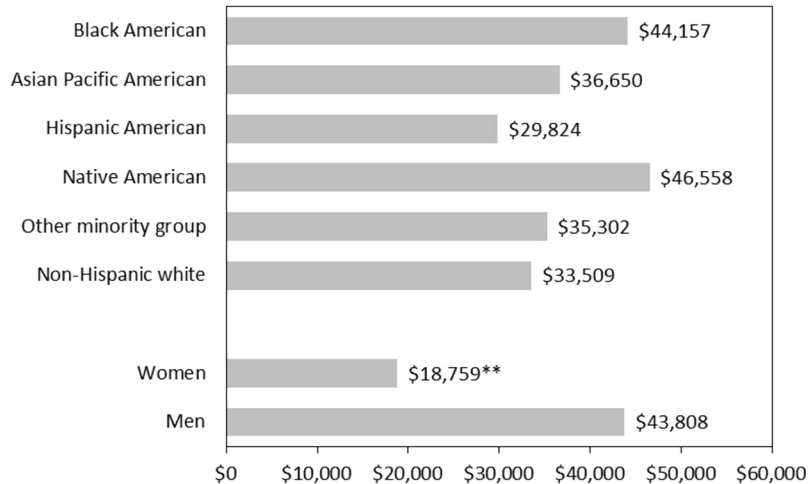
**Figure 3-15.**  
**Mean annual business**  
**owner earnings in the ITD**  
**Study Area, 2010-2014**

Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars.

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

Subcontinent Asian American and other race minority were combined into the single category of "Other minority group" due to small sample sizes.



Source:

BBC Research & Consulting from 2010-2014 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

The study team's analyses of marketplace conditions indicate that minorities, women, and minority- and woman-owned businesses face substantial barriers nationwide and in the ITD Study Area. Existing research, as well as analyses 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 ITD Study Area industries—construction and professional services—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 ITD Study Area marketplace indicates that government agencies in the state are 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.

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- <sup>1</sup>Haney-López, Ian. 2006. *White by Law: The Legal Construction of Race*. New York: NYU Press.
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- <sup>3</sup>Prucha, Francis Paul. 1986. *The Great Father: The United States Government and the American Indians*. Lincoln: University of Nebraska Press.
- <sup>4</sup>Lee, Erika. 2003. *At America's Gates: Chinese Immigration During the Exclusion Era, 1882-1943*. Chapel Hill, NC: University of North Carolina Press.
- <sup>5</sup>Goldin, Claudia. 2006. "The Quiet Revolution That Transformed Women's Employment, Education, and Family." *The American Economic Review* 96(2):1-21.
- <sup>6</sup>Frey, Robert and Robert McCarl. 2014. "The Confluence of Rivers: The Indigenous Tribes of Idaho." Pp. 13-43 in *Idaho's Place: A New History of the Gem State*, edited by Adam M. Sowards. Seattle: University of Washington Press.
- <sup>7</sup>Mercier, Laurie. 2014. "Confronting Race and Community: Idaho's Ethnic History." Pp. 167-197 in *Idaho's Place: A New History of the Gem State*, edited by Adam M. Sowards. Seattle: University of Washington Press.
- <sup>8</sup>Jones, Errol D. 2014. "Latinos in Idaho: Making Their Way in the Gem State." Pp. 201-234 in *Idaho's Place: A New History of the Gem State*, edited by Adam M. Sowards. Seattle: University of Washington Press.
- <sup>9</sup>Loewen, James W. 2013. *Sundown Towns: A Hidden Dimension of American Racism*. New York: The New Press.
- <sup>10</sup>Mercier, Laurie. 2014. "Confronting Race and Community: Idaho's Ethnic History." Pp. 167-197 in *Idaho's Place: A New History of the Gem State*, edited by Adam M. Sowards. Seattle: University of Washington Press.
- <sup>11</sup>Jones, Errol D. 2014. "Latinos in Idaho: Making Their Way in the Gem State." Pp. 201-234 in *Idaho's Place: A New History of the Gem State*, edited by Adam M. Sowards. Seattle: University of Washington Press.
- <sup>12</sup>Woodworth-Ney, Laura and Tara A. Rowe. 2014. "Defying Boundaries: Women in Idaho History." Pp. 138-164 in *Idaho's Place: A New History of the Gem State*, edited by Adam M. Sowards. Seattle: University of Washington Press.
- <sup>13</sup>Dobbin, Frank. 2009. *Inventing Equal Opportunity*. Princeton: Princeton University Press.
- <sup>14</sup>Holzer, Harry and David Neumark. 2000. "Assessing Affirmative Action." *Journal of Economic Literature* 38(3):483-568
- <sup>15</sup>Kalev, 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.
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# **CHAPTER 4.**

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## **Collection and Analysis of Contract Data**

# CHAPTER 4.

## Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies Idaho Transportation Department (ITD) uses to award contracts; the contracts that BBC Research & Consulting (BBC) analyzed as part of the disparity study; and the process that BBC used to collect relevant prime contract and subcontract data.<sup>1</sup> 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

ITD's Division of Highways is responsible for managing FHWA-related construction contracts, ITD's Consulting Division is responsible for managing FHWA-related consulting services contracts, and the Public Transportation Division is responsible for managing FTA-related contracts. ITD's Office of Civil Rights is responsible for managing the Federal Disadvantaged Business Enterprise (DBE) Program. Separate procurement policies are used to award construction and consulting services contracts.

**Construction.** ITD follows Idaho Code § 40-902 for the procurement of construction contracts. This section of the Idaho Statutes imposes the following requirements for procuring construction services for highways and bridges:

- ITD must advertise the bid opportunity for at least two weeks prior to the submission date;
- Bids must be accompanied by a bond or cashier's check for 5 percent of the amount of the bid; and
- Bids are opened publically and awarded to the lowest responsible bidder.

Idaho Code also provides opportunities for ITD to use alternative delivery procurement processes if the ITD board determines it is appropriate. Idaho Code § 40-904 defines guidelines for the use and scoring of design-build procurements while Idaho Code § 40-905 provides details about the requirements for construction manager/general contractor procurements.

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<sup>1</sup> The terms "contract," "procurement," and "agreement" are used interchangeably in this report, unless otherwise noted.

**Consulting agreements.** ITD uses informal and formal procurement processes to award construction procurements. ITD contracting policies can be grouped into two categories: purchases worth up to \$100,000 and; purchase worth more than \$100,000.

**Purchases worth up to \$100,000.** The Consulting Division uses an informal process to award consulting agreements worth up to \$100,000. For agreements of that size, an Agreement Administrator within the Consulting Division identifies three qualified firms from the term agreement list. The administrator then uses their knowledge of the firms' capabilities to select one of the firms to perform the work.

**Purchases worth more than \$100,000.** ITD uses a formal procurement process to award consulting agreements worth more than \$100,000. For agreements of that size, a committee of three Consulting Division staff members identifies three firms from the term agreement list. The committee then develops agreement specific questions which are sent to each of the three qualified firms. Each firm submits their responses to the committee. Each committee member then reads and rates each firm independently. The committee then convenes to discuss each firm's responses and rating; and selects the final firm to perform the agreement.

## **B. Collection and Analysis of Contract Data**

The study team examined contracts that ITD and subrecipient local agencies awarded between October 1, 2011 and September 30, 2015. The study team worked closely with ITD staff to collect data on ITD FHWA-, state-, and FTA-funded construction and consulting prime contracts and subcontracts. ITD provided information on whether each contract was FHWA-funded.<sup>2</sup>

**Construction contracts.** Construction data collection began at the project initiation meeting in July 2016. BBC met with ITD staff to determine what types of construction data were available during the study period. ITD provided BBC with a list of construction prime contracts and associated subcontractors from various databases systems.

**Consulting agreements.** Consulting agreement data collection also began during the project initiation meeting in July 2016. ITD's staff informed BBC that records of consulting agreements are maintained in a separate system called PATS. ITD provided BBC with all consulting agreements let during the study period.

**FTA-funded contracts.** ITD's Public Transportation Division handles the local agency FTA-direct funded contracts. Contract information is kept in the ProjectWise system but does not contain subcontract information. ITD provided BBC with a list of subrecipient local agencies that received FTA-fund to perform construction and consulting projects during the study period. ITD does not collect any information on the prime contractors and subcontractors that subrecipient local agencies used on FTA-funded projects. In order to collect that information, BBC worked directly with the relevant subrecipient local agencies.

The study team worked with Public Transportation Division staff to obtain contact information for all subrecipient local agencies. After receiving that information, BBC emailed data request

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<sup>2</sup> ITD considers a contract to be FHWA-funded if there is at least \$1 of FHWA funding included on the contract.

forms to each agency. Follow-up requests were sent to all agencies that did not respond to the initial request. BBC sent surveys to 11 subrecipient local agencies to collect prime and subcontractor. Data were received for 24 contracts. Of the 24 contracts, 12 were not construction or consulting-related contracts. The remaining 12 contracts account for approximately \$5.7 million of ITD's contracting dollars during the study period.

**Contracts analyzed.** As shown in figure 4-1, BBC identified 412 construction contracts and 1,083 Consulting agreements awarded during the study period.

**Figure 4-1.**  
**Number of ITD prime contracts by contract source,**  
**October 1, 2011 to September 30, 2015**

Source:  
BBC Research & Consulting from ITD contract data

ITD contracts	Number	Dollars (Thousands)
<b>Contract sources</b>		
Construction	412	\$955,603
Consulting	1,083	\$143,654
<b>Total</b>	<b>1,495</b>	<b>\$1,099,257</b>

**Contracts included in study analyses.** BBC collected information on 1,495 prime contracts and 2,300 associated subcontracts that ITD awarded during the study period in the areas of construction and consulting. BBC collected information on both federally- and state-funded contracts, as well as FTA-funded contracts. Those contracts accounted for approximately \$1.1 billion of ITD contracting dollars during the study period. Figure 4-2 presents dollars by relevant contracting area for the prime contracts that BBC included in its analyses.

**Figure 4-2.**  
**Number of ITD contracts included in the**  
**study**

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

Source:  
BBC Research & Consulting from ITD contract data.

ITD Contracts	Number	Dollars (Thousands)
<b>Construction contracts</b>		
Federally-funded	299	\$777,956
State-funded	108	\$172,356
FTA-funded	5	\$5,290
<b>Total</b>	<b>412</b>	<b>\$950,312</b>
<b>Consulting agreements</b>		
Federally-funded	1,075	\$143,148
FAA-funded	1	\$30
FTA-funded	7	\$476
<b>Total</b>	<b>1,082</b>	<b>\$143,624</b>
<b>Total contracts</b>		
Federally-funded	1,374	\$921,104
State-funded	109	\$172,356
FAA-funded	1	\$30
FTA-funded	12	\$5,766
<b>Total</b>	<b>1,495</b>	<b>\$1,099,256</b>

**Prime contract and subcontract amounts.** For each contract included in key analyses, BBC examined the dollars that ITD 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 contract award amount to the prime contractor.
- If a contract included subcontracts, BBC calculated subcontract amounts as the total amount awarded to each subcontractor as part of the prime contract. BBC then calculated the prime contract amount as the total contract amount awarded less the sum of dollars awarded to all subcontractors.

## **C. Collection of Vendor Data**

ITD maintains a list of businesses that have worked with the agency on construction and consulting contracts. BBC compiled the following information on businesses that participated on ITD construction and consulting contracts 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:

- ITD contract data;
- ITD vendor lists;
- ITD's Office of Civil Rights DBE directory;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Telephone surveys that BBC conducted with business owners and managers as part of the utilization and availability analyses;
- Business websites; and
- Reviews that ITD conducted of study information.



## D. Relevant Geographic Market Area

BBC used ITD'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 and where the substantial majority of interested contractors and subcontractors that seek to do business with ITD are located. BBC's analysis showed that 90 percent of ITD's construction and consulting dollars during the study period went to businesses located in Idaho; Asotin County, Washington; and Spokane County, Washington; indicating that Idaho, Asotin County, and Spokane County should be considered the relevant geographic market area for the study. BBC's analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on Idaho; Asotin County, Washington; and Spokane County, Washington.

## E. Relevant Types of Work

For each prime contract and subcontract, BBC determined the prime and subcontractor's *subindustry* that best characterized the business's primary line of work (e.g., heavy construction). BBC identified subindustries based on ITD contract data; telephone surveys that BBC conducted with prime contractors and subcontractors; business certification lists; Dun & Bradstreet business listings; and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-3 presents the dollar amounts that BBC examined in the various construction and consulting subindustries that BBC included in its analyses.<sup>3</sup>

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<sup>3</sup> Total construction and consulting contract dollars presented in Figure 4-3 differ from those presented in Figure 4-2. Figure 4-2 presents contract dollars based on the primary line of work of prime contractors, whereas Figure 4-3 presents total contract dollars based on the primary line of work of prime and subcontractors.

**Figure 4-3.**  
**ITD contract dollars by**  
**subindustry, October 1, 2011**  
**to September 30, 2015**

Note:

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

Source:

BBC Research & Consulting from ITD contract data and Availability Surveys.

Industry	Total (Thousands)
<b>Construction</b>	
Highway, street, and bridge construction	\$692,319
Excavation, grading, drainage, drilling, and demolition	59,629
Concrete, asphalt, sand, and gravel products	44,890
Concrete work	21,972
Electrical work, lighting, and signal systems	19,108
Painting, striping, and marking	17,569
Other construction materials	17,316
Heavy construction equipment rental	15,360
Flagging services	14,535
Fencing, guardrails, barriers, and signs	11,067
Other construction services	10,878
Water, sewer, and utility lines	8,147
Construction management	5,635
Landscaping	2,519
Rebar and reinforcing steel	1,621
Trucking and hauling	1,588
<b>Total Construction</b>	<b>\$944,155</b>
<b>Consulting</b>	
Engineering	\$111,423
Environmental services	20,762
Testing and inspection	7,966
Surveying and mapmaking	4,826
Transportation planning services	1,639
Landscape architecture	1,056
Architectural and design services	856
<b>Total Consulting</b>	<b>\$148,528</b>
<b>Total Contracting</b>	<b>\$1,092,683</b>

BBC combined related subindustries that accounted for relatively small percentages of total contracting dollars into “other construction services” and “other construction materials.” For example, the contracting dollars that ITD awarded to contractors for “gravel mining” represented less than one percent of total ITD contract dollars that BBC examined in the study. BBC combined “gravel mining” with other construction materials subindustries that also accounted for relatively small percentages of total contracting dollars and that were relatively dissimilar to other subindustries into the “other construction materials” 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 industries that were not directly related to transportation contracting (e.g., business management consultant) (\$7.2 million of associated contract dollars);
- Were classified as state education institutions (\$264,600 of associated contract dollars); or
- ITD awarded to government agencies or nonprofit organizations (\$43,100 of associated contract dollars).

## **F. Collection of Bid and Proposal Data**

BBC conducted a case study analysis of bids and proposals for a sample of construction and consulting contracts that ITD awarded during the study period. ITD provided documents related to bid, proposal, and other related information to BBC for a sample of its contracts. BBC successfully collected and examined bid and proposal information for a sample of 146 construction and 39 consulting agreements that ITD awarded during the study period. For details about the case study analysis, see Chapter 8.

## **G. Agency Review Process**

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

# CHAPTER 5.

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## 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 Idaho Transportation Department (ITD) construction and consulting prime contracts and subcontracts. 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 ITD 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 ITD contract dollars that went to minority- and woman-owned businesses during the study period (i.e., *utilization*) to the percentage of dollars that one might expect those businesses to receive based on their availability for specific types and sizes of ITD prime contracts and subcontracts (i.e., *availability*). Comparisons between utilization 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 ITD 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 construction and consulting prime contracts and subcontracts that ITD awarded during the study period. BBC began the availability analysis by identifying the specific subindustries in which ITD spends the majority of its contracting dollars (for details, see Chapter 4) as well as the geographic areas in which the majority of the businesses with which ITD spends those contracting dollars are located (i.e., the *relevant geographic market area*, which BBC identified as the entire state of Idaho as well as Asotin County, Washington and Spokane County, Washington). The study team then developed a database of potentially available businesses through surveys with businesses located in the relevant geographic market area that perform work within relevant subindustries. That method of examining availability is referred to as a

*custom census* and has been accepted in federal court as a valid methodology for conducting availability analyses. Figure 5-1 summarizes the strengths of BBC's custom census approach.

**Overview of availability surveys.** The study team conducted telephone surveys with business owners and managers to identify local businesses that are potentially available for ITD construction and consulting prime contracts and subcontracts.<sup>1</sup> BBC began the survey process by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace.<sup>2</sup> 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 ITD awarded during the study period. BBC obtained listings on 5,275 local businesses that do work related to those work specializations. However, 906 of those business listings did not include a working phone number. BBC attempted availability surveys with the remaining 4,369 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;
- Qualifications and interest in performing work for ITD or other local government agencies;
- Qualifications and interest in performing work as a prime contractor or as a subcontractor;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

**Figure 5-1.**  
**Summary of BBC's custom census availability approach**

Federal courts have reviewed and upheld custom census approaches to conducting availability analyses. Compared with other court-reviewed approaches, BBC's approach adds several layers of screening to determine which businesses are potentially available for work in relevant industries and subindustries. For example, BBC collects detailed information from businesses about their roles as contractors, their interest in local government work, and the geographic locations of their work—items not included in some previous court-reviewed availability analyses. BBC also analyzes the sizes of contracts and subcontracts on which businesses have bid on or performed in the past to determine the *relative capacity* of businesses.

The objective of BBC's availability approach is not to collect information about each and every relevant business that is operating in a particular geographical area. Instead, it is to collect information from a large, unbiased subset of local businesses that appropriately represents the entire local business population. That approach allows BBC to estimate the availability of minority- and woman-owned businesses in an accurate, statistically-valid manner.

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<sup>1</sup> 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.

<sup>2</sup> D&B Marketplace is accepted as the most comprehensive and complete source of business listings in the nation.

Appendix C provides details about specific survey questions and an example of the availability survey instrument.

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

- Being a private business (as opposed to a nonprofit organization);
- Having performed work relevant to ITD construction and consulting contracting;
- Having bid on or performed construction and consulting prime contracts or subcontracts in either the public or private sector in Idaho 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 qualified for and interested in work for ITD or other state or local government agencies.<sup>3</sup>

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts that ITD awarded during the study period:

- 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 hundreds of local businesses, the study team developed a database of information about businesses that are potentially available for ITD construction and consulting contracting work. Information from the database allowed BBC to develop a representative depiction of businesses that are ready, willing, and able to perform work for ITD. Figure 5-2 presents the percentage of businesses in the study team's *availability database* that were minority- or woman-owned. The information in Figure 5-2 reflects a simple *head count* of businesses with no analysis of their availability for specific ITD prime contracts and subcontracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for ITD work. The study team's analysis included 279 businesses that are potentially available for specific construction and consulting contracts that ITD awarded during the study period. As shown in Figure 5-2, of those businesses, 19.4 percent were minority- or woman-owned.

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<sup>3</sup> That information was gathered separately for prime contract and subcontract work.

**Figure 5-2.**  
**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.

Race/Ethnicity and Gender	Percent of Firms
Black American-owned	1.8 %
Asian Pacific American-owned	0.4
Subcontinent Asian American-owned	0.4
Hispanic American-owned	2.1
Native American-owned	4.3
<b>Total minority-owned</b>	<b>9.0 %</b>
White woman-owned	10.4 %
<b>Total minority-/woman-owned</b>	<b>19.4 %</b>
<b>Total majority-owned firms</b>	<b>80.6 %</b>
<b>Total firms</b>	<b>100.0 %</b>

## 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 ITD contracting work. Those estimates represent the percentage of ITD construction and consulting contracting dollars that minority- and woman-owned businesses would be expected to receive based on their availability for specific types and sizes of ITD 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 ITD 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 ITD 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:

- For each contract element, the study team identified businesses in the availability database that reported that they:
  - Are qualified and interested in performing construction and consulting work in that particular role for that specific type of work for ITD;
  - 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 ITD awarded the contract element.
- The study team then counted the number of minority-owned businesses (separately by race/ethnicity), white 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 5-3 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that ITD 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 ITD work rather than using a simple head count of minority- and woman-owned businesses (e.g., simply calculating the percentage of all local construction and consulting 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.<sup>4</sup>*

**Figure 5-3.  
Example of the availability calculation for an ITD subcontract**

On a contract that ITD awarded in 2014, the prime contractor awarded a subcontract worth \$174,435 for water, sewer, and utility lines work in Idaho District 4. 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 water, sewer, and utility lines work;
- c. Reported bidding on work of similar or greater size in the past;
- d. Reported being able to work or serve customers in Idaho District 4; and
- e. Reported qualifications and interest in working as a subcontractor on ITD or other local agency projects.

The study team found 41 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 17 percent (i.e.,  $7/41 \times 100 = 17$ ).

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<sup>4</sup> 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 23 different subindustries related to construction and consulting as part of estimating availability for ITD prime contracts and subcontracts.

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

- Businesses that reported being qualified for and interested in working as prime contractors were counted as available for prime contracts;
- Businesses that reported being qualified for and interested in working as subcontractors were counted as available for subcontracts; and
- Businesses that reported being qualified for and 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.*,<sup>5</sup> *Western States Paving Company v. Washington State DOT*,<sup>6</sup> *Rothe Development Corp. v. U.S. Department of Defense*,<sup>7</sup> and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*<sup>8</sup>).

As part of the disparity study, BBC used regression analysis to examine whether the relative capacity of minority- and woman-owned businesses differs from that of businesses owned by non-Hispanic white men after accounting for various other factors. That analysis indicated that the capacity of minority- and woman-owned businesses was not depressed relative to that of business owned by non-Hispanic white men after accounting for differences in industry and age of business.

**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

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<sup>5</sup> *AGC, San Diego Chapter v. California DOT*, 2013 WL 1607239 (9th Cir. April 16, 2013).

<sup>6</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

<sup>7</sup> *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

<sup>8</sup> *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

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 3,795 construction and consulting prime contracts and subcontracts that ITD awarded between October 1, 2011 and September 30, 2015. Figure 5-4 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for those contracts.

**Figure 5-4.**  
**Overall dollar-weighted 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.

Race/Ethnicity and Gender	Utilization Benchmark (Availability %)
Black American-owned	0.2 %
Asian Pacific American-owned	0.3
Subcontinent Asian American-owned	0.0
Hispanic American-owned	0.7
Native American-owned	11.6
<b>Total minority-owned</b>	<b>12.9 %</b>
White woman-owned	5.0 %
<b>Total minority-/woman-owned</b>	<b>17.9 %</b>

Overall, the availability of minority- and woman-owned businesses for ITD construction and consulting contracts is 17.9 percent. White woman-owned businesses (5.0%) and Native American-owned businesses (11.6%) exhibited the highest availability percentages among all groups. Note that availability estimates varied when the study team examined different subsets of those contracts (for availability results for specific contract sets, see Appendix F). Assuming that the mix of the types, sizes, and locations of the contracts that ITD awards in the future are similar to that of the contracts that the agency awarded during the study period, one might expect 17.9 percent of ITD's contracting dollars to go to minority- and woman-owned businesses based on their availability for that work.

## F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in ITD's Federal Highway Administration (FHWA)-funded transportation contracts.<sup>9</sup> 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-

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<sup>9</sup> The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

funded prime contracts and subcontracts. BBC's approach to calculating ITD'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."

BBC's availability analysis indicates that the availability of potential DBEs for ITD's FHWA-funded transportation contracts is 13.3 percent. ITD might consider 13.3 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. For details about ITD's base figure for its overall DBE goal, see Chapter 9.

**Differences from overall MBE/WBE 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 5-4. 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 FHWA-funded contracts 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 transportation prime contracts and subcontracts.

**Additional steps before ITD determines its overall DBE goal.** ITD 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 ITD to make a step-2 adjustment as long as the agency can explain what factors it considered and why no adjustment was warranted. Chapter 9 discusses factors that ITD might consider in deciding whether to make a step-2 adjustment to the base figure.

## **G. Implications for Any DBE Contract Goals**

If ITD determines that the use of DBE contract goals is appropriate in the future, it might use information from the availability analysis when setting any contract-specific DBE 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. 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.

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## Utilization Analysis

# CHAPTER 6.

## Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction and consulting contracts that the Idaho Transportation Department (ITD) awarded between October 1, 2011 and September 30, 2015. (Chapter 4 provides additional information about data collection and methodology related to the utilization analysis.) 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 ITD contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that ITD awarded to minority- and woman-owned businesses during the study period. For example, if 5 percent of ITD prime contract and subcontract dollars went to white woman-owned businesses on a particular set of contracts, utilization of white woman-owned businesses for that set of contracts would be 5 percent.<sup>1</sup> The study team measured the participation of all minority- and woman-owned businesses regardless of certification and separately of minority- and woman-owned businesses that were certified as Disadvantaged Business Enterprises (DBEs).

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

- BBC counted all minority- and woman-owned businesses in its analysis, not only certified DBEs; and
- BBC examined state-funded contracts in addition to FHWA-funded contracts.

**All minority- and woman-owned business, not only certified DBEs.** Per USDOT regulations, ITD prepares DBE utilization reports for FHWA based on information only about certified DBEs. ITD does not track the participation of minority- and woman-owned businesses that are not DBE-certified for those reports. In contrast, BBC's utilization analysis includes the

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<sup>1</sup> BBC uses the term "white woman-owned businesses" to refer to "non-Hispanic white woman-owned businesses."

participation of *all* minority- and woman-owned businesses, regardless of whether they are certified as DBEs. The study team included minority- and woman-owned businesses that:

- Are currently DBE-certified;
- May have once been DBE-certified and graduated (or let their certifications lapse); and
- Are not eligible for certification or have never been certified.

BBC provides utilization results for all minority- and woman-owned businesses and separately for minority- and woman-owned businesses that were DBE-certified during the study period.<sup>2</sup>

**FHWA-, state-, and FTA-funded contracts.** USDOT requires ITD to prepare DBE participation reports only for its FHWA- and FTA-funded contracts. Thus, ITD reports the participation of certified DBEs only for those contracts. BBC analyzed the participation of minority- and woman-owned businesses in FHWA-, state-, and FTA-funded ITD contracts.

## B. Utilization Analysis Results

Figure 6-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction and consulting contracts that ITD awarded during the study period (including both prime contracts and subcontracts). The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period. As shown in Figure 6-1, overall, minority- and woman-owned businesses received 7 percent of the relevant contracting dollars that ITD awarded during the study period. The darker portion of the bar shows that 2.6 percent of relevant contracting dollars went to certified DBEs.

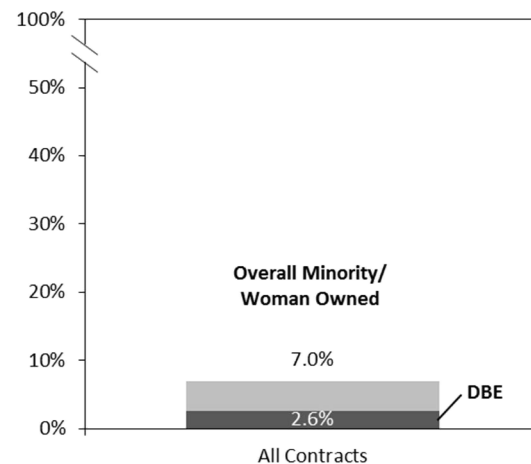
**Figure 6-1.**  
**Participation of minority- and woman-owned businesses**

**Notes:**

The study team analyzed 3,795 prime contracts and subcontracts.  
The darker portion of the bar represents participation of certified DBEs.  
For more detail, see Figure F-2 in Appendix F.

**Source:**

BBC Research & Consulting utilization analysis.



<sup>2</sup> Although businesses that are owned and operated by socially- and economically-disadvantaged non-Hispanic white men can become certified as DBEs, BBC did not identify any DBE-certified businesses that were owned by non-Hispanic white men that participated on ITD contracts during the study period.



In addition, BBC examined participation in ITD contracting separately for each relevant racial/ethnic and gender group. Those results are presented in Figure 6-2. Overall, Native American-owned businesses and white woman-owned businesses exhibited higher levels of participation on ITD contracts than all other groups (2.3% for Native American-owned businesses and 3.7% for white woman-owned businesses).

**Figure 6-2.**  
**Participation of minority- and woman-owned businesses by group**

**Note:**

The study team analyzed 3,795 prime contracts and subcontracts.

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.

	Total	
	\$ in Thousand	Percent
<b>Minority-/Woman-owned</b>		
Black American-owned	\$40	0.0 %
Asian Pacific American-owned	713	0.1
Subcontinent Asian American-owned	9	0.0
Hispanic American-owned	9,801	0.9
Native American-owned	25,302	2.3
White woman-owned	40,403	3.7
<b>Total minority-/woman-owned</b>	<b>103,724</b>	<b>7.0 %</b>
Majority-owned	988,959	93.0
<b>Total</b>	<b>\$1,092,683</b>	<b>100.0 %</b>
<b>DBEs</b>		
Black American-owned	\$0	0.0 %
Asian Pacific American-owned	494	0.0
Subcontinent Asian American-owned	0	0.0
Hispanic American-owned	6,095	0.6
Native American-owned	2,345	0.2
White male-owned	0	0.0
White woman-owned	19,240	1.8
<b>Total DBE</b>	<b>\$28,174</b>	<b>2.6 %</b>
Non-DBE	1,064,509	97.4
<b>Total</b>	<b>\$1,092,683</b>	<b>100.0 %</b>

Further analysis revealed that, in many cases, a relatively small number of businesses accounted for relatively large percentages of minority- and woman-owned business participation in ITD contracting during the study period:

- A Black American-owned paving contractor received all of the dollars that went to Black American-owned businesses (\$39,600);
- A Hispanic American-owned highway and street contractor received 33 percent of the total dollars that went to Hispanic American-owned businesses (approximately \$3.3 million of \$9.8 million) and as of the writing of the report, this firm has graduated from the DBE program;
- A Native American-owned highway and street contractor received 80 percent of the total dollars that went to Native American-owned businesses (approximately \$20 million of \$25.3 million);
- A Subcontinent Asian American-owned architecture business received all of the dollars that went to Subcontinent Asian American-owned businesses (\$9,330); and

Information about the participation of minority- and woman-owned businesses is instructive on its own, but it is even more instructive when it is compared with the participation that one might expect based on the availability of minority- and woman-owned businesses for ITD work. BBC presents such comparisons as part of the disparity analysis in Chapter 7.

# CHAPTER 7.

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## Disparity Analysis

# CHAPTER 7.

## Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses on contracts that the Idaho Transportation Department (ITD) awarded between October 1, 2011 and September 30, 2015 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work. The analysis focused on construction and consulting services. Chapter 7 presents the disparity analysis in five parts:

- A. Overview of disparity analysis;
- B. Overall disparity analysis results;
- C. Statistical significance of disparity analysis results.

### 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 ITD 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 made those comparisons for each relevant racial/ethnic and gender group. BBC reports disparity analysis results for all ITD contracts considered together and separately for different sets of contracts (e.g., prime contracts and subcontracts).

BBC expressed both actual participation and availability as percentages of the total dollars associated with a particular set of contracts, making them directly comparable (e.g., 5 percent participation compared with 4 percent availability). BBC then calculated a *disparity index* to help compare participation and availability results across relevant racial/ethnic and gender groups and across different sets of contracts. A disparity index of 100 indicates a match between actual participation and availability (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability, and a disparity index of less than 80 is often considered *substantial*.<sup>1</sup> Figure 7-1 describes how BBC calculates disparity indices.

The disparity analysis results that BBC presents in Chapter 7 summarize detailed results tables provided in Appendix F. Each table in Appendix F presents disparity analysis results for a different set of ITD contracts. For example, Figure 7-2, which is identical to Figure F-2 in Appendix F, presents disparity analysis results for *all* ITD contracts that the study team examined as part of the study—that is, construction and consulting prime and subcontracts that ITD awarded during the study period.

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<sup>1</sup> Many courts have deemed disparity indices below 80 as being “substantial” and have accepted them as evidence of adverse conditions for minority- 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 (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.

Appendix F includes analogous tables for different subsets of contracts including those that present results separately for:

- Construction and consulting contracts;
- Prime contracts and subcontracts;
- Federal Highway Administration (FHWA)-, state-, and FTA-funded contracts; and
- Large and small prime contracts.

The heading of each table in Appendix F provides a description of the subset of contracts that the study team analyzed for that particular disparity analysis table.

A review of Figure 7-2 helps to introduce the calculations and format of all of the disparity analysis tables in Appendix F. As illustrated in Figure 7-2, the disparity analysis tables present information 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 owned by non-Hispanic white men (i.e., majority-owned businesses) and all minority- and woman-owned businesses considered together.
- Row (2) provides results for all minority- and woman-owned businesses, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).
- Row (3) provides results for all white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) provides results for all minority-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (10) provide results for businesses of each individual minority group, regardless of whether they were certified as DBEs.

#### **Figure 7-1. Calculation of disparity indices**

The disparity index provides a way of assessing how closely the actual participation of minority- and woman-owned businesses matches the percentage of contract dollars that those businesses might be expected to receive based on their availability for specific sets of contracts. One can directly compare a disparity index for one racial/ethnic or gender group to that of another group and compare disparity indices across different sets of contracts. BBC calculates disparity indices using the following formula:

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

For example, if actual participation of white woman-owned businesses on a set of contracts was 2 percent and the availability of white woman-owned businesses for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20. In this example, white woman-owned businesses would have actually received 20 cents of every dollar that they might be expected to receive based on their availability.

**Figure 7-2.**  
**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	3,795	\$1,092,683	\$1,092,683				
(2) MBE/WBE	750	\$76,267	\$76,267	7.0	17.9	-10.9	39.0
(3) WBE	495	\$40,403	\$40,403	3.7	5.0	-1.3	73.5
(4) MBE	255	\$35,864	\$35,864	3.3	12.9	-9.6	25.5
(5) Black American-owned	1	\$40	\$40	0.0	0.2	-0.2	1.6
(6) Asian Pacific American-owned	25	\$713	\$713	0.1	0.3	-0.2	23.5
(7) Subcontinent Asian American-owned	3	\$9	\$9	0.0	0.0	0.0	8.9
(8) Hispanic American-owned	163	\$9,801	\$9,801	0.9	0.7	0.2	124.0
(9) Native American-owned	63	\$25,302	\$25,302	2.3	11.6	-9.3	19.9
(10) Unknown MBE	0	\$0					
(11) DBE-certified	428	\$28,174	\$28,174	2.6			
(12) Woman-owned DBE	247	\$19,240	\$19,240	1.8			
(13) Minority-owned DBE	181	\$8,934	\$8,934	0.8			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	16	\$494	\$494	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	140	\$6,095	\$6,095	0.6			
(18) Native American-owned DBE	25	\$2,345	\$2,345	0.2			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

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

Source: BBC Research & Consulting disparity analysis.

The bottom half of Figure 7-2 presents utilization results for businesses that were certified as DBEs. BBC does not report availability or disparity analysis results separately for DBE-certified businesses.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that the study team analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-2, the study team analyzed 3,795 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 (9) of column (a), Native American-owned businesses participated in 63 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 7-2, the study team examined approximately \$1.1 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 (9) of column (b), Native American-owned businesses received \$25.3 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that the study team 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 utilization percentage of each racial/ethnic and gender group as a percentage of total dollars associated with the set of contract elements. The study team 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 Native American-owned businesses, the study team divided \$25.3 million by \$1.1 billion and multiplied by 100 for a result of 2.3%, as shown in row (9) of column (d)).

**Availability results.** Column (e) of Figure 7-2 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 utilization results for specific groups for specific sets of contracts (e.g., as shown in row (9) of column (e), the availability of Native American-owned businesses is 11.6 percent).

**Differences between utilization 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 utilization percentage from the availability percentage. Column (f) of Figure 7-2 presents the percentage point difference between utilization and availability for each relevant racial/ethnic and gender group. For example, as presented in row (9) of column (f)

of Figure 7-2, the participation of Native American-owned businesses in ITD contracts was 9.3 percentage points less 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, which measured actual participation relative to availability and served as a metric to compare any disparities across different groups and different sets of contracts. BBC calculated disparity indices by dividing the utilization percentage for each group by the availability percentage for each group and multiplying by 100. Smaller disparity indices indicate greater disparities (i.e., a greater degree of underutilization).

Column (g) of Figure 7-2 presents the disparity index for each relevant racial/ethnic and gender group. For example, as reported in row (9) of column (g), the disparity index for Native American-owned businesses was approximately 20, indicating that Native American-owned businesses actually received only \$0.20 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that ITD awarded during the study period.

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

- 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+.”<sup>2</sup>

## B. Overall Disparity Analysis Results

BBC used the disparity analysis results from Figure 7-2 to assess any disparities between the participation of minority- and woman-owned businesses in prime contracts and subcontracts that ITD awarded during the study period as well as their availability for that work. Figure 7-3 presents disparity indices for all relevant racial/ethnic and gender groups considered together and separately for each group. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity.

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<sup>2</sup> A particular racial/ethnic or gender group could show a utilization percentage greater than 0 percent but an availability percentage of 0 percent for many reasons including the fact that one or more businesses that participated in ITD contracts during the study period were out of business at the time that BBC conducted availability surveys.



**Figure 7-3.**  
**Disparity indices by group**

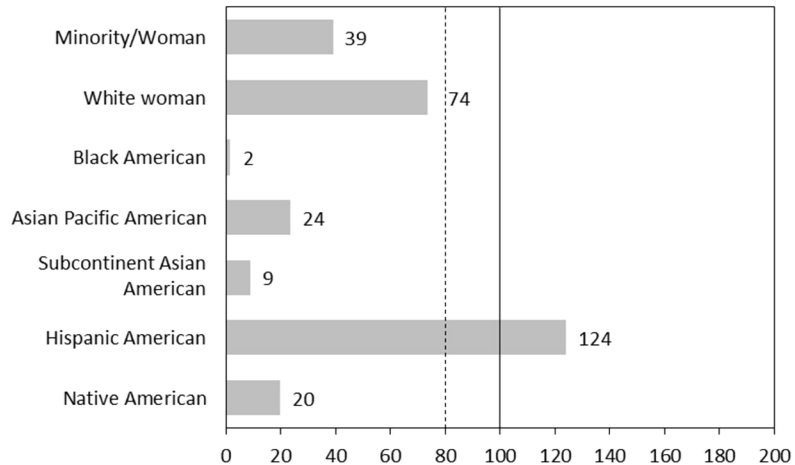
Note:

The study team analyzed 3,795 prime contracts/subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



As shown in Figure 7-3, overall, the participation of minority- and woman-owned businesses in contracts that ITD awarded during the study period was lower than what one might expect based on the availability of those businesses for that work. The disparity index of 39 indicates that minority- and woman-owned businesses considered together received approximately \$0.39 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that ITD awarded during the study period. Disparity analysis results by individual group showed that:

- Five groups exhibited substantial disparities—Black American-owned businesses (disparity index of 2), Asian-Pacific American-owned businesses (disparity index of 24), Subcontinent-Asian American-owned businesses (disparity index of 9), Native American-owned businesses (disparity index of 20), and woman-owned businesses (disparity index of 74).
- Hispanic American-owned businesses were the only group above parity (disparity index of 124).

### 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*. Random chance is the factor that researchers consider most in determining the statistical significance of results that are based on population samples.

**Monte Carlo analysis.** BBC used a computational 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* method. The analyses that the study team completed as part of the disparity study were well-suited for using Monte Carlo analysis to test statistical significance. Monte Carlo analysis was appropriate for that purpose, because, among the contracts that ITD awarded during the study period, there were many individual chances for businesses to win prime contracts and subcontracts, each with a different payoff (i.e., each with a different dollar value). Figure 7-4 provides additional information about how the study team used a Monte Carlo

method to test the statistical significance of disparity analysis results. It is important to note that Monte Carlo simulations may not be appropriate to use with very small populations of contracts.

**Figure 7-4.**  
**Monte Carlo Analysis**

The study team 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, contract size, and location of the work. The study team assumed that each available business had an equal chance of winning that contract element. For example, the odds of a white woman-owned business receiving that contract element were equal to the number of 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 then randomly chose a business from the pool of available businesses to win the contract element.

The Monte Carlo simulation repeated the above process for all other elements in a particular set of contracts. The output of a single Monte Carlo simulation for all contract elements in the set represented simulated utilization of minority- and woman-owned businesses, by group, for that set of contract elements. The entire Monte Carlo simulation was then repeated one million times for each set of contracts. The combined output from all one million simulations represented a probability distribution of the overall utilization of minority- 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 one million that produced a utilization result that was equal or below the actual observed utilization result for each racial/ethnic and 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 the study team 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 the study team considered that disparity index to be statistically significant at the 90 percent confidence level. If that number was less than or equal to 75,000 (i.e., 7.5% of the total number of simulations), then the study team considered that disparity index to be statistically significant at the 85 percent confidence level.

**Results.** BBC identified substantial disparities for various racial/ethnic and gender groups on all contracts considered together (for details, see Figures 7-2 and 7-3). BBC used Monte Carlo analysis to test whether the disparities that the study team observed were statistically significant.

As shown in Figure 7-5, results from the Monte Carlo analysis indicated that the disparities on all contract for minority-owned businesses, Black American-owned businesses, Asian Pacific American-owned businesses, and Native American-owned businesses were statistically significant at the 95 percent confidence level. The disparities for white woman-owned businesses and Subcontinent Asian American-owned businesses on all contracts were statistically significant at the 85 percent confidence level.

**Figure 7-5.**  
**Monte Carlo simulation results for disparity analysis results**

Race/Ethnicity and Gender	Disparity Index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
<b>Total minority-/woman-owned</b>	39	0	<0.1 %
White woman-owned	74	52,490	5.2
<b>Total minority-owned</b>	25	0	<0.1 %
Black American-owned	2	0	<0.1 %
Asian Pacific American-owned	24	108	<0.1 %
Subcontinent Asian American-owned	9	59,403	5.9 %
Hispanic American-owned	124	N/A	N/A %
Native American-owned	20	0	<0.1 %

Note: Numbers rounded to nearest tenth of 1 percent.  
Numbers may not add to totals due to rounding.  
N/A – Not applicable – Statistical significance was not calculated in instances where disparities were not present.

Source: BBC Research & Consulting disparity analysis.

# **CHAPTER 8.**

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## **Further Exploration of Disparities**

## CHAPTER 8.

# Further Exploration of Disparities

As presented in Chapter 7, the study team observed disparities between the participation and availability of minority- and woman-owned businesses when considering all relevant ITD contracts together and when considering Federal Highway Administration (FHWA)-funded contracts separately. Six areas of questions provide a framework for further exploration of the disparities that the study team observed between the participation and availability of minority- and woman-owned businesses:

- A. Are there disparities for relevant contracting areas?
- B. Are there disparities for different time periods?
- C. Are there disparities for prime contracts and subcontracts?
- D. Are there disparities for large and small prime contracts?
- E. Are there disparities for geographical areas?
- F. Are there disparities for FHWA-, FTA-, and state-funded contracts?
- G. Do bid/proposal processes explain any disparities for prime contracts?

Answers to those questions may be relevant as ITD considers how to refine its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. They may also help ITD identify the specific racial/ethnic and gender groups, if any, that might be included in any future race- or gender-conscious program measures that the agency decides to use.

### A. Are there Disparities for Relevant Contracting Areas?

BBC Research & Consulting (BBC) examined disparity analysis results separately for construction and consulting contracts that ITD awarded during the study period. That information might help ITD refine its implementation of the Federal DBE Program for particular contracting areas. Figure 8-1 presents disparity indices for all relevant racial/ethnic and gender groups separately for construction and consulting contracts. Overall, minority- and woman-owned businesses exhibited substantial disparities for both types of contracts (Construction disparity index of 37; Consulting disparity index of 63).

- Four groups exhibited substantial disparities on construction contracts—Black American-owned businesses (disparity index of 2), Subcontinent Asian American-owned businesses (disparity index lower than 1), Native American-owned businesses (disparity index of 18), and white woman-owned businesses (disparity index of 79).
- Asian Pacific American-owned businesses (disparity index of 121) and Hispanic American-owned businesses (disparity index of 105) did not exhibit disparities on construction contracts.

- Four groups exhibited substantial disparities on consulting contracts—Black American-owned businesses (disparity index lower than 1), Asian Pacific American-owned businesses (disparity index of 18), Subcontinent Asian American-owned businesses (disparity index of 9), and white woman-owned businesses (disparity index of 50).
- Native American-owned businesses (disparity index of 88) exhibited a disparity on consulting contracts, but the disparity was not substantial.
- Hispanic American-owned businesses (disparity index of 200+) did not exhibit a disparity on consulting contracts.

**Figure 8-1.**  
**Disparity indices for**  
**construction and**  
**consulting contracts**

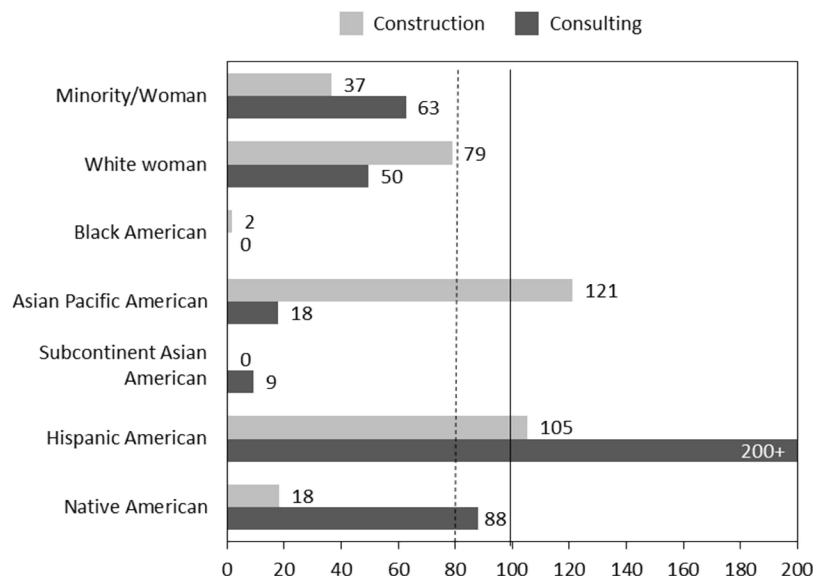
Note:

The study team analyzed 2,232 construction contracts and 1,563 consulting contracts.

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

Source:

BBC Research & Consulting disparity analysis.



## B. Are there Disparities for Different Time Periods?

BBC examined disparity analysis results separately for two separate time periods—October 1, 2011 through September 30, 2013 (*early* study period) and October 1, 2014 through September 30, 2015 (*late* study period). That information might help ITD determine whether there were different outcomes for minority- and woman-owned businesses as the country moved further from the economic downturn that began in 2008. Figure 8-2 presents disparity indices for all relevant racial/ethnic and gender groups separately for the early and late study periods. Overall, minority- and woman-owned businesses exhibited substantial disparities for contracts awarded during both the early study period (disparity index of 50) and the late study period (disparity index of 29).

- Three groups exhibited substantial disparities on contracts awarded during the early study period—Black American-owned businesses (disparity index lower than 1), Asian Pacific American-owned businesses (disparity index of 28), and Native American-owned businesses (disparity index of 28).
- White woman-owned businesses (disparity index of 91) exhibited a disparity on contracts awarded during the early study period, but it was not substantial.

- Hispanic American-owned businesses (disparity index of 104) and Subcontinent Asian American-owned businesses (disparity index of 200+) did not exhibit disparities on contracts awarded during the early study period.
- Five groups exhibited substantial disparities on contracts awarded during the late study period—Black American-owned businesses (disparity index of 4), Asian Pacific American-owned businesses (disparity index of 19), Subcontinent Asian American-owned (disparity index of 6), Native American-owned businesses (disparity index of 13), and white woman-owned businesses (disparity index of 54).
- Hispanic American-owned businesses (disparity index of 148) did not exhibit a disparity on contracts awarded during the late study period.

**Figure 8-2.**  
**Disparity indices for early and late study period**

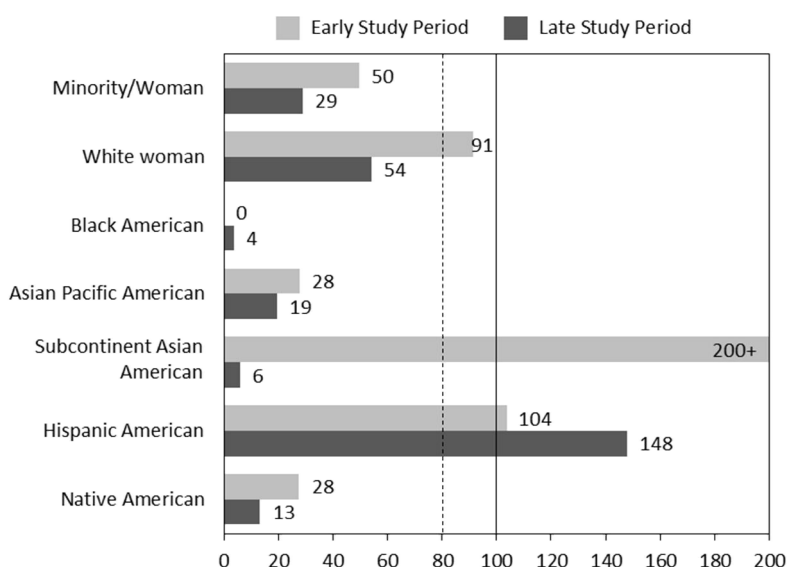
**Note:**

The study team analyzed 2,086 contracts in the early study period and 1,709 contracts in the late study period.

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

**Source:**

Availability and utilization analyses.



### C. Are there Disparities for Prime Contracts and Subcontracts?

BBC examined disparity analysis results separately for prime contracts and subcontracts to assess whether minority- and woman-owned businesses exhibited different outcomes based on their roles as either prime contractors or subcontractors during the study period. Figure 8-3 presents disparity indices for all relevant racial/ethnic and gender groups separately for prime contracts and subcontracts. Overall, minority- and woman-owned business exhibited substantial disparities for prime contracts (disparity index of 24) and for subcontracts (disparity index of 72).

- Four groups exhibited substantial disparities on prime contracts—Black American-owned businesses (disparity index lower than 1), Asian Pacific American-owned businesses (disparity index of 15), Subcontinent Asian American-owned businesses (disparity index lower than 1), Native American-owned businesses (disparity index of 23), and white woman-owned businesses (disparity index of 17).
- Hispanic American-owned businesses (disparity index of 129) did not exhibit a disparity for prime contracts awarded during the study period.

- Four groups exhibited substantial disparities on subcontracts—Black American-owned businesses (disparity index of 2), Asian Pacific American-owned businesses (disparity index of 49), Subcontinent Asian American-owned businesses (disparity index of 16), and Native American-owned businesses (disparity index of 9).
- Neither Hispanic American-owned businesses (disparity index of 120) nor white woman-owned businesses (disparity index of 138) exhibited disparities on subcontracts.

**Figure 8-3.**  
**Disparity indices for prime contracts and subcontracts**

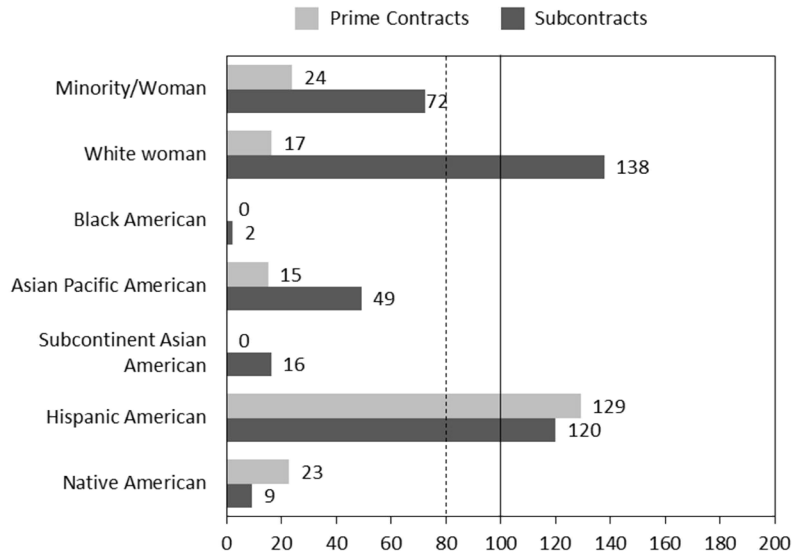
Note:

The study team analyzed 1,495 prime contracts and 2,300 subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



## D. Are there Disparities for Large and Small Prime Contracts?

- BBC compared disparity analysis results for “large” prime contracts and “small” prime contracts that ITD awarded during the study period to assess whether contract size affected disparity analysis results for prime contracts. “Large” prime contracts were defined as construction contracts worth more than \$2 million and consulting contracts worth more than \$500,000. “Small” prime contracts were defined as construction contracts worth \$2 million or less and consulting worth \$500,000 or less. Figure 8-4 presents disparity indices for all relevant racial/ethnic and gender groups separately for large and small prime contracts. Overall, minority- and woman-owned businesses exhibited substantial disparities for both large prime contracts (disparity index of 25) and small prime contracts (disparity index of 22)
- Three groups exhibited substantial disparities on large prime contracts—Asian Pacific American-owned businesses (disparity index lower than 1), Native American-owned businesses (disparity index of 27), and white woman-owned businesses (disparity index lower than 1).
- Three groups did not exhibit disparities on large prime contracts—Subcontinent Asian American-owned businesses (disparity index of 100), Hispanic American-owned businesses (disparity index of 200+), and Black American-owned businesses (disparity index of 100).
- Six groups exhibited substantial disparities on small prime contracts—Black American-owned businesses (disparity index lower than 1), Asian Pacific American-owned businesses (disparity index of 19), Subcontinent Asian American-owned businesses (disparity index



lower than 1), Hispanic American-owned (disparity index of 57), Native American-owned businesses (disparity index of 12), and white woman-owned businesses (disparity index of 31).

**Figure 8-4.**  
**Disparity indices for**  
**large and small prime**  
**contracts**

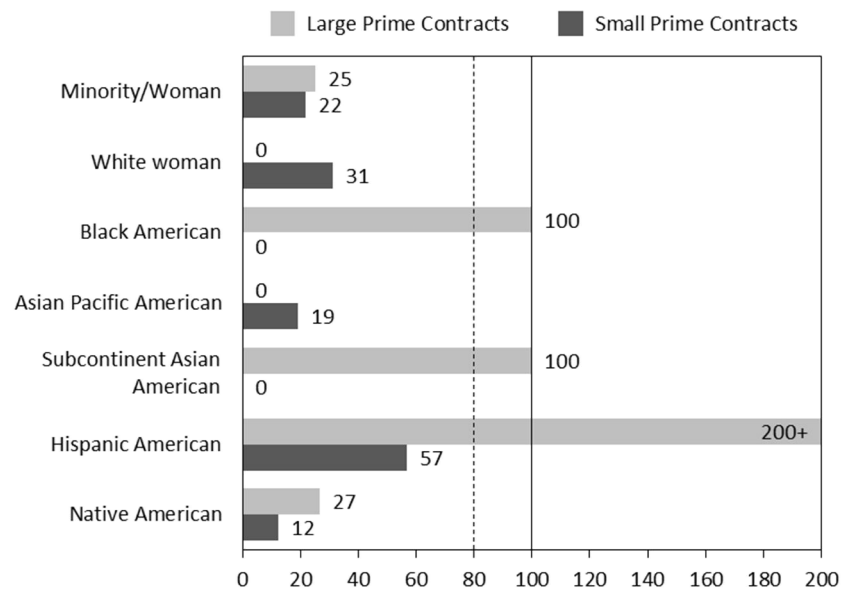
Note:

The study team analyzed 170 large prime contracts and 1,325 small prime contracts.

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

Source:

BBC Research & Consulting disparity analysis.



## E. Are there Disparities for Geographical Areas?

BBC compared disparity analysis results for contracts that ITD awarded in three geographical areas: Districts 1 and 2; District 3; and Districts 4, 5, and 6. Figure 8-5 presents disparity indices for all relevant racial/ethnic and gender groups separately for each geographical area. Overall, minority- and woman-owned businesses exhibited substantial disparities for contracts awarded in all three geographical areas

- All relevant groups exhibited substantial disparities for contracts in Districts 1 and 2.
- Five groups exhibited substantial disparities for contracts in District 3—Black American-owned businesses (disparity index below 1), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned businesses (disparity index below 1), Native American-owned (disparity index of 2), and white woman-owned businesses (disparity index of 73).
- Hispanic American-owned businesses (disparity index of 200+) did not exhibit a disparity for contracts in District 3.
- All relevant groups exhibited substantial disparities for contracts in Districts 4, 5, and 6.

**Figure 8-5.**  
**Disparity indices for**  
**geographical areas**

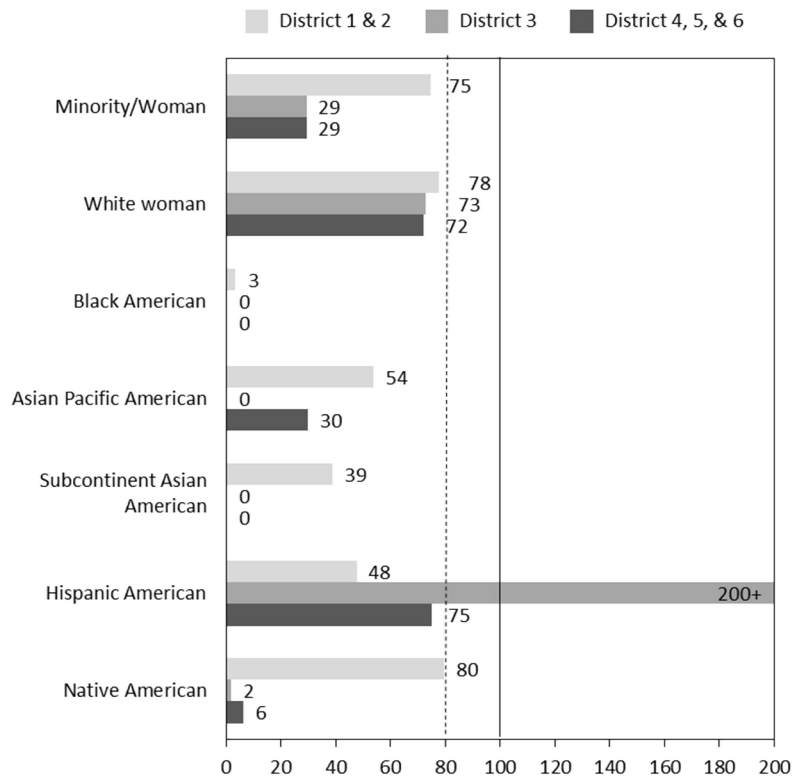
Note:

The study team analyzed 964 District 1 and District 2 contracts; 1,465 District 3 contracts; and 1,379 District 4, District 5, and District 6 contracts.

For more detail, see Figures F-11, F-12, and F-13 in Appendix F.

Source:

BBC Research & Consulting  
disparity analysis.



## F. Are there Disparities for FHWA-, FTA-, and State-Funded Contracts?

BBC compared disparity analysis results for FHWA-, FTA-, and state-funded contracts that were awarded during the study period. Figure 8-6 presents disparity indices for all relevant racial/ethnic and gender groups separately for FHWA-, FTA-, and state-funded contracts. Overall, minority- and woman-owned businesses exhibited substantial disparities for all three contract types.

- Five groups exhibited substantial disparities on FHWA-funded contracts—Black American-owned businesses (disparity index lower than 1), Asian Pacific American-owned businesses (disparity index of 23), Subcontinent Asian American-owned businesses (disparity index of 9), and Native American-owned (disparity index of 18).
- Hispanic American-owned businesses (disparity index of 133) did not exhibit a disparity on FHWA-funded contracts awarded during the study period.
- Three groups exhibited substantial disparities on FTA-funded contracts—Hispanic American-owned businesses (disparity index lower than 1), Native American-owned (disparity index of 37), and white woman-owned businesses (disparity index of 76).
- Three groups did not exhibit disparities on FTA-funded contracts—Black American-owned businesses (disparity index 200+), Asian Pacific American-owned businesses (disparity index 100), and Subcontinent Asian American-owned businesses (disparity index of 100).
- Three groups exhibited substantial disparities on state-funded contracts—Black American-owned businesses (disparity index lower than 1), Asian Pacific American-owned businesses (disparity index of 39), and Native American-owned (disparity index of 32).

- Subcontinent Asian American-owned businesses (disparity index of 100) and Hispanic American-owned businesses (disparity index 110) did not exhibit disparities on state-funded contracts.
- White woman-owned businesses (disparity index of 81) exhibited a disparity on state-funded contracts that was close to the threshold for being considered substantial.

**Figure 8-6.**  
**Disparity indices for ITD**  
**and local assistance**  
**contracts**

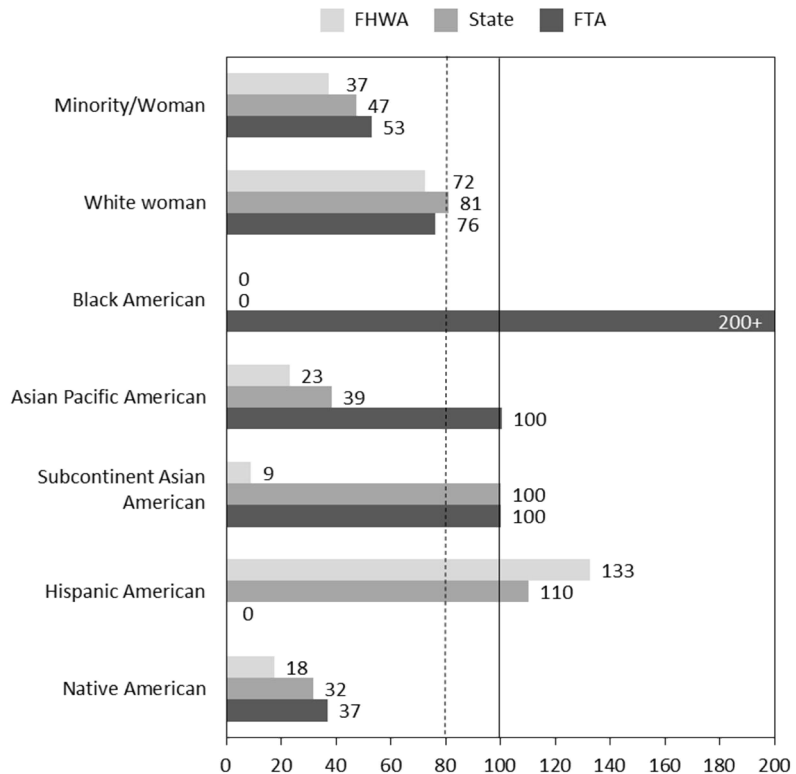
Note:

The study team analyzed 3,221 FHWA-funded contracts, 533 state-funded contracts, and 40 FTA-funded contracts.

For more detail, see Figures F-14, F-15, and F-16 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



## G. Do Bid/Proposal Processes Explain Any Disparities for Prime Contracts?

The study team completed a case study analysis to assess whether characteristics of ITD's bid and proposal evaluation processes help to explain any of the disparities that the study team observed for prime contracts. The study team analyzed bid and proposal information from samples of contracts that ITD awarded during the study period.

**Construction.** The study team examined bid information for a sample of 146 construction contracts that ITD awarded during the study period.<sup>1</sup> In total, ITD received 639 bids for those contracts.

<sup>1</sup> The study team was given data on 246 construction bid contracts and utilized 146 of these contracts for the case study analysis. The remaining 100 were excluded from analysis (98 contracts did not indicate a winning firm, one contract indicated multiple winners, and one contract did not have bidder information).

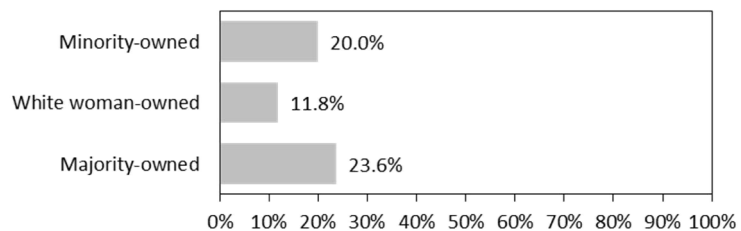
**Number of bids from minority- and woman-owned businesses.** Minority- and woman-owned businesses submitted 49 of the 639 bids (8%) that the study team examined:

- 15 bids (2% of all bids) came from minority-owned businesses (4 different businesses); and
- 34 bids (5% of all bids) came from white woman-owned businesses (10 different businesses).

**Success of bids.** The study team also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-7, 20 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. Of the bids that woman-owned businesses submitted, 12 percent resulted in contract awards, much lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

**Figure 8-7.**  
**Percentage of bids on construction contracts that resulted in contract awards**

Note:  
Based on an analysis of 639 bids on 146 contracts.  
Source:  
ITD contracting data.



**Consulting.** The study team examined bid information for a sample of 39 consulting contracts that ITD awarded during the study period. In total, ITD received 111 bids for those contracts.<sup>2</sup>

**Number of bids from minority- and woman-owned businesses.** Minority- and woman-owned businesses submitted 9 of the 111 bids (8%) that the study team examined:

- 3 bids (3% of all bids) came from minority-owned businesses (2 different businesses); and
- 5 bids (5% of all bids) came from white woman-owned businesses (4 different businesses).

**Success of bids.** The study team also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-8, 33 percent of the bids that minority-owned businesses submitted resulted in contract awards, which was the same as the percentage of bids that majority-owned businesses submitted that resulted in contract awards. Of the bids that woman-owned businesses submitted, 67 percent resulted in contract awards – higher than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

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<sup>2</sup> The study team was given data on 49 consulting bid contracts and utilized 39 of these contracts for the case study analysis. The remaining 10 were excluded from analysis (nine contracts no longer had information on bidding vendors and one contract did not indicate a winning firm).

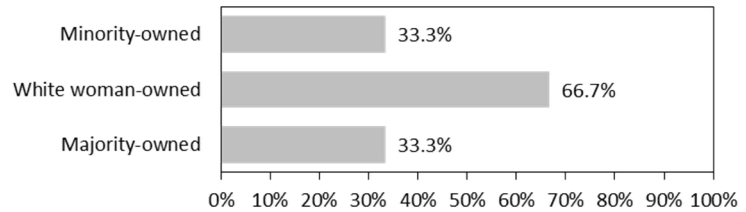
**Figure 8-8.**  
**Percentage of bids on consulting contracts that resulted in contract awards**

Note:

Based on an analysis of 111 bids on 39 contracts.

Source:

ITD contracting data.



**Available bidders.** As part of availability surveys, the study team asked construction and consulting business owners and managers to indicate whether their companies compete as prime contractors on contracts with local, state, or other government agencies. Of the business owners and managers that indicated that their companies compete as prime contractors, 13 percent represented minority-owned businesses and 4 percent represented woman-owned businesses. The percentage of available minority- businesses was higher than the percentage of minority -owned businesses that submitted bids on all ITD contracts during the study period (13 percent vs. 2 percent). In contrast, the availability of woman-owned businesses was slightly lower than the percentage of woman-owned businesses that submitted bids on all ITD contracts during the study period (4 percent vs. 5 percent).

# CHAPTER 9.

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Overall DBE Goal

## CHAPTER 9.

# Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the Idaho Transportation Department (ITD) is required to set an overall goal for DBE participation in its Federal Highway Administration (FHWA)-funded contracts. The Final Rule effective February 28, 2011 revised requirements for goal-setting so that agencies that implement the Federal DBE Program need to 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 for that year, 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.

ITD 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. ITD's last conditionally approved methodology of an overall DBE goal for FHWA-funded contracts was for federal fiscal years (FFYs) 2014 through 2016. The agency established an overall DBE goal of 7.6 percent. ITD indicated to FHWA that it planned to meet the goal through the use of a race- and gender-neutral measures. ITD has submitted a 7% goal for FFYs 2017 through 2019, which has not yet been approved.

ITD is required to develop a new goal for FFYs 2017 through 2019. Chapter 9 provides information that ITD might consider as part of setting its new overall DBE goal. Chapter 9 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 ITD's FHWA-funded contracts. As presented in Chapter 5, potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 13.3 percent of ITD's FHWA-funded prime contract and subcontract dollars based on their availability for that work. ITD might consider 13.3 percent as the base figure for its overall DBE goal if it anticipates that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the future will be similar to the FHWA-funded contracts that it awarded during the study period (October 1, 2011 through September 30, 2015).

Figure 9-1 presents the construction and consulting components of the base figure for ITD's overall DBE goal. The availability estimates presented in Figure 9-1 are based on the availability of potential DBEs for FHWA-funded prime contracts and subcontracts. The overall base figure reflects a weight of 0.85 for construction contracts, 0.15 for consulting contracts based on the volume of dollars of FHWA-funded contracts that ITD awarded during the study period. If ITD expects that the relative distributions of FHWA-funded construction and engineering contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. ITD might also consider evaluating whether the types, sizes, and locations of the FHWA-funded contracts that it awards will change substantially in the future.

**Figure 9-1.**  
**Availability components of the**  
**base figure (based on**  
**availability of potential DBEs**  
**for FHWA-funded**  
**transportation contracts)**

Note:

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

See Figures F-18 and F-19 in Appendix F for corresponding disparity results tables

Source:

BBC Research & Consulting availability analysis.

Potential DBEs	Availability Percentage		Weighted Average
	Construction	Consulting	
Black American-owned	0.2 %	0.0 %	0.2 %
Asian Pacific American-owned	0.0	0.0	0.0
Subcontinent Asian American-owned	0.0	0.1	0.0
Hispanic American-owned	0.4	0.1	0.4
Native American-owned	9.5	0.2	8.0
White woman-owned	4.2	7.1	4.6
<b>Total potential DBEs</b>	<b>14.3 %</b>	<b>7.5 %</b>	<b>13.3 %</b>
<b>Industry weight</b>	<b>84.5 %</b>	<b>15.5 %</b>	

## B. Considering a Step-2 Adjustment

The Federal DBE Program requires ITD to consider a potential step-2 adjustment to its base figure as part of determining its overall DBE goal. ITD 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 including:

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.<sup>1</sup>

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 ITD 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

<sup>1</sup> 49 CFR Section 26.45.



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.<sup>2</sup>*

Figure 9-2 presents past DBE participation based on ITD’s Uniform Reports of DBE Awards or Commitments and Payments as reported to FHWA. According to ITD’s Uniform Reports, median DBE participation in FHWA-funded contracts from FFYs 2011 through 2016 was 1.9 percent.

**Figure 9-2.**  
**Past certified DBE participation in FHWA-funded contracts, FFY 2011-2016**

Source:

Commitments/Awards reported on ITD’s Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE Attainment	Annual DBE Goal	Difference
2011	4.5 %	10.5 %	-6.0 %
2012	2.8	10.5	-7.7
2013	2.8	10.5	-7.7
2014	1.0	7.6	-6.7
2015	0.7	7.6	-6.9
2016	0.6	7.6	-7.0

The information about past DBE participation supports a downward adjustment to ITD’s base figure. If ITD 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 13.3 percent base figure and the 1.9 percent median past DBE participation, yielding a potential overall DBE goal of 7.6 percent. BBC’s analysis of DBE participation in ITD’s FHWA-funded contracts indicates a mean dollar-weighted DBE participation (2.4%) that is also lower than the base figure. If ITD were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 13.3 percent base figure and the 2.4 percent DBE participation, yielding a potential overall DBE goal of 7.9 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 in Appendices D and E, respectively. BBC’s analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, business ownership, and business success in the ITD study area contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FHWA-funded contracts that ITD awards, which supports an upward step-2 adjustment to ITD’s base figure.

<sup>2</sup> 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>

Although it may not be possible to quantify the effects that barriers in human capital, financial capital, and business success may have on the availability of minority- and woman-owned businesses in the local marketplace, the effects of barriers in business ownership can be quantified. BBC used regression analyses to investigate whether race/ethnicity and gender are related to rates of business ownership among workers in the local contracting industry. The regression analyses allowed BBC to examine those relationships while statistically controlling for various race- and gender-neutral personal characteristics including education and age. (Chapter 3 and Appendix D provide details about BBC's regression analyses.) The regression analyses revealed that, even after accounting for various personal characteristics:

- Being a woman was associated with a lower likelihood of owning a construction business compared to being a man.

BBC analyzed the impact that barriers in business ownership would have on the base figure if the groups of minorities and women that exhibited statistically significant disparities in rates of business ownership owned businesses at the same rate as comparable non-Hispanic white men. The results of that analysis—sometimes referred to as a *but for* analysis, because it estimates the availability of minority- and woman-owned businesses *but for* the effects of race- and gender-based discrimination—are presented in Figure 9-3.

The *but for* analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FHWA-funded construction and consulting prime contracts and subcontracts that ITD awarded during the study period). The weights for each industry were based on the proportion of FHWA-funded contract dollars that ITD awarded in each industry during the study period (i.e., 0.85 weight for construction and a 0.15 weight for consulting). In that way, BBC determined a potential adjustment to ITD's base figure that attempted to account for race- and gender-based barriers in business ownership in the local contracting industry.

The rows and columns of Figure 9-3 present the following information from BBC's *but for* analysis:

- a. **Current availability.** Column (a) presents the current availability of potential DBEs by racial/ethnic and gender group and by industry, as also presented in Figure 9-1. Each row presents the percentage availability for each racial/ethnic and gender group. Combined, the current availability of potential DBEs for ITD's FHWA-funded contracts is 13.3 percent, as shown in row (19) of column (a).
- b. **Disparity indices for business ownership.** For each group that is significantly less likely than similarly-situated non-Hispanic white men to own construction and engineering businesses, BBC simulated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white men who share similar race- and gender-neutral personal characteristics.

To simulate business ownership rates if minorities and women owned businesses at the same rate as non-Hispanic white men in a particular industry, BBC took the following steps: 1) BBC performed a probit regression analysis predicting business ownership including only workers who were non-Hispanic white men in the dataset; and 2) the study team then

used the coefficients from that model and the mean personal characteristics of individual minority groups (or non-Hispanic white women) working in the industry (i.e., personal characteristics, indicators of educational attainment, and indicators of personal financial resources and constraints) to simulate business ownership for each group.

The study team then calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the simulated business ownership rate and then multiplying the result by 100. Values of less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for non-Hispanic white men who share similar personal characteristics. Column (b) presents disparity indices related to business ownership for the different racial/ethnic and gender groups. For example, as shown in row (6) of column (b), non-Hispanic white women own construction businesses at 76 percent of the rate that they would be expected to own construction businesses if they were non-Hispanic white men with similar personal characteristics.

- c. **Availability after initial adjustment.** Column (c) presents availability estimates by racial/ethnic and gender group and by industry after initially adjusting for statistically significant disparities in business ownership rates. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100. Note that BBC only made adjustments for those groups that are significantly less likely than similarly-situated non-Hispanic white men to own businesses.
- d. **Availability after scaling to 100 percent.** Column (d) shows adjusted availability estimates that the study team re-scaled so that the sum of the availability estimates equaled 100 percent for each industry. BBC re-scaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under "Total" in column (c)—in row (9) for construction and row (18) for consulting. For example, the scaled availability estimate for non-Hispanic white woman-owned construction businesses shown in row (6) of column (d) was calculated in the following way:  $(5.5\% \div 101.3\%) \times 100 = 5.4$  percent.
- e. **Components of goal.** Column (e) shows the component of the total base figure attributed to the adjusted availability of minority- and woman-owned businesses for each industry. BBC calculated each component by taking the total availability estimate shown under "Potential DBEs" in column (d)—in row (7) for construction and row (16) for consulting—and multiplying it by the proportion of total FHWA-funded contract dollars for which each industry accounts (i.e., 0.85 for construction and 0.15 for consulting). For example, BBC used the 15.4 percent shown in row (7) of column (d) for construction and multiplied it by 0.85 for a result of 13.0 percent (see row (7) of column (e)). The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership—14.2 percent, as shown in the bottom row of column (e).

**Figure 9-3.**  
**Potential step-2 adjustment considering disparities in the rates of business ownership**

Industry and group	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of potential step-2 adjustment**
<b>Construction</b>					
(1) Black American	0.2 %	n/a	0.2 %	0.2 %	
(2) Asian Pacific American	0.0	n/a	0.0	0.0	
(3) Subcontinent Asian American	0.0	n/a	0.0	0.0	
(4) Hispanic American	0.4	n/a	0.4	0.4	
(5) Native American	9.5	n/a	9.5	9.3	
(6) White woman	4.2	76	5.5	5.4	
(7) Potential DBEs	14.3 %	n/a	15.6 %	15.4 %	13.0 %
(8) All other businesses ***	85.7	n/a	85.7	84.6	
(9) <b>Total firms</b>	<b>100.0 %</b>	n/a	<b>101.3 %</b>	<b>100.0 %</b>	
<b>Consulting</b>					
(10) Black American	0.0 %	n/a	0.0 %	0.0 %	
(11) Asian Pacific American	0.0	n/a	0.0	0.0	
(12) Subcontinent Asian American	0.1	n/a	0.1	0.1	
(13) Hispanic American	0.1	n/a	0.1	0.1	
(14) Native American	0.2	n/a	0.2	0.2	
(15) White woman	7.1	n/a	7.1	7.1	
(16) Potential DBEs	7.5 %	n/a	7.5 %	7.5 %	1.2 %
(17) All other businesses	92.5	n/a	92.5	92.5	
(18) <b>Total firms</b>	<b>100.0 %</b>	n/a	<b>100.0 %</b>	<b>100.0 %</b>	
(19) <b>Total</b>	<b>13.3 %</b>	n/a	n/a		<b>14.2 %</b>

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

\* Initial adjustment is calculated as current availability divided by the disparity index.

\*\* Components of potential step-2 adjustment were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FHWA-funded contract dollars in each industry (construction = 0.845 and consulting= 0.155).

\*\*\* All other businesses included majority-owned businesses and minority- and woman-owned businesses that were not potential DBEs.

Source: BBC Research & Consulting.

Based on information related to business ownership alone, ITD might consider adjusting the base figure upward to 14.2 percent.

### 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 the ITD study area do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices D and E). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the ITD study area 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 ITD'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 ITD'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.<sup>3</sup>

**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 D presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix E. Some of that information suggests that discrimination based on 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 ITD's base figure.

**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 ITD 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.<sup>4</sup>*

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

- ITD 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."<sup>5</sup>
- 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 also supports an upward adjustment to ITD's base figure.
- ITD must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. ITD's utilization reports for FFYs 2011 through 2016 indicated median annual DBE participation of 1.9

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<sup>3</sup> 49 CFR Section 26.45.

<sup>4</sup> USDOT. "Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program." <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

<sup>5</sup> 49 CFR Section 26.45 (b).

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 ITD's FHWA-funded contracts also indicates a mean dollar-weighted DBE participation (2.4%) that is lower than the base figure.

USDOT regulations clearly state that an agency such as ITD 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 ITD 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.

# CHAPTER 10.

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## Program Measures

## CHAPTER 10.

# Program Measures

As part of implementing the Federal Disadvantaged Business Enterprise (DBE) Program, the Idaho Transportation Department (ITD) uses *race- and gender-neutral measures* to encourage the participation of minority- and woman-owned businesses in its contracting. 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- or 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). ITD does not currently use any race- and gender-conscious measures as part of its implementation of the Federal DBE Program.

To meet the *narrow tailoring* requirement of the strict scrutiny standard of constitutional review, agencies that implement the Federal DBE Program must meet the maximum feasible portion of their overall DBE Annual Participation Goal (APG) through the use of race- and gender-neutral measures.<sup>1</sup> If an agency cannot meet its overall APG through the use of race- and gender-neutral measures alone, then it must consider also using race- and gender-conscious measures. When submitting its overall APG to the United States Department of Transportation (USDOT), an agency must project the portion of its overall APG that it expects to meet through race- and gender-neutral measures and what portion it expects to meet through race- and gender-conscious measures. USDOT offers guidance concerning how a transportation agency should project the portion of its overall APG that it will meet through race- and gender-neutral and race- and gender-conscious measures including the following:

- “Official Questions and Answers (Q&A) Disadvantaged Business Enterprise Program Regulation (49 CFR Part 26),” which addresses factors for federal aid recipients to consider when projecting the portions of their overall APG that they will meet through the use of race- and gender-neutral measures;<sup>2</sup>
- USDOT’s “Tips for Goal-Setting,” which suggests factors for federal aid recipients to consider when making such projections;<sup>3</sup> and
- Federal Highway Administration (FHWA) template, which describes how it considers approving DBE goal and methodology submissions includes a section on projecting the percentage of the overall APG to be met through race- and gender-neutral and race- and gender-conscious measures. Figure 10-1 presents an excerpt from that template.

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<sup>1</sup> 49 CFR Section 26.51.

<sup>2</sup> [https://cms.dot.gov/sites/dot.gov/files/docs/Official Questions and Answers 49 CFR Part 26.pdf](https://cms.dot.gov/sites/dot.gov/files/docs/Official%20Questions%20and%20Answers%2049%20CFR%20Part%2026.pdf)

<sup>3</sup> <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>



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 such projections include:

- 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 APG?
- C. What has DBE participation been when the agency did not use race- or gender-conscious measures?<sup>4</sup>
- 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 10 is organized around each of those general areas of questions.

**Figure 10-1.**  
**Excerpt from Explanation of Approval of [State] DBE APG 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.

### **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 D and E, BBC Research & Consulting (BBC) examined conditions in the Idaho marketplace related to human capital, financial capital, business ownership, and the success of businesses. There is substantial quantitative evidence of disparities for minority- and woman-owned businesses overall and for specific groups concerning the above issues. Qualitative information also indicated evidence of discrimination within the local marketplace. ITD 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 APG through race- and gender-neutral measures alone.

### **B. What has been the agency's past experience in meeting its overall APG?**

Figure 10-2 presents the participation of certified DBEs in ITD's federally-funded transportation contracts in recent years, as presented in ITD reports to USDOT. BBC presents that information for both FHWA- and FTA-funded contracts. Based on information about awards and commitments to DBE-certified businesses, ITD has not met its overall FHWA APG in recent years.

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<sup>4</sup> To assess that question, USDOT guidance suggests evaluating (a) DBE participation as prime contractors if DBE contract goals did not affect utilization; (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE contract goals; and (c) overall utilization for other state/ local or private sector contracting where DBE contract goals were not used.

In federal fiscal years (FFYs) 2011 through 2016, DBE awards and commitments on FHWA-funded contracts were below ITD's overall APG by an average of 7.0 percentage points.

ITD has met and exceeded its FTA APG in recent years, with the exception of FFY 2014. In FFYs 2011 through 2016, DBE awards and commitments on FTA-funded contracts were above ITD's overall APG by an average of 34.6 percentage points. Note that the vast majority of ITD's USDOT funding comes from FHWA. ITD did not apply race- and gender-conscious DBE contract goals to any FHWA- or FTA-funded transportation contracts during those years. ITD discontinued DBE contract goals in 2006.

**Figure 10-2.**  
**Past certified DBE participation on FHWA-and FTA-**  
**funded contracts, FFY 2011-2016**

Note:

Data for FFY 2016 is through March 31, 2016.

There were no FTA-funded awards or commitments reported for FFY 2015

Source:

Commitments/Awards reported on ITD's Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE Attainment	Annual DBE Goal	Difference
<b>FHWA</b>			
2011	4.52 %	10.50 %	-5.98 %
2012	2.82	10.50	-7.68
2013	2.80	10.50	-7.70
2014	0.95	7.60	-6.65
2015	0.71	7.60	-6.89
2016	0.63	7.60	-6.97
<b>FTA</b>			
2011	0.00 %	0.00 %	0.00 %
2012	11.48	0.00	11.48
2013	81.20	7.00	74.20
2014	4.25	7.00	-2.75
2015	0.00%	10.00	-10.00
2016	100.00	10.00	90.00

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

ITD did not apply DBE contract goals or any other race- or gender-conscious measures to any contracts that the agency awarded during the study period. BBC's analysis shows that overall, certified DBEs received 2.6 percent of the dollars associated with those contracts. ITD should consider 2.6 as the percentage of its overall APG that it can achieve through race- and gender-neutral measures.

### **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 ITD could meet its overall APG 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. ITD should also review measures that it has planned, or could consider, for future implementation. BBC reviewed race- and gender-neutral measures that ITD 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 Idaho use.

**ITD's race- and gender-neutral measures.** ITD uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many minority- and woman-owned businesses—in its contracting. ITD 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;
- Technical assistance and business development programs;
- Finance and bonding programs;
- Improved contracting processes;
- Prompt payment; and
- Data collection, monitoring, and reporting.

**Advocacy and outreach efforts.** ITD conducts several advocacy and outreach efforts across the state of Idaho to encourage the utilization and growth of small businesses and minority- and woman-owned businesses, including:

- Meetings and relationship building;
- Website, email, newsletter, and social media communications;
- Advertisements of contract opportunities; and
- Other outreach events and workshops.

***Meetings and relationship building.*** In an effort to engage its stakeholders, ITD meets regularly with a wide range of interest groups including trade associations and small business representatives. For example, ITD has regular meetings with the Idaho chapter of the Associated General Contractors (AGC). ITD facilitates those meetings in partnership with a representative from the organization. ITD presents updated information regarding any new regulations or provisions affecting DBEs and small businesses.

**Idaho Small Business Symposium.** ITD participates in the annual Idaho Small Business Symposium (ISBS), which is hosted by the Idaho Procurement Technical Assistance Center (PTAC). The ISBS is a reverse trade show where attending businesses can network with government and prime contractor purchasing agents and attend training sessions on marketing, procurement strategies, bonding, and financing. The event location rotates between Boise, eastern Idaho, and Northern Idaho and draws around 300 attendees.

**The Idaho Public Purchasing Association (IPPA) Annual Reverse Vendor Trade Show.** ITD participates in the annual IPPA Reverse Vendor Trade Show. The trade show is held annually in Boise and offers training sessions on doing business with the state. The event typically draws around 100 attendees.

***Website, email, newsletter, and social media communications.*** ITD regularly updates the Office of Civil Rights website, publishes a monthly newsletter called ITD Business News, and provides frequent updates on its Facebook account. In addition, ITD communicates frequently with

minority-owned businesses, woman-owned businesses, and other small businesses through direct email communications.

The website currently provides access to various resources including links to relevant information such as:

- DBE certification database;
- ITD's bidder's list;
- DBE program requirements presentation, guidelines, frequently asked questions, instructions, and application;
- Information for upcoming ITD trainings; and
- Supportive services programs and resources.

In addition, ITD provides notices about statewide business management trainings; notices about special trainings such as the Idaho AGC's Supervisor Training Program and the United States Army Corps of Engineers Construction Quality Management certification classes; information about changes or developments at ITD; information about State of Idaho and Federal purchasing specifications; and information about upcoming reverse trade shows through the ITD Business News Newsletter, the "Training Events" page of its website, its Facebook account, and mailings to DBEs and other key stakeholders.

***Advertisements of contract opportunities.*** In addition to accessing the ITD purchasing website, there are several other ways for small businesses, including many minority- and woman-owned businesses, to find out about contract opportunities with ITD.

**Contract opportunities posted on ITD website.** ITD posts all solicitations, subsequent planholder lists, bid results, and award notices online at its website or the Idaho Division of Purchasing's website.<sup>5</sup> In addition, ITD posts prime contractors' invitations to bid on its website.<sup>6</sup> The ITD Office of Civil Rights shows businesses how to access this information, how to identify prime contractors, and how to access bid tabulations for closed projects.

**Planholders search.** Planholders lists are composed of contractors who have ordered bid books for a particular project. Planholders lists are updated immediately when a bidder places its order for a bid book online. ITD provides a planholders search that offers an up-to-the-minute view of who is bidding on all currently-advertised projects. The planholders search provides options for searching by DBE or small business status to help meet any contract goals.

**PTAC bid matching services.** ITD encourages DBEs and other small businesses to become PTAC members to receive free bid matching services. PTAC sends information about relevant bid opportunities to members who sign up for this service.

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<sup>5</sup> <http://itd.idaho.gov/business/>

<sup>6</sup> <http://apps.itd.idaho.gov/apps/civil/invitations.htm>

**Forwarded project solicitations.** ITD forwards relevant project solicitations from local government agencies to selected DBEs that conduct similar work and are located in the relevant geographic area.

**DBE directory.** ITD offers an online directory of DBE firms for prime contractors and local agencies. The directory allows the interested party to search DBE capabilities by keyword, North American Industry Classification System (NAICS) code, or by the locations where the DBE is willing to work. The most recent version of the on-demand, online DBE directory, which includes greatly expanded search capabilities, became available in July 2015.

***Other outreach events and workshops.*** ITD participates in a number of outreach events and workshops. The most notable workshops and outreach events that ITD hosts or participates in include:

**Doing Business with the Government workshops.** ITD conducts “Doing Business with the Government” workshops throughout Idaho every year. ITD presents information about contracting with ITD, consulting with ITD, and the Federal DBE Program, including certification requirements and how to become DBE-certified. Presentations are available in PDF format by request and are also included in a “master workbook,” which is left at the venue where the training took place (e.g., Idaho Small Business Development Centers, Small Business Incubators). ITD advertises the workshops on the Civil Rights website; in emails to its bidder’s list and targeted stakeholders; in emails to partner agency’s mailing lists; on ITD’s Facebook page; and through press releases to regional papers. ITD also publishes information about those trainings in its monthly ITD Business News monthly newsletter. Those workshops are presented in partnership with the Boise and Spokane Small Business Administration (SBA) offices, PTAC, and various federal contracting agencies including the United States Forest Service, the Bureau of Land Management, the United States Park Service, the Mountain Home Air Force Base, the Fairchild Air Force Base, and the Idaho National Laboratory. The workshops are held in cities and towns throughout Idaho and have ranged from 125 to 270 total annual attendees over the last six years.

**Individual business outreach.** ITD works to identify existing minority- and woman-owned businesses that are not currently DBE-certified. Businesses that are not certified are encouraged to complete the DBE certification process. ITD’s Office of Civil Rights regularly studies the ITD bidder’s list registrations to identify companies that self-identify as minority- or woman-owned and are not DBE-certified. The Office of Civil Rights adds those businesses to the ITD Business News newsletter and training mailing lists so that they may learn about DBE certification and the advantages of program participation. In addition, ITD’s partner agencies (e.g., the SBA, the Idaho Department of Commerce, and the Idaho SBDCs) often refer businesses that would be eligible for DBE certification to the ITD Office of Civil Rights. The ITD Office of Civil Rights offers individualized orientations through email, by phone, or in-person for potential DBE businesses.

**Small Business Information Forum.** ITD is a member of the interagency Small Business Information Forum, which holds workshops and exhibits for businesses on topics such as business formation, business taxes, workers compensation insurance, marketing, financing, and other relevant topics. The forum includes a number of state and federal agencies in addition to ITD, including the Internal Revenue Service (IRS), the Idaho Department of Labor, the SBA, and the Idaho

Industrial Commission. The first event in 2015 had 28 attendees and the second event in 2016 drew 75 attendees.

**Other ITD-hosted workshops.** The ITD Office of Civil Rights regularly holds additional training events in-house. Two recent examples include a Davis-Bacon workshop, which was broadcasted to all ITD districts and a ChallengeHER event for women in federal contracting.

**Technical assistance and business development.** ITD provides technical assistance to DBEs and other small businesses by providing information on training sessions going on around the state. In addition, ITD partners with the Idaho SBDC to implement a Business Development Program (BDP) for DBEs.

***DBE Supportive Services Program.*** Each year, ITD applies for funding from FHWA to implement a DBE Supportive Services Program. The program is run through the SBDC and includes a number of program components, including the implementation of a Business Development Program, DBE program outreach, and stakeholder development.

**Business Development Program.** As part of the DBE Supportive Services Program, the Idaho SBDC implements a Business Development Program for Idaho-based DBEs. The six SBDC offices located in Idaho—Post Falls, Lewiston, Boise, Twin Falls, Pocatello, and Idaho Falls—offer DBE firms one-on-one business assessments. An SBDC representative works with the DBE firm to identify firm weaknesses and develop a robust business plan. The program includes regular check-up meetings with the business counselor.

**Reimbursable training events.** As part of the DBE Supportive Services program, reimbursement is available for qualified participants for many training events offered throughout the state, including the Open House For Vendors Day at the Mountain Home Air Force Base; the Small Business Success Coaching & Workshop Conference held by Service Corps of Retired Executives (SCORE) in Boise; Army Corps of Engineers Construction Quality Management Certification Trainings in Boise and Idaho Falls, Industry Days in Boise, and Safety Fests of the Great Northwest.

***Technical assistance trainings.*** ITD assists DBEs and other small businesses to develop their capability through trainings for emerging technology and strategies for conducting business through electronic media. DBEs are referred to workshops around the state hosted by the six SBDCs located in Idaho; the SBDC located in Ontario, Oregon; the Idaho, Native American, and Eastern Washington PTACs; the Zions Small Business Resource Center; and SCORE Chapters in Boise and Idaho Falls. The schedules for those training opportunities are provided to all Idaho DBEs and interested small business through a bi-weekly email blast.

**Finance and bonding programs.** ITD partners with the USDOT Small Business Technical Resource Center (SBTRC) to provide Bonding Education information to DBEs. In 2014, ITD hosted a two-day Bonding Education Workshop for DBEs and other interested small businesses. In addition, ITD refers DBEs to the SBTRC for one-on-one assistance for applying for bonding or short-term loans. ITD also refers interested DBE's to the Zions Bank Small Business Resource Center in Boise, which offers financial education workshops and one-on-one counseling to DBEs.

There are also a number of finance and accounting classes provided at the SBDC locations throughout the state.

**Improved contracting practices.** Consistent with other public agencies in Idaho, ITD uses a competitive, low-bid system for selecting construction contractors and a qualifications-based system for awarding most consulting-related contracts.

ITD also reviews all upcoming contracts for unbundling opportunities. ITD ensures that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform. ITD has analyzed its construction contracts and consulting agreements for FFY 2010 through 2013, and it has found that its contracts are at a small enough size without the need for unbundling. During this period, there were 237 prime federal-funded highway construction contracts. Of those contracts, 47 percent were under \$1 million and 95 percent were under \$10 million.

**Prompt payment.** ITD has policies in place to help ensure prompt payment to prime contractors and subcontractors. ITD enforces prompt payment processes that require prime contractors to pay their subcontractors within 20 days of receiving payment from a state agency. Contractors are asked to submit payment records in ITD's online tracking system. Reports should include any release of retainage payments made to subcontractors. Any delay or postponement of payment among the contractors may take place only for good cause, with ITD's written approval. The explanation from the contractor must be made in writing. ITD plans to implement a new requirement that all subcontract agreements between prime contractors and subcontractors include the same prompt payment provision. This would be verified by the resident engineer prior to contract approval.

**Data collection, monitoring, and reporting.** ITD recently implemented an updated contract compliance database system called B2GNow to better track subcontractors and the payments that they receive from prime contractors. The prime contractor reports its payments to all subcontractors and suppliers and the subcontractors and suppliers confirm or dispute the payment amounts reported by the prime contractor.

**Other agencies' race- and gender-neutral measures.** In addition to the race- and gender-neutral measures that ITD currently uses, there are a number of race- and gender-neutral program measures that other agencies in Idaho use to encourage the participation of minority- and woman-owned businesses. ITD actively promotes those programs sponsored by other agencies to minority- and woman-owned businesses. Figure 10-3 provides examples of those measures.

**Figure 10-3.**  
**Examples of race- and gender-neutral measures that other agencies in Idaho use**

Type	Examples in the local marketplace
<b>Advocacy and outreach</b>	There are about 50 local chambers of commerce in Idaho that provide support and assistance to the local small business community. Many of those chambers of commerce offer outreach events and supportive services to small businesses in the local community.
<b>Technical assistance and business development</b>	<p>Business incubators throughout the state offer small start-up businesses provide spaces where businesses can share overhead costs such as secretarial and accounting services. In addition, a number of the incubators provide business counseling to meet small businesses' needs.</p> <p>The Small Business Administration (SBA) Boise office offers an Emerging Leader Program, which an entrepreneurship training program aimed at accelerating the growth of high-potential small businesses. Selected businesses participate in high-level training and peer-networking sessions.</p>
<b>Finance and bonding programs</b>	<p>Small business financing is available through SBA's 7(a) loan program; microloan program; real estate and equipment loan program; and disaster loan program. Local small businesses can apply for those programs through one of SBA's local lender partners. In addition, the SBA Boise office offers financing advice and information to small businesses.</p> <p>Other local organizations also offer financing assistance to small businesses in Idaho, including the Panhandle Area Council, the Eastern Idaho Development Corporation, and the East-Central Idaho Planning &amp; Development Association, among others. In addition, the Zions Bank Small Business resource Center in Boise offers financial education workshops and one-on-one counseling to DBEs.</p> <p>Bonding programs offering bonding and finance assistance and training have become more popular. Programs such as the SBE Bond guarantee Program provide bid, performance, and payment bond guarantees for individual contracts. The USDOT Bonding Assistance Program also provides bonding assistance in the form on bonding fee cost reimbursements for DBEs performing transportation work.</p>
<b>Mentor-protégé programs</b>	The Idaho National Laboratory (INL) implements a mentor-protégé program in an effort to increase diversity and develop new and emerging businesses in the energy industry. The program aims to increase small businesses' capabilities to perform contracts and subcontracts for INL and other Department of Energy (DOE) facilities. The program is modeled after the DOE program guidelines. Eligible businesses include small disadvantaged businesses; 8(a)-Certified businesses; woman-owned businesses; and service-disabled veteran-owned businesses.

Source: BBC Research & Consulting.



# **CHAPTER 11.**

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## **Federal DBE Program Implementation**

# CHAPTER 11.

## Federal DBE Program Implementation

Chapter 11 reviews information relevant to the Idaho Transportation Department's (ITD's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for United States Department of Transportation (USDOT)-funded contracts. 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.<sup>1</sup>

### Reporting to DOT – 49 CFR Part 26.11 (b)

ITD must periodically report DBE participation in its USDOT-funded contracts to USDOT. ITD tracks DBE and non-DBE participation through its B2GNow tracking system. Prime contractors report payments to first-tier subcontractors and suppliers and subcontractors report on lower-tier subcontractors and suppliers. All listed subcontractors and suppliers must verify the payment amounts submitted by the prime contractors and subcontractors. ITD tracks the total amount of those payments to DBEs to calculate DBE participation. Based on that information, ITD prepares Uniform Reports of DBE Awards or Commitments and Payments, which it reports to USDOT. ITD plans to continue to collect and report that information in the future using the same approach.

### Bidders List – 49 CFR Part 26.11 (c)

As part of its implementation of the Federal DBE Program, ITD 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.

ITD currently maintains a bidders list that includes all of the above information for businesses bidding or proposing on the agency's USDOT-funded prime contracts and subcontracts.

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<sup>1</sup> Because only certain portions of the Federal DBE Program are discussed in Chapter 11, ITD 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 ITD prime contracts and subcontracts. ITD should consider using that information to invite available firms to join its current bidders list.

**Maintaining comprehensive vendor data.** ITD currently collects self-reported race, gender, and ethnicity information from its vendors during the registration process, regardless of DBE certification status. ITD should consider submitting follow-up requests to vendors to encourage them to provide that information if they chose not to during the initial registration process. As appropriate, ITD can use business information that the study team collected as part of the 2016-17 disparity study to augment its vendor data.

### **Prompt Payment Mechanisms – 49 CFR Part 26.29**

ITD's prompt payment policies appear to comply with the federal regulations in 49 CFR Part 26.29. Prime contractors are required to pay their subcontractors no later than 20 days after receiving payment from ITD. Qualitative information that the study team collected through in-depth interviews and public meetings revealed that some businesses are dissatisfied with how promptly they receive payment on Idaho government contracts. ITD should review those comments in Appendix E of this report and determine whether changes to its prompt payment policies are necessary. In addition, ITD should ensure that it stays up-to-date and compliant with federal regulations to maintain prompt payment to both prime contractors and subcontractors.

### **DBE Directory – 49 CFR Part 26.31**

ITD offers a directory on its website of all DBE-certified businesses, searchable by business name, industry code, industry type, and geographical location. ITD might consider working to increase awareness of the DBE directory so that prime contractors are better aware of qualified DBE subcontractors. In addition, ITD currently publicizes bid and solicitation information on its website. ITD should consider linking that information to information about qualified DBEs, so that when prime contractors become aware of contracts in which they might be interested, they are also notified of qualified DBEs who might be interested in participating in those contracts as subcontractors.

### **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 over concentrated 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.

ITD's policy states that if overconcentration occurs, the agency will obtain approval from USDOT to develop appropriate measures to address it. Once approved, the measures will then become part of ITD's implementation of the Federal DBE program.

BBC investigated potential overconcentration on ITD contracts and identified only one subindustry in which certified DBEs accounted for 50 percent or more of total dollars for contracts awarded during the study period. The flagging services subindustry received ITD and local agency contracts worth approximately \$14.5 million, of which about \$11 million was awarded to five DBE certified firm on 116 contracts. ITD should closely monitor the utilization of DBEs in flagging services contracts for signs of overconcentration.

### **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 DBE Program. ITD partners with the Idaho Small Business Development Center (SBDC) to offer a BDP for potential and current DBEs. The program's objective is to build strong, competitive DBEs who can effectively compete on federally-funded projects. The program is offered in two stages—the developmental stage and the transitional stage.

**Developmental stage.** The developmental stage of the BDP focuses on the DBE's completion of a business self-assessment, which identifies the DBEs strengths and weaknesses. The SBDC representative then assists the DBE in developing a customized and comprehensive business plan. The SBDC representative and the DBE will work closely together following the development of the business plan to periodically review and check-in on objectives.

**Transitional stage.** The transitional stage of the BDP is for DBEs who are well-established and beyond the early stages of setting up their business. This stage of the program focuses on helping those DBEs transition into a prime contractor role or into new areas of expertise in the highway design or construction industries.

The Idaho SBDC has six regional offices throughout Idaho. As such, the BDP is available to DBEs and potential DBEs throughout the state. ITD should continue to communicate with certified DBEs to ensure that its BDPs provide the most relevant specialized assistance that is tailored to the needs of developing businesses in the Idaho marketplace. ITD might explore additional partnerships to implement other BDPs including implementing a mentor-protégé program. Such programs could provide specialized assistance that would be tailored to the needs of developing businesses.

### **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 on contracts with race and/or gender conscious goals. 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 its overall DBE Annual Participation Goal (APG). ITD implements a number of monitoring and enforcement mechanisms, including:

- A review of DBE participation both prior to and after contract award;
- DBE subcontract payment tracking through its subcontract payment tracking system; and
- CUF reviews, which require ITD's Resident or Regional Engineer to monitor DBE performance for compliance with CUF requirements.

ITD 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, ITD 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.”<sup>2</sup> The Final Rule effective February 28, 2011 added a requirement for agencies to foster small business participation in their contracting. It required agencies to submit a plan for fostering small business participation to USDOT in early 2012. USDOT also 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 consisting of 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.

ITD fosters small business participation by ensuring that a reasonable number of prime contracts are of a size that allows for small businesses to successfully compete. In order to evaluate whether there are a good number of contracts that fall into that category, ITD has analyzed participation on its construction and professional services contracts for federal fiscal years (FFYs) 2010-2013. The results of that analysis indicated that a reasonable portion of ITD's contracts are available for small business competition. About 75 percent of the prime contractors that performed construction contracts during that period qualified as small

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<sup>2</sup> 49 CFR Part 26.39(a).

businesses.<sup>3</sup> About 70 percent of the prime contractors that performed professional services contracts qualified as small businesses.<sup>4</sup>

In addition, Chapter 10 of the report outlines many of ITD's current and planned race- and gender-neutral measures and provides examples of measures that other organizations in Idaho have implemented. ITD should review that information and consider implementing measures that the agency deems to be effective. ITD 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. ITD does not currently use DBE quotas or set-asides in any way as part of its implementation of the Federal DBE Program.

### **Setting Overall APGs – 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 APGs. As discussed in Chapter 1, agencies such as ITD now need to develop and submit APGs every three years. Chapter 9 uses data and results from the disparity study to provide ITD with information that could be useful in developing its next APG submission.

### **Analysis of Reasons for not Meeting APG – 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 APG 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 APG in the next fiscal year.

Based on information about awards and commitments to DBE-certified businesses, ITD has not met its overall FHWA APG in recent years. In federal fiscal years (FFYs) 2011 through 2016, DBE awards and commitments on FHWA-funded contracts were below ITD's APG by an average of 7.0 percentage points.

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<sup>3</sup> For construction prime contracts, ITD defined small businesses as those that fell under USDOT's size cap of \$23.98 million in three-year average gross receipts.

<sup>4</sup> For professional services prime contracts, ITD defined small businesses as those firms meeting the small business size standards described in section of the Small Business Act and the SBA regulations implementing it (13 CFR Part 121).

ITD has met and exceeded its FTA APG in recent years, with the exception of FFY 2014. In FFYs 2011 through 2016, DBE awards and commitments on FTA-funded contracts were above ITD's APG by an average of 34.6 percentage points. Note that the vast majority of ITD's USDOT funding comes from FHWA. ITD did not apply race- and gender-conscious DBE contract goals to any FHWA- or FTA-funded transportation contracts during those years.

**Need for separate accounting for participation of potential DBEs.** In accordance with guidance in the Federal DBE Program, BBC's analysis of the APG 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).<sup>5</sup> Agencies can explore whether one reason why they have not met their APGs 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 APG. ITD currently implements the following:

- Collecting information on the race/ethnicity and gender of the owners of all businesses—not just certified DBEs—participating as prime contractors or subcontractors in USDOT-funded contracts; and
- Tracking participation of certified DBEs on USDOT-funded contracts per USDOT reporting requirements.

ITD should periodically evaluate those efforts to ensure that they are kept up-to-date and compliant with federal regulations. In addition, ITD should consider developing internal reports for the participation of all minority- and woman-owned businesses (based on race/ethnicity and gender of ownership; annual revenue; and other factors such as whether the business has been denied DBE certification in the past) in USDOT-funded contracts. In order to increase the pool of minority- and woman-owned firms that are available to work on ITD contracts, ITD can reach out to non-certified suppliers and other subcontracts that appear to be minority- or woman-owned and encourage them to apply for certification.

**Other steps to evaluate how ITD might better meet its APG.** Analyzing the participation of potential DBEs is one step among many that ITD might consider taking when examining any differences between DBE participation and its APG. Based on a comprehensive review, ITD must establish specific steps and milestones to correct any problems it identifies to enable it to better meet its APG in the future.<sup>6</sup>

### **Maximum Feasible Portion of APG Met through Neutral Program Measures – 49 CFR Part 26.51(a)**

As discussed in Chapter 10, ITD must meet the maximum feasible portion of its APG through the use of race- and gender-neutral program measures. ITD must project the portion of its APG that

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<sup>5</sup> 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 APG. However, the participation of those businesses is not counted as part of ITD's DBE participation reports.

<sup>6</sup> 49 CFR Part 26.47(c)(2).

could be achieved through such measures. The agency should consider the information and analytical approaches presented in Chapter 10 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 APG 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, ITD should assess whether the use of DBE contract goals is necessary in the future to meet any portion of its APG. 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 USDOT-funded contract;
- During the period covered by the APG, an agency must set DBE contract goals so that they will cumulatively result in meeting the portion of the APG 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 ITD determines that it needs to use DBE contract goals on FHWA- or FTA-funded projects, then it should also evaluate which DBE groups should be considered eligible for those goals. If ITD decides to consider only certain DBE groups (e.g., groups that ITD determines to be *underutilized* DBEs) as eligible to participate in DBE contract goals, it must submit a waiver request to FHWA or FTA.

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 business owners and representatives noted that DBE-certification is no longer advantageous due to a lack of DBE percentage goals; the interviewees expressed that small businesses would benefit from the implementation and enforcement of DBE goals.
- Some interviewees mentioned that there is a lack of knowledge of the DBE program; increased outreach efforts, enforcement, and monitoring of the program were recommended.

ITD should consider those comments if it determines that it is appropriate to use DBE contract goals on FHWA- OR FTA-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 ITD determines that DBE participation exceeds its APG 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 APG 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 APG in the following year. If ITD 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 APG 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. ITD'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. ITD should review 49 CFR Part 26.53 and The Final Rule to ensure that its good faith efforts procedures are consistent with federal regulations.

ITD 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 are considered by ITD in evaluating good faith efforts include:

- A bidder's solicitation process;
- 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 the DBE goal will be achieved;
- Whether a bidder has provided interested DBEs with information about the plans, specifications, and requirements of the contract 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 has made efforts to assist interested DBEs in obtaining bonding, lines of credit, insurance, equipment, supplied, material, or related assistance; and
- Whether the bidder was involved in pre-solicitation meetings or pre-bid meetings that were scheduled to inform DBEs of contracting and subcontracting opportunities.

Perfunctory efforts are not considered good faith efforts. Determining the sufficiency of bidders' good faith efforts is at the agency's discretion and using quantitative formulas is not required. ITD did not apply race- and gender-conscious DBE contract goals to any FHWA- or FTA-funded transportation contracts during the study period, so it has not had the need to evaluate any prime contractors' good faith efforts during that time.

## **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. Section 26.11 discusses the Uniform Report of DBE Awards or Commitments and Payments. As discussed above, ITD has developed procedures and databases to consistently track participation of minority- and woman-owned businesses and potential DBEs in the contracts that the agency awards in addition to certified businesses. ITD should ensure that it is effectively using that information and evaluating participation of DBE-certified and non-DBE-certified minority- and woman-owned businesses. Such measures will help the agency track the effectiveness of its efforts to encourage DBE participation. If applicable, ITD 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). If it does not already, an agency implementing the Federal DBE Program should consider collecting and using the following information:

- Databases developed as part of a disparity study;
- Contractor/consultant registration documents from businesses working with ITD as prime contractors or subcontractors including information about the race/ethnicity and gender of their owners;
- Prime contractor participation on agency contracts;
- Reports on the participation of certified DBEs in FHWA- and FTA-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 or payment estimates 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.

ITD already collects and uses a substantial portion of the above listed information. ITD should ensure that its existing efforts remain up-to-date and compliant with federal regulations. In addition, ITD should consider implementing any efforts it does not currently implement. ITD 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**

ITD is responsible for all DBE certifications in the state of Idaho. ITD also maintains all of the DBE certification records for the state of Idaho. ITD's certification process is designed to comply with 49 CFR Part 26 Subpart D. As ITD continues to work with DBE-certified businesses, 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.

Several business owners and managers participating in in-depth interviews, public hearings, and focus groups commented on the DBE certification process. Some business owners felt that the certification process was reasonable and relatively easy. Alternatively, a number of business owners reported that the process was difficult to understand and very time consuming. Appendix E provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process.

ITD 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. ITD 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. ITD should also continue to monitor court decisions in those and other relevant cases (for details see Appendix B).

# APPENDIX A.

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## Definition of Terms

# APPENDIX A.

## Definitions of Terms

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

### **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 and of contract elements that the Idaho 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 the Dun & Bradstreet database or other database of business information. A Dun & Bradstreet 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.

### **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.

## **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 Code of Federal Regulations (CFR) Part 26 which pertains to the Federal DBE Program. DBEs must be certified as such through the Idaho Department of Transportation. 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 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 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 Idaho Transportation Department 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 Idaho Transportation Department 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 Idaho Transportation Department 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](http://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 21<sup>st</sup> 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 “USDOT-funded contract” or “FHWA-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.”

## **Idaho Transportation Department (ITD)**

The Idaho Transportation Department (ITD) is the owner/operator of Idaho’s federal and state highway system.

## **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 specified in the Federal DBE Program—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.

## **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.

## **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 ITD.

## **Prime Contract**

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



## **Prime Contractor**

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

## **Project**

A project refers to a construction; professional services; or goods and support services endeavor that ITD 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 attempting to do work with an agency or measures specifically designed to increase the participation of small or emerging businesses, 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 methods 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 ITD 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 ITD is the state of Idaho.

## **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).

## **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 ITD.

## **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.

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## Legal Analysis and Framework

**HOLLAND & KNIGHT LLP**

**APPENDIX B**

**PRIVILEGED AND CONFIDENTIAL**

**FINAL APRIL 14, 2017**

**ATTORNEY-CLIENT PRIVILEGE**

**ATTORNEY WORK PRODUCT**

**NOT FOR PUBLIC DISSEMINATION**

**CONFIDENTIAL APRIL 14, 2017**

**FINAL REPORT**

**IDAHO TRANSPORTATION DEPARTMENT**

**REPORT ON LEGAL ANALYSIS AND FRAMEWORK**

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# APPENDIX B.

## Legal Analysis and Framework

### 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”),<sup>1</sup> 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,<sup>2</sup> which DBE Program was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act).<sup>3</sup> 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 Idaho Transportation Department (“ITD”).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.<sup>4</sup> *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*,<sup>5</sup> (“*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 Ninth Circuit decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*<sup>6</sup> and *Western States Paving Co. v. Washington State DOT*,<sup>7</sup> and the recent U.S. District Court decisions in the Ninth Circuit in

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<sup>1</sup> 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.

<sup>2</sup> 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (“Federal DBE Program”).

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

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

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

<sup>6</sup> *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)

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



*Mountain West Holding Co. v. Montana, Montana DOT, et al.*<sup>8</sup>, and *M.K. Weeden Construction v. Montana, Montana DOT, et al.*<sup>9</sup>

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*, (“AGC, SDC v. Cal. DOT” or “Caltrans”), the Ninth Circuit in 2013 upheld the validity of California DOT’s DBE Program implementing the Federal DBE Program. 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. 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 *Mountain West Holding* and *M.K. Weeden*, two U.S. District Courts in Montana upheld the validity of the Montana Department of Transportation’s implementation of the Federal DBE Program. The *Mountain West Holding* decision, at the time of this report, has been appealed to the U.S. Court of Appeals for the Ninth Circuit.<sup>10</sup>

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: *Dunnet Bay Construction Co. v. Illinois DOT*,<sup>11</sup> *Northern Contracting, Inc. v. Illinois DOT*,<sup>12</sup> *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,<sup>13</sup> *Adarand Construction, Inc. v. Slater*<sup>14</sup> (“Adarand VII”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>15</sup> *Geyer Signal, Inc. v. Minnesota DOT*,<sup>16</sup> *Geod Corporation v. New Jersey Transit Corporation*,<sup>17</sup> and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.<sup>18</sup> The analysis also reviews recent cases involving challenges to MBE/WBE programs.

The analyses of *AGC, SDC v. Cal. DOT*, *Western States Paving*, *Mountain West Holding, Inc.*, *M.K. Weeden*, 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 ITD submitted in compliance with the Federal DBE regulations.

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<sup>8</sup> *Mountain West Holding Co., Inc. v. Montana*, 2014 WL 6686734 (D. Mont. 2014), appeal pending in the U.S. Court of Appeals for the Ninth Circuit.

<sup>9</sup> *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

<sup>10</sup> *Mountain West Holding v. Montana*, 2014 WL 6686734 (D. Mont. 2014), appeal pending in the U.S. Court of Appeals for the Ninth Circuit, Docket Numbers 14-36097 and 15-35003.

<sup>11</sup> *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), cert. denied, 580 U.S. \_\_\_, 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).

<sup>12</sup> *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

<sup>13</sup> *Sherbrooke Turf, Inc. v. Minn. DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

<sup>14</sup> 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) (“Adarand VII”).

<sup>15</sup> 2015 WL 1396376 (N.D. Ill. March 24, 2015), appeal pending in the U.S. Court of Appeals for the Seventh Circuit, Docket No. 15-1827.

<sup>16</sup> *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

<sup>17</sup> 766 F. Supp.2d. 642 (D. N.J. 2010).

<sup>18</sup> 544 F. Supp.2d 1336 (S.D. Fla. 2008).

Following *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.<sup>19</sup> The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.<sup>20</sup> The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.<sup>21</sup>

The USDOT's Guidance is recognized by the federal regulations as "valid, and express the official positions and views of the Department of Transportation"<sup>22</sup> for states in the Ninth Circuit.

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."<sup>23</sup> 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.<sup>24</sup>

The Ninth Circuit Court of Appeals 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 is constitutional.<sup>25</sup> 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.<sup>26</sup>

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<sup>19</sup> 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](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm); see 49 CFR § 26.9; see also 49 CFR Section 26.45.

<sup>20</sup> USDOT Guidance, available at [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006)

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, 49 CFR § 26.9.

<sup>23</sup> *Western States Paving*, 407 F.3d at 996; see also Br. for the United States, at 28 (April 19, 2004).

<sup>24</sup> DOT Guidance, available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006).

<sup>25</sup> *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).

<sup>26</sup> *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

The two recent District Court decisions in Montana in *Mountain West Holding*<sup>27</sup> and *M.K. Weeden*<sup>28</sup> followed the AGC, *SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana Department of Transportation's implementation of the Federal DBE Program.

Also, recently the Seventh Circuit Court of Appeals in Illinois in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, upheld the implementation of the Federal DBE Program by the Illinois DOT.<sup>29</sup> 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.<sup>30</sup>

## **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.<sup>31</sup> 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.

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."<sup>32</sup> 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.<sup>33</sup> 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-

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<sup>27</sup> *Mountain West Holding*, 2014 WL 6686734, appeal pending.

<sup>28</sup> *M.K. Weeden*, 2013 WL 4774517.

<sup>29</sup> 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

<sup>30</sup> *Id.*

<sup>31</sup> 488 U.S. 469 (1989).

<sup>32</sup> 488 U.S. at 500, 510.

<sup>33</sup> 488 U.S. at 480, 505.

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.<sup>34</sup>

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.<sup>35</sup> 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.”<sup>36</sup>

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.”<sup>37</sup> “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.”<sup>38</sup>

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.”<sup>39</sup> 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.”<sup>40</sup>

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.”<sup>41</sup> “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.”<sup>42</sup>

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

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<sup>34</sup> 488 U.S. at 507-510.

<sup>35</sup> 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741.

<sup>36</sup> 488 U.S. at 501 *quoting Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

<sup>37</sup> 488 U.S. at 502.

<sup>38</sup> *Id.*

<sup>39</sup> 488 U.S. at 509.

<sup>40</sup> *Id.*

<sup>41</sup> 488 U.S. at 509.

<sup>42</sup> *Id.*

that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”<sup>43</sup>

## **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 ITD and the disparity study because they concern the strict scrutiny analysis and legal framework in this area, and implementation of the DBE Program by recipients of federal financial assistance (like ITD) 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.<sup>44</sup> Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21<sup>st</sup> Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (“MAP-21”).<sup>45</sup> In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>46</sup>

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

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<sup>43</sup> 488 U.S. at 492.

<sup>44</sup> *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*.

<sup>45</sup> Pub. L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat. 405.

<sup>46</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

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.<sup>47</sup>

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.<sup>48</sup> This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.<sup>49</sup> Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.<sup>50</sup> 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.<sup>51</sup> This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.<sup>52</sup>

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.<sup>53</sup>

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.<sup>54</sup> 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 §

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<sup>47</sup> 49 CFR § 26.51.

<sup>48</sup> 49 CFR § 26.45(a), (b), (c).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at § 26.45(d).

<sup>51</sup> *Id.*

<sup>52</sup> 49 CFR § 26.45(b)-(d).

<sup>53</sup> 49 CFR § 26.51.

<sup>54</sup> 49 CFR § 26.51(b).

26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.<sup>55</sup>

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;

(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)).

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<sup>55</sup> 49 CFR §§ 26.21-26.37.

(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 inflation<sup>56</sup>

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.<sup>57</sup>

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

#### **DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).<sup>58</sup>**

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.<sup>59</sup>

The USDOT noted the DBE Program was reauthorized in the Moving Ahead for Progress in the 21<sup>st</sup> 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.<sup>60</sup>

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.<sup>61</sup>

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<sup>56</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

<sup>57</sup> *Id.*

<sup>58</sup> 79 F.R. 59566-59122 (October 2, 2014).

<sup>59</sup> 77 F.R. 54952-55024 (September 6, 2012).

<sup>60</sup> 77 F.R. 54952.

<sup>61</sup> 79 F.R. 59566-59622 (October 2, 2014).



The new and revised forms include 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 include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.<sup>62</sup>

Several of the areas revised include:

- the size standard on statutory gross receipts has been increased for inflation;
- the ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantage 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;
- certification procedures and grounds for decertification are revised 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
- counting of DBE participation, including trucking services and expenditures with DBEs for materials and supplies and related matters.<sup>63</sup>

In terms of forms and data collection, the new 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.<sup>64</sup>

The new 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

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<sup>62</sup> *Id.*

<sup>63</sup> 79 F.R. 59566-59622.

<sup>64</sup> *Id.*

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.<sup>65</sup>

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.<sup>66</sup>

### **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, 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](http://www.civilrights.dot.gov/disadvantaged-business-enterprise).

### **MAP-21 (July 2012).**

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

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.<sup>67</sup> 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 disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”<sup>68</sup>

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.<sup>69</sup>

### **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

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<sup>67</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>68</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>69</sup> *Id.*

small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.<sup>70</sup>

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.<sup>71</sup>

In addition, the 2011 Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

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 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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

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

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<sup>70</sup> 76 F.R. 5083-5101.

<sup>71</sup> See 49 CFR § 26.37, 76 F.R. at 5097.

<sup>72</sup> 76 F.R. at 5097, January 28, 2011.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

<sup>75</sup> *Id.* at 5097, amending 49 CFR § 26.39(c).

<sup>76</sup> 76 F.R. at 5098, amending 49 CFR § 26.47(c).

<sup>77</sup> *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

<sup>78</sup> *Id.*, amending 49 CFR § 26.47(c)(5).

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.”<sup>79</sup>

The United States DOT in the 2011 Final Rule stated that there is a continuing compelling need for the DBE program.<sup>80</sup> 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.”<sup>81</sup> 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.”<sup>82</sup> This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”<sup>83</sup>

## 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.<sup>84</sup> The implementation of the Federal DBE Program by recipients of federal funds, such as ITD, also are subject to and must follow the strict scrutiny analysis if they utilize race- and ethnicity-based measures.<sup>85</sup> 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.<sup>86</sup>

### 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.<sup>87</sup> State and local governments cannot rely on

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<sup>79</sup> 76 F.R. at 5092.

<sup>80</sup> 76 F.R. at 5095.

<sup>81</sup> 76 F.R. at 5095.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *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); *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.

<sup>85</sup> *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; *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 (3d Cir. 1993).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.<sup>88</sup> 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.<sup>89</sup>

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.<sup>90</sup> 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).<sup>91</sup>

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.”<sup>92</sup> 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).<sup>93</sup> The evidentiary basis on which Congress relied to support its finding of discrimination includes:

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<sup>88</sup> *Id.*; see *e.g.*, *Concrete Works, Inc. v. City and County of Denver* (“*Concrete Works I*”), 36 F.3d 1513, 1520 (10th Cir. 1994).

<sup>89</sup> *See, e.g.*, *Concrete Works I*, 36 F.3d at 1520.

<sup>90</sup> *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*, 84 F. Supp. 3d 705, 2015 WL 1396376, *appeal pending*; *Mountain West Holding*, 2014 WL 666734, *appeal pending*.

<sup>91</sup> *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.*, \_\_\_ F.3d \_\_\_, 2016 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.

<sup>92</sup> *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.

<sup>93</sup> *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.

■ **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.<sup>94</sup>

■ **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.<sup>95</sup>

■ **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.<sup>96</sup>

■ **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.<sup>97</sup>

■ **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.<sup>98</sup> 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.<sup>99</sup>

**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.<sup>100</sup> If the government makes its initial

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<sup>94</sup> *Adarand VII*, 228 F.3d at 1168-70; *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

<sup>95</sup> *Adarand VII*, at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

<sup>96</sup> *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>97</sup> *Adarand VII*, 228 F.3d at 1174-75; see *Sherbrooke Turf*, 345 F.3d at 973-4.

<sup>98</sup> 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.

<sup>99</sup> *Id.* at § 1101(b)(1).

<sup>100</sup> See *AGC, SDC v. Caltrans*, 713 F.3<sup>rd</sup> at 1195; *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*

showing, the burden shifts to the challenger to rebut that showing.<sup>101</sup> The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."<sup>102</sup>

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.<sup>103</sup> It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.<sup>104</sup> In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."<sup>105</sup>

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."<sup>106</sup> "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"<sup>107</sup> Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.<sup>108</sup>

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> This rebuttal can be accomplished by providing a neutral explanation for the

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*Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9<sup>th</sup> 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).

<sup>101</sup> *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>102</sup> *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.

<sup>103</sup> *Id.*; *Western States Paving*, 407 F.3d at 990; *See also Majeske v. City of Chicago*, 218 F.3d 816, 820 (7<sup>th</sup> Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>104</sup> *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

<sup>105</sup> *Croson*, 488 U.S. at 500; *see, e.g., Sherbrooke Turf*, 345 F.3d at 971-972; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>106</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7 (N.D. Ill. 2015), *appeal pending*; *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10<sup>th</sup> Cir. 1994).

<sup>107</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509).

<sup>108</sup> *Croson*, 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at \*7, *appeal pending*.

<sup>109</sup> *Adarand Constructors, Inc. v. Pena*, ("Adarand III"), 515 U.S. 200 at 235 (1995); *see, e.g., Majeske v. City of Chicago*, 218 F.3d at 820.

<sup>110</sup> *Majeske*, 218 F.3d at 820; *see, e.g. Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 2015 WL 1396376 at \*7; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>111</sup> *Id.*; *Adarand VII*, 228 F.3d at 1166.

<sup>112</sup> *See e.g., H.B. Rowe v. North Carolina DOT* (4<sup>th</sup> 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 (10<sup>th</sup> Cir. 2000)); *Midwest Fence*, 2015 W.L. 1396376 at \*7, *appeal pending*; *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.



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.<sup>113</sup> Conjecture and unsupported criticisms of the government's methodology are insufficient.<sup>114</sup> 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.<sup>115</sup>

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.'" <sup>116</sup> 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.<sup>117</sup> Instead, the Supreme Court stated that a government may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>118</sup> 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.<sup>119</sup>

**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.<sup>120</sup> "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."<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup>

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<sup>113</sup> *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).

<sup>114</sup> *Id*; *see also, Sherbrooke Turf*, 345 F.3d at 971-974.

<sup>115</sup> *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.

<sup>116</sup> *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)).

<sup>117</sup> *H.B. Rowe Co.*, 615 F.3d at 241; *see e.g., Concrete Works*, 321 F.3d at 958.

<sup>118</sup> *Croson*, 488 U.S. 509, *see e.g., H.B. Rowe*, 615 F.3d at 241.

<sup>119</sup> *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., AGC, San Diego v. Caltrans*, 713 F.3d at 1196.

<sup>120</sup> *See, e.g., Croson*, 488 U.S. at 509; *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.

<sup>121</sup> *Croson*, 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *See AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197.

<sup>122</sup> *Croson*, 488 U.S. at 509; *see AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *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.

<sup>123</sup> *See, e.g., Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *see also Western States Paving*, 407 F.3d at 1001.

However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>124</sup>

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.<sup>125</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,<sup>126</sup> “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”<sup>127</sup>
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.<sup>128</sup>
- **Disparity index.** An important component of statistical evidence is the “disparity index.”<sup>129</sup> 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.”<sup>130</sup>
- **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.<sup>131</sup>

**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.<sup>132</sup> But personal accounts of actual discrimination may complement empirical evidence and play an

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<sup>124</sup> *Western States Paving*, 407 F.3d at 1001.

<sup>125</sup> 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.

<sup>126</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 448 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”).

<sup>127</sup> *Id.*

<sup>128</sup> See *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *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.

<sup>129</sup> *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).

<sup>130</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-244; *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.

<sup>131</sup> *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.

<sup>132</sup> 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’Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

important role in bolstering statistical evidence.<sup>133</sup> 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.<sup>134</sup>

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.<sup>135</sup>

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.<sup>136</sup>

## **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.<sup>137</sup>

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<sup>133</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *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).

<sup>134</sup> *Concrete Works I*, 36 F.3d at 1520.

<sup>135</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *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).

<sup>136</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *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; *Mountain West Holding*, 2014 WL 668734, *appeal pending*; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at \*21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

The 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.<sup>138</sup> The narrow tailoring requirement has several components.

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.<sup>139</sup> Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.<sup>140</sup>

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.<sup>141</sup>

It should be pointed out that in the *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.”<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup> The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).<sup>145</sup> Accordingly,

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<sup>137</sup> 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); see also, Geyer Signal, Inc., 2014 WL 1309092.

<sup>138</sup> *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

<sup>139</sup> *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>140</sup> *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.

<sup>141</sup> 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>142</sup> 473 F.3d at 722.

<sup>143</sup> *Id.* at 722.

<sup>144</sup> *Id.* at 723-24.

<sup>145</sup> *Id.*

the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.<sup>146</sup>

The recent 2015 Seventh Circuit Court of Appeals decision in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* 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.<sup>147</sup> The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.<sup>148</sup> The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.<sup>149</sup>

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, the federal courts, including the Ninth 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.<sup>150</sup>

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.”<sup>151</sup> 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.”<sup>152</sup>

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<sup>146</sup> See, e.g., *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *appeal pending*; *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).

<sup>147</sup> *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at \*\*18-22 (7th Cir. 2015).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See, e.g., *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; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>151</sup> *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).

<sup>152</sup> 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.

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, ‘for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>153</sup>

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*<sup>154</sup> 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.”<sup>155</sup> 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.<sup>156</sup> 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.<sup>157</sup>

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.”<sup>158</sup>

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

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<sup>153</sup> *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

<sup>154</sup> 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

<sup>155</sup> 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).

<sup>156</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1199; *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.

<sup>157</sup> *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.

<sup>158</sup> *Croson*, 488 U.S. at 509-510.

remedies.<sup>159</sup> 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.’<sup>160</sup>

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.<sup>161</sup>

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<sup>159</sup> 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. 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.

<sup>160</sup> 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)).

<sup>161</sup> See 49 CFR § 26.51(b); see, e.g., *Croson*, 488 U.S. at 509-510; *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.

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-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”<sup>162</sup>

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.<sup>163</sup> 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.<sup>164</sup> In *AGC, SDC v. Caltrans*, the court found that narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.”<sup>165</sup>

### **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.<sup>166</sup> For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;<sup>167</sup> (2) good faith efforts provisions;<sup>168</sup> (3) waiver provisions;<sup>169</sup> (4) a rational basis for goals;<sup>170</sup> (5) graduation provisions;<sup>171</sup> (6) remedies only for groups for which there were findings of discrimination;<sup>172</sup> (7) sunset provisions;<sup>173</sup> and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.<sup>174</sup>

### **3. Intermediate scrutiny analysis**

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.<sup>175</sup> The Ninth Circuit and other courts have interpreted this standard to require that gender-based classifications be:

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<sup>162</sup> *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); *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..

<sup>163</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

<sup>164</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

<sup>165</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

<sup>166</sup> See *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

<sup>167</sup> *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).

<sup>168</sup> *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

<sup>169</sup> *CAEP I*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

<sup>170</sup> *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973.

<sup>171</sup> *Id.*

<sup>172</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *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.

<sup>173</sup> *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559.

<sup>174</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>175</sup> See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *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.”)



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.<sup>176</sup>

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.<sup>177</sup>

Intermediate scrutiny, as interpreted by the Ninth Circuit and other federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. 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.<sup>178</sup>

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.”<sup>179</sup>

#### 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 ITD and study, include:

- ***Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*** 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003. (See Section D 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.***, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827. (See Section E below.)
- ***Rothe Development Inc. v. United States Department of Defense, United States Small Business Administration, et al.***, 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, *pending in*

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* 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. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

<sup>178</sup> *Coral Constr. Co.*, 941 F.2d at 931-932; *See Eng’g Contractors Ass’n*, 122 F.3d at 910.

<sup>179</sup> 122 F.3d at 929 (internal citations omitted.)

the U.S. Court of Appeals, District of Columbia Circuit, Docket Number 15-5176. (See Section G below).

The U.S. Supreme Court 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.*, 580 U.S. \_\_\_, 2016 WL 193809 (October 3, 2016), Docket No. 15-906 (See Section E 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*, 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.<sup>180</sup>

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.<sup>181</sup> Therefore, the court held the rational basis test applied and not strict scrutiny.<sup>182</sup> 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.<sup>183</sup> Section 8(a), the Court said, unlike the implementing regulations, uses facially race-neutral terms of eligibility to identify

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<sup>180</sup> 2016 WL 4719049 (September 9, 2016)

<sup>181</sup> 2016 WL4719049, at \*1-2.

<sup>182</sup> *Id.*

<sup>183</sup> 2016 WL 4719049 at \*\*1-2.

individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such.<sup>184</sup> See Section G below.

Rothe, at the time of this report, filed on October 19, 2016, a Petition for Rehearing and Rehearing En Banc to the full Court of Appeals, which is pending.

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 and implementation of 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.

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<sup>184</sup> *Id.*

# SUMMARIES OF RECENT DECISIONS

## D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs in the Ninth Circuit Court of Appeals

### **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 initial 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 (9<sup>th</sup> Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT’s program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for “narrow tailoring”:

“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be

limited to those minority groups that have actually suffered discrimination.”  
*Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

**Evidence gathering and the 2007 Disparity Study.** On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: “Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contract dollars from Caltrans administered federally assisted contracts.” *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian-Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm’s findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation

firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

**Caltrans' DBE Program.** Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

**District Court proceedings.** AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

**Subsequent Caltrans study and program.** While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

**Jurisdiction issue.** Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

**Caltrans' DBE Program held constitutional on the merits.** The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that

Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

**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 Stat. 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. *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 (9<sup>th</sup> 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.*

**3. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> 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 (9<sup>th</sup> 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 21<sup>st</sup> 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 (8<sup>th</sup> 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 (6<sup>th</sup> 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6<sup>th</sup> 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. *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 (9<sup>th</sup> 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. The remedy available to Western States remains for further adjudication and the case is currently pending.

**5. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) appeal pending in the U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003**

**Factual and procedural background.** In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 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 decision in *Western States*, 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. Mountain West alleged that the disparity study was flawed, and the State did not have a strong basis in evidence. The State of Montana commissioned a disparity study, which was completed in in 2009. 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 asserted 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.

**Western States Paving Co. v. Washington DOT.** The 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*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The 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 Court stated the Ninth Circuit 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." *Id.* at \*2, quoting *Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit 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*, 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 998.

**MDT study.** The MDT obtained a firm to conduct a disparity study, which was completed in 2009. The 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 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 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 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 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 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 seeks 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*, at \*5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. *Id.* at \*4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id.* at \*3, citing *Western States*, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, "the data shows 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.'" *Mountain West*, at \*5, quoting AGC, *San Diego v. California DOT*, 713 F.3d at 1197. The Court in *Mountain West* said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. *Mountain West*, at \*5, citing AGC, *San Diego*, 713 F.3d at 1199.

The Court in *Mountain West*, following AGC, *San Diego*, concluded that a state's implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute "an impermissible collateral attack on the facial validity of the federal Act and regulations." *Mountain West*, at \*5, quoting AGC, *San Diego*, at 1200.

**Statistical evidence.** The Court held that Montana's DBE program passes strict scrutiny. The Court found that Mountain West could not create a genuine dispute about the fact that the 2009

disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana's transportation contracting market. *Mountain West*, at \*5. In addition, the Court found that Mountain West could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana's transportation contracting market. *Id.* Also, the Court found that Mountain West could not dispute that the study indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana's transportation contracting industry. *Id.*

The Court noted that Mountain West merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at \*6. The Court found that in mounting this attack on the study, Mountain West relied entirely on the expert report of Dr. George "LaNoue" (sic), and that Mountain West only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

Mountain West, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at \*6. In addition, the Court found contrary to the allegation by Mountain West, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

**Anecdotal evidence.** The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana's transportation contracting market, including evidence of a "good ole boy network." *Id.* at \*6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted "federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination." *Mountain West*, at \*6, quoting *AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue's report merely criticized the sample size of the responses obtained, and that Mountain West also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at \*6. Contrary to Mountain West's assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state's DBE program must be supported by affidavits. *Mountain West*, at \*6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana's transportation contracting industry. *Id.* at \*6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that "substantial statistical disparities alone would give rise to an inference of discrimination, and certainly... statistical evidence combined with anecdotal evidence passes constitutional muster." *Mountain West* at \*6, quoting *AGC, San Diego*, 713 F.3d at 1196.

**Precipitous drop in utilization.** The Court in *Mountain West* also found that neither Dr. LaNoue's report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana's transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at \*6. The

Court found that while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen “dramatically” to 0.8 percent. *Id.* at \*6. The Court held that this undisputed fact “strongly supports [Defendants’] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.” *Mountain West*, at \*6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

**Conclusion and holding.** In sum, the Court held that MDT presented sufficient evidence to demonstrate evidence of discrimination in Montana’s transportation contracting industry. *Id.* at \*7. The Court concluded that Montana’s DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state’s transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive “good ole boy network” within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at \*7.

Therefore, the Court held Montana’s DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana’s transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at \*7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana’s DBE program during 2012-2014 when Montana and MDT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West’s claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and MDT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097. The decision was cross appealed by Montana to the Ninth Circuit, Docket No. 15-35003.

#### **6. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*, 2013 WL 4774517 (D. Mont.) (September 4, 2013)**

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a

subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that it was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

**Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith



exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

### **7. *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 (9<sup>th</sup> 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.

### **8. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (10<sup>th</sup> 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 (5<sup>th</sup> Cir. 1996). The court held that the statute violated the Equal Protection Clause.

### **9. *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 (9<sup>th</sup> Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court

discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9<sup>th</sup> 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.

#### **10. *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 (11<sup>th</sup> 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.

## **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. *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.*, 580 U.S. \_\_\_\_\_, 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 causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

**Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority.** The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from

[a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority.” *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract’s DBE participation goal at 22% without the required analysis; (2) implementing a “no-waiver” policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was “arbitrary” and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT’s methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court’s conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT’s record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay’s challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT’s determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT’s supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court

said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

**Conclusion.** The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

**Petition for a Writ of Certiorari Denied.** Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

## **2. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007)**

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7<sup>th</sup> Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on 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.*

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 (9<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8<sup>th</sup> 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 (7<sup>th</sup> Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT’s DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit’s opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law “when the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI’s collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the

base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

### **3. *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8<sup>th</sup> 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*.).

**4. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> 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 (10<sup>th</sup> 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.

## Recent District Court Decisions

### **5. *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), appeal pending in U.S. Court of Appeals, Seventh Circuit, Docket No. 15-1827.**

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 (10<sup>th</sup> 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 (7<sup>th</sup> 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.*

**Notice of Appeal.** At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

## **6. *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 accessing 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.

**7. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. 2014), affirmed *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7<sup>th</sup> 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 (7<sup>th</sup> 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.** At the time of this report, 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 in August 2019. See above at E1. Dunnet Bay submitted a Petition for a Writ of Certiorari to the U.S. Supreme Court in January 2016, which is pending at the time of this report.

#### **8. *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 (7<sup>th</sup> 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 (6<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 procured 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.

**9. *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 5<sup>th</sup> and 14<sup>th</sup> 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(9<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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.

#### **10. *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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (7<sup>th</sup> Cir. 1991), then reaffirmed in *Northern Contracting*, 473 F.3d 715 (7<sup>th</sup> 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 (6<sup>th</sup> 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 (10<sup>th</sup> 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.

**11. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), *aff'd* 473 F.3d 715 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (10<sup>th</sup> 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.

## **12. 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 (8<sup>th</sup> Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> 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.

**13. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8<sup>th</sup> 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 (10<sup>th</sup> 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), aff’d 345 F.3d 964 (8<sup>th</sup> 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 Tippet, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010)**

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The

Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> 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 (4<sup>th</sup> 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 (8<sup>th</sup> 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. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7<sup>th</sup> 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.

#### **4. *Viridi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (5<sup>th</sup> 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.

**5. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> 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 *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant.

The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the 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.

## **6. *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 (6<sup>th</sup> Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, citing *Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 F.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.

## **7. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (11<sup>th</sup> 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.

**8. *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).

### **9. *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999)**

This case is instructive to the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local MBE/WBE program. In addition, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City's enforcement of the MBE/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15 percent minority participation goals for City construction contracts. In addition, the court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City's Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City's construction projects. Significantly, the court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MBE/WBE program.

### **10. *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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (10<sup>th</sup> 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 *Crosby*:

[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 *Crosby*, 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.

## **Recent District Court Decisions**

### **11. *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.

**12. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)**

In *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.* ("Rowe"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE

Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

**Background.** In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued

in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

**September 28, 2007 Order of the District Court.** On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina's MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 19A, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If



not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

**Compelling interest.** The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

**Narrowly tailored.** The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the

relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F.3d 233 (4th Cir. 2010), discussed above.

**13. *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.

**Plaintiffs' 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 (8<sup>th</sup> Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

#### **14. *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.

**15. *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 (10<sup>th</sup> 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 (10<sup>th</sup> 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.

#### **16. *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.

**17. *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).

**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 (10<sup>th</sup> 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 (6<sup>th</sup> Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an

opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenor who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenor did not actually offer any of the evidence to the court in this case. The Intervenor submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenor have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenor’s evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenor did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act’s minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic

groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

**Narrow tailoring.** The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 citing *Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *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)**

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 (11<sup>th</sup> 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 (11<sup>th</sup> Cir. 2000).

## **21. *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.

## **22. *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.*, \_\_\_ F.3d \_\_\_, 2016 WL 4719049 (D.C. Cir. Sept. 9, 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. \_\_\_ F.3d \_\_\_, 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.*

**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 (10<sup>th</sup> 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 (11<sup>th</sup> 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 pending at the time of this report.** Plaintiff Rothe has appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit, which appeal is pending at the time of this report.



**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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 10<sup>th</sup> 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 area. 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.

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# **APPENDIX C.**

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## **General Approach to Availability**

# APPENDIX C.

## General Approach to Availability Analysis

The study team used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for construction and engineering prime contracts and subcontracts that the Idaho Transportation Department (ITD) awarded between October 1, 2011 and September 30, 2015. Appendix C expands on the information presented in Chapter 5 to describe the study team's:

- A. General approach to collecting availability information;
- B. Development of the business establishments list;
- 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 in Idaho; Asotin County, WA; and Spokane County, WA, which BBC identified as the *relevant geographic market area* for ITD contracting. Business establishments that CRI surveyed were businesses with locations in Idaho, Asotin County, or Spokane County that the study team identified as doing work in fields closely related to the types of contracts that ITD awarded during the study period. The study team began the survey process by determining the subindustries for each relevant ITD contract element and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries.<sup>1</sup> The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations. Rather than drawing a sample of business listings from D&B, the study team attempted to contact every business establishment listed under relevant work specialization codes.<sup>2</sup>

As part of the telephone survey effort, the study team attempted to contact 5,275 business establishments in the local marketplace that do work that is relevant to ITD contracting. That total included 3,948 construction establishments and 1,327 professional services establishments. The study team was able to successfully contact 2,042 of those establishments—

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<sup>1</sup> D&B has developed 8-digit industry codes that provide more precise definitions of business specializations than the 4-digit Standard Industrial Classification (SIC) codes or the North American Industry Classification System (NAICS) codes that the federal government has prepared.

<sup>2</sup> Because D&B organizes its database by *business establishment* and not by “business” or “firm,” BBC purchased business listings in that manner. Therefore, in many cases, the study team purchased information about multiple locations of a single business and called all of those locations. BBC’s method for consolidating information for different establishments that were associated with the same business is described later in Appendix C.

52 percent of the establishments with valid phone listings. Of business establishments that the study team contacted successfully, 817 establishments completed availability surveys.

## **B. Development of the Business Establishments List**

The study team did not expect every business establishment that it contacted to be potentially available for ITD 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 ITD 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 ITD.

In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction or consulting work. To do so would have required the study team to include subindustries that are only marginally related or even unrelated to the types of contracts that ITD awarded during the study period. Moreover, some business establishments working in relevant subindustries may have been missing from corresponding D&B or other listings.

BBC determined the types of work involved in ITD prime contracts by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure C-1 lists the 8-digit work specialization codes within construction and engineering that the study team determined were most related to the contract dollars that ITD awarded during the study period and that BBC considered as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure C-1.

## **C. Development of the Survey Instrument**

BBC drafted an availability survey instrument to collect business information from construction and engineering business establishments in Idaho. As an example, the survey instrument that the study team used with construction establishments is presented at the end of Appendix C. The study team modified the construction survey instrument slightly for use with establishments working in other industries in order to reflect terms more commonly used in those industries (e.g., the study team substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying engineering establishments).<sup>3</sup>

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<sup>3</sup> 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 C-1.**  
**Subindustries included in the availability analysis**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Construction</b>			
<b>Concrete, asphalt, sand, and gravel products</b>		<b>Excavation, drilling, and earthmoving</b>	
1422-9902	Cement rock, crushed and broken-quarrying	1629-0400	Land preparation construction
1741-9906	Refractory or acid brick masonry	1629-9901	Blasting contractor, except building demolition
2951-0000	Asphalt paving mixtures and blocks	1629-9902	Earthmoving contractor
3272-0000	Concrete products, not elsewhere classified	1629-9903	Land clearing contractor
3272-0300	Precast terrazzo or concrete products	1741-0102	Retaining wall construction
3272-0303	Concrete products, precast, nec	1771-9904	Foundation and footing contractor
3273-0000	Ready-mixed concrete	1781-0000	Water well drilling
5032-0100	Paving materials	1794-0000	Excavation work
5032-9901	Aggregate	1794-9901	Excavation and grading, building construction
<b>Concrete work</b>		1795-0000	Wrecking and demolition work
1771-0000	Concrete work	1795-9902	Demolition, buildings and other structures
1771-0300	Driveway, parking lot, and blacktop contractors	1799-0901	Boring for building construction
1771-0301	Blacktop (asphalt) work	1799-0903	Shoring and underpinning work
1771-9900	Concrete work, not elsewhere classified	1799-9906	Core drilling and cutting
1771-9901	Concrete pumping	<b>Fencing, guardrails, barriers, and signs</b>	
1771-9902	Concrete repair	1611-0100	Highway signs and guardrails
1791-9902	Concrete reinforcement, placing of	1611-0101	Guardrail construction, highways
1795-9901	Concrete breaking for streets and highways	1611-0102	Highway and street sign installation
<b>Electrical work, lighting, and signal systems</b>		1799-9912	Fence construction
1731-0000	Electrical work	3444-9905	Guard rails, highway: sheet metal
1731-9903	General electrical contractor	3993-0100	Electric signs
3699-0000	Electrical equipment and supplies, not elsewhere classified	3993-9907	Signs, not made in custom sign painting shops
4911-0000	Electrical services	5211-9907	Fencing
5063-0000	Electrical apparatus and equipment	<b>Flagging services</b>	
5063-0206	Electrical supplies, not elsewhere classified	3669-0200	Transportation signaling devices
		7359-9912	Work zone traffic equipment (flags, cones, barrels)
		7389-9921	Flagging service (traffic control)

**Figure C-1.**  
**Subindustries included in the availability analysis (continued)**

<b>Construction (continued)</b>			
<b>Heavy construction equipment rental</b>		<b>Other construction materials (continued)</b>	
3531-0604	Cranes, nec	3441-0000	Fabricated structural metal
5082-0300	General construction machinery and equipment	3443-0700	Metal parts
7353-0000	Heavy construction equipment rental	3462-0000	Iron and steel forgings
7353-9900	Heavy construction equipment rental, nec	5031-0000	Lumber, plywood, and millwork
7353-9901	Cranes and aerial lift equipment, rental or leasing	5039-0000	Construction materials, nec
7359-0000	Equipment rental and leasing, nec	5082-0302	Contractor's materials
7389-9909	Crane and aerial lift service	5082-0307	Scaffolding
		5084-0400	Petroleum industry machinery
<b>Highway, street, and bridge construction</b>		5172-0202	Diesel fuel
1611-0000	Highway and street construction	5211-0000	Lumber and other building materials
1611-0200	Surfacing and paving	5211-0506	Sand and gravel
1611-0202	Concrete construction: roads, highways, sidewalks, etc.		
1611-0204	Highway and street paving contractor	<b>Other construction services</b>	
1611-0205	Resurfacing contractor	1541-0000	Industrial buildings and warehouses
1611-9901	General contractor, highway and street construction	1623-9904	Pipeline construction, nsk
1611-9902	Highway and street maintenance	1711-0000	Plumbing, heating, air-conditioning
1622-0000	Bridge, tunnel, and elevated highway construction	1711-0201	Septic system construction
1622-9901	Bridge construction	1741-0000	Masonry and other stonework
1629-0000	Heavy construction, not elsewhere classified	1743-9904	Tile installation, ceramic
<b>Landscaping</b>		1761-0103	Roofing contractor
0781-0200	Landscape services	1771-9903	Flooring contractor
0782-0000	Lawn and garden services	1781-9901	Geothermal drilling
0782-0205	Mulching services, lawn	1799-0200	Coating, caulking, and weather, water, and fireproofing
0782-9903	Landscape contractors	1799-0207	Glazing of concrete surfaces
0783-0100	Planting, pruning, and trimming services	1799-0500	Exterior cleaning, including sandblasting
<b>Other construction materials</b>		1799-0610	Window treatment installation
1429-0101	Basalt, crushed and broken-quarrying	1799-0702	Parking lot maintenance
1429-9913	Slate, crushed and broken-quarrying	1799-9932	Welding on site
1442-0000	Construction sand and gravel	2891-0000	Adhesives and sealants
1442-0201	Gravel mining	3531-0000	Construction machinery
2899-9908	Concrete curing and hardening compounds	4953-9905	Recycling, waste materials
		4959-0102	Sweeping service: road, airport, parking lot, etc.
		7549-0300	Towing services
		7699-0403	Sewer cleaning and rodding

**Figure C-1.**  
**Subindustries included in the availability analysis (continued)**

<b>Construction (continued)</b>			
<b>Painting, striping, and marking</b>		<b>Trucking, hauling, and storage</b>	
1721-0200	Commercial painting	4212-0000	Local trucking, without storage
1721-0300	Industrial painting	4212-9908	Heavy machinery transport, local
1721-0303	Pavement marking contractor	4213-0000	Trucking, except local
<b>Rebar and reinforcing steel</b>		4213-9904	Heavy hauling, nec
1791-0000	Structural steel erection	4731-0000	Freight transportation arrangement
3449-0101	Bars, concrete reinforcing: fabricated steel	5521-9904	Trucks, tractors, and trailers: used
5051-0200	Iron and steel (ferrous) products	<b>Water, sewer, and utility lines</b>	
5051-0205	Concrete reinforcing bars	1623-0000	Water, sewer, and utility lines
5051-0214	Pipe and tubing, steel	1623-0300	Water and sewer line construction
5051-0216	Steel	1623-0302	Sewer line construction
<b>Transportation planning services</b>		1623-9906	Underground utilities contractor
8742-0410	Transportation consultant		
8748-0200	Urban planning and consulting services		
8748-0204	Traffic consultant		
<b>Professional Services</b>			
<b>Architectural and design services</b>		<b>Environmental services</b>	
8712-0000	Architectural services	8748-9905	Environmental consultant
<b>Construction management</b>		<b>Landscape architecture</b>	
8741-9902	Construction management	0781-0201	Landscape architects
8742-0402	Construction project management consultant	0781-0000	Landscape counseling and planning
<b>Engineering</b>		<b>Surveying and mapmaking</b>	
8711-0000	Engineering services	8713-0000	Surveying services
8711-0404	Structural engineering	<b>Testing and inspection</b>	
8712-0101	Architectural engineering	7389-0200	Inspection and testing services
8711-9909	Professional engineer	8734-9909	Soil analysis
8711-0202	Mechanical engineering	7389-0209	Pipeline and power line inspection service
8711-9905	Electrical or electronic engineering	8734-9911	Water testing laboratory
8711-0400	Construction and civil engineering		
8711-9903	Consulting engineer		
8711-0402	Civil engineering		

Source: BBC Research & Consulting.

**Survey structure.** The availability survey included 15 sections, and CRI attempted to cover all sections with each business establishment that they successfully contacted and that was willing to complete a survey.

**1. Identification of purpose.** The surveys began by identifying ITD as one of the survey sponsors and describing the purpose of the study (e.g., “developing 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”).

**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. If the business name was incorrect, surveyors asked if the respondent knew how to contact the business. CRI 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 C).

**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 A4a). If D&B’s work specialization codes were incorrect, businesses then described their main lines of business (Question A4b). Construction businesses also confirmed their main lines of business according to prequalification categories that ITD and other local agencies use (Questions A4c, Q4d, and A4e). 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. Sole location or multiple locations.** Because the study team surveyed business establishments and not businesses, the surveyor asked business owners or managers if their businesses had other locations (Question A5) and whether their establishments were affiliates or subsidiaries of other businesses (Questions A6 and A7).

**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 through B8).

**8. Qualifications and interest in future work.** The surveyor asked about businesses’ qualifications and interest in future work with state or local government agencies in Idaho. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B9 through B12).



**9. Geographic areas.** The surveyor asked questions about the geographic regions within Idaho in which businesses serve customers (Questions C1a through C1c).

**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 contract on which they had bid on or had been awarded during the past five years. CRI asked those questions for both prime contracts and subcontracts (Questions D2 through D4).

**12. Ownership.** The surveyor asked whether businesses were at least 51 percent owned and controlled by women or minorities (Questions E1 through E3). If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of their business' ownership. The study team confirmed that information through several other data sources including:

- ITD's directories of certified Disadvantaged Business Enterprises (DBEs);
- ITD's vendor data;
- ITD staff 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.

**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 also asked about their revenues 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**

CRI conducted all surveys in 2016. CRI programmed the surveys, conducted them via telephone, and provided 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 a company representative such as the owner, manager, chief financial officer, or other key official who could provide accurate and detailed responses to survey questions.

**Establishments that the study team successfully contacted.** Figure C-2 presents the disposition of the 5,275 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 2,042 establishments that the study team was able to successfully contact.

**Figure C-2.**  
**Disposition of**  
**attempts to survey**  
**business**  
**establishments**

Source:  
BBC Research & Consulting  
availability analysis.

	Number of Firms	Percent of Business Listings
Beginning list	5,275	
Less duplicate phone numbers	7	
Less non-working phone numbers	695	
Less wrong number/business	204	
Unique business listings with working phone numbers	4,369	100 %
Less no answer	2,085	9
Less could not reach responsible staff member	107	36
Less language barrier	22	0
Less unreturned fax/email	113	3
<b>Establishments successfully contacted</b>	<b>2,042</b>	<b>52 %</b>

**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 (seven listings);
- Non-working phone numbers (695 listings); or
- Wrong numbers for the desired businesses (204 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

**Working phone numbers.** As shown in Figure C-2, there were 4,369 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 2,085 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 107 establishments.
- CRI could not conduct the availability survey due to language barriers for 22 establishments.
- CRI sent hardcopy fax or e-mail availability surveys upon request but did not receive completed surveys from 113 establishments.

After taking those unsuccessful attempts into account, CRI was able to successfully contact 2,042 business establishments, or about 52 percent of establishments with valid phone listings.

**Establishments included in the availability database.** Figure C-3 presents the disposition of the 2,042 business establishments that CRI successfully contacted and how that number resulted in the 279 businesses that the study team included in the availability database and that the study team considered available for ITD and other agency work.

**Figure C-3.**  
**Disposition of successfully contacted business establishments**

	Number of Establishments
Establishments successfully contacted	2,042
Less establishments not interested in discussing availability for ITD work	1,225
Establishments that completed interviews about firm characteristics	817
Less no relevant work	218
Less not a for-profit business	13
Less line of work outside scope	24
Less no past bid/award	116
Less no interest in future work	136
Less established after study period	2
Less multiple establishments	29
<b>Establishments available for ITD work</b>	<b>279</b>

Source: BBC Research & Consulting availability analysis.

**Establishments not interested in discussing availability for ITD work.** Of the 2,042 business establishments that the study team successfully contacted, 1,225 establishments were not interested in discussing their availability for ITD work. In total, 817 (40%) successfully-contacted business establishments completed availability surveys.

**Establishments available for agency work.** The study team only deemed a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that ITD and other agencies participating in the disparity study awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 218 establishments that indicated that their businesses were not involved in relevant contracting work.
- Of the establishments that completed availability surveys, 13 indicated that they were not a for-profit business. The survey ended when respondents reported that their establishments were not for-profit businesses.
- BBC excluded 24 establishments that indicated that their businesses were involved in construction or professional services work but reported that their main lines of business were outside of the study scope.
- BBC excluded 116 establishments that reported not having bid on or been awarded contracts within the past five years.

- BBC excluded 136 establishments that reported not being qualified or interested in either prime contracting or subcontracting opportunities with state or local government agencies in Idaho.
- BBC excluded two business establishments that reported being established in 2016. Those business establishments would not have been available for contract elements that ITD or other participating agencies awarded during the study period.
- Twenty-nine 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 279 businesses that were considered potentially available for ITD and other agency work.

**Coding responses from multi-location businesses.** Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work 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 business' relative capacity (i.e., the largest contract for which the business could be considered available).
- 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

The study team made several additional considerations related to its approach to measuring availability to ensure that the study team's estimates of the availability of minority- and woman-owned businesses for ITD work were as accurate as possible.

**Not providing a count of all businesses available for ITD work.** The purpose of the availability analysis was to provide precise and representative estimates of the percentage of ITD 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 ITD 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, such as the United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" recommend similar approaches to measuring availability for agencies implementing minority- and woman-owned business programs.<sup>4</sup>

**Not basing the availability analysis on MBE/WBE or DBE directories, prequalification lists, or bidders lists.** Federal guidance, such as USDOT guidance for determining the availability of minority- and woman-owned businesses, recommends dividing the number of businesses in an agency's certification directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of minority- or woman-owned businesses for an agency's prime contracts and subcontracts. The primary reason why the study team rejected such approaches when measuring the availability of minority- and woman-owned businesses for ITD work is that dividing a simple count of certified businesses by the total number of businesses does not provide the data on business characteristics that the study team desired for the disparity study. The methodology applied 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 surveys provided data on qualifications, relative capacity, and interest in ITD work for each business, which allowed the study team to take a more refined 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.

**Using D&B lists as the sample frame.** BBC began its custom census approach of measuring availability with D&B business lists. D&B does not require businesses to pay a fee to be included in its listings—it is completely free to listed businesses. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in Idaho. There can be a lag between formation of a new business and inclusion in D&B, meaning that the newest businesses may be underrepresented in the sample frame. Based on information from BBC's survey effort, newly formed businesses are

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<sup>4</sup> Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>.

more likely to be minority- or woman-owned, suggesting that minority- and woman-owned businesses might be underrepresented in the final availability database.

BBC is not able to quantify the degree to which minority- and woman-owned businesses were underrepresented in the final availability database, if at all. However, estimates presented in the disparity study should be considered conservative estimates of the availability of minority- and woman-owned businesses. Note that there are no alternative business listings that would better address such issues.

**Selection of specific subindustries.** Defining subindustries based on specific work specialization codes (e.g., North American Industry Classification Codes or 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 in the relevant geographic market area.

In addition, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at the 8-digit 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 in which response rate is less than 100 percent. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Work specializations; and
- Language barriers.

**Research sponsorship.** Surveyors introduced themselves by identifying ITD as one of the survey sponsors, 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 rate.

**Work specializations.** Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate

the availability of 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 minimized, because the availability analysis examines businesses within particular work fields before calculating overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

**Language barriers.** ITD 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 surveys in English in the availability analysis. Businesses unable to complete the survey due to language barriers represented less than one 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 ITD and other participating agencies. For example, certification databases include data on the race/ethnicity and gender of the owners of DBE-certified businesses. The study team compared survey responses concerning business ownership with that information.
- BBC examined ITD contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual ITD contract data.
- ITD reviewed vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.

# Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Customer Research International. We are calling on behalf of the Idaho Transportation Department (ITD).

This is not a sales call. ITD is developing 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. This call should take between 5 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

*(AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS)*

*(IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE AGENCIES)*

**X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?**

1=RIGHT COMPANY – **SKIP TO A1**

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – **TERMINATE**

**Y1. What is the name of this firm?**

1=VERBATIM

**Y2a. Is [new firm name] the same firm as [firm name] doing business under a new name?**

1=Yes, same firm doing business under a different name

2=No, different firm – **SKIP TO Y3**

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**



**Y2b. Was [*firm name*] bought or sold, or did it change ownership?**

1=Yes, company bought/sold/changed ownership

2=No, same ownership

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

**Y3. Can you give me the complete address or city for [*new firm name*]?**

*(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT):*

. *STREET ADDRESS*

. *CITY*

. *STATE*

. *ZIP*

1=VERBATIM

**Y5. Can you give me the name of the owner or manager of [*new firm name*]?**

*(ENTER UPDATED NAME)*

1=VERBATIM

**Y6. Can I have a telephone number for him/her?**

*(ENTER UPDATED PHONE)*

1=VERBATIM

**Y8. Do you work for this new company?**

1=YES

2=NO – **TERMINATE**

**A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance, or design on transportation-related projects. Is that correct?**

*(NOTE TO INTERVIEWER – INCLUDES ANY WORK RELATED TO CONSTRUCTION, MAINTENANCE OR DESIGN SUCH AS PARKING FACILITIES, PAVING AND CONCRETE, TUNNELS, BRIDGES AND ROADS AND OTHER TRANSPORTATION-RELATED PROJECTS. IT ALSO INCLUDES TRUCKING AND HAULING)*

*(NOTE TO INTERVIEWER – INCLUDES HAVING DONE WORK, TRYING TO SELL THIS WORK, OR PROVIDING MATERIALS)*

1=Yes

2=No – **TERMINATE**

**A2. Let me confirm that [*firm name/new firm name*] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?**

1=Yes, a business

2=No, other – **TERMINATE**

**A4a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [*SIC Code description*]. Is that correct?**

*(NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY)*

1=Yes – **SKIP TO A4c**

2=No

98=(DON'T KNOW)

99=(REFUSED)

**A4b. What would you say is the main line of business at [*firm name/new firm name*]?**

*(NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.)*

1=VERBATIM

**A4c. Next, we're interested in additional types of work that [firm name/new firm name] performs. Does your firm do work in the area of:**

**[READ, MULTIPUNCH]**

**1 = Highway, street, and tunnel construction?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES PLACING OF AGGREGATE BASES; PAVING; APPLYING BITUMINOUS TREATMENTS; PAVING PLANNING, MILLING, AND SCARIFICATION; CONCRETE TEXTURING; SAWING; PAVEMENT REPLACEMENT; CONCRETE WORK; TUNNELING; AND SEALING OF CONCRETE SURFACES.]

**2 = Excavation, grading, drainage, drilling, and demolition?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES GRADING; PAVEMENT RUBBLIZING, BREAKING, AND PULVERIZING; CLEARING AND GRUBBING; BUILDING REMOVAL ROADWAY EXCAVATION AND EMBANKMENT CONSTRUCTION; MAJOR ROADWAY EXCAVATION; STRUCTURAL REMOVAL; HYDRODEMOLITION; CAISSON AND DRILLED SHAFT WORK; PILING; AND GAS, OIL, WATER WELL ABANDONMENTS.]

**3 = Bridge and elevated highway construction?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES BRIDGE CONSTRUCTION; STUD WELDING; EXPANSIONS AND CONTRACTION OF JOINTS, JOINTS SEALERS, AND BEARING DEVICES; STRUCTURE REPAIRS; HEAT STRAIGHTENING; AND POST TENSIONING BRIDGE MEMBERS WORK.]

**4 = Structural steel erection and repair?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES REINFORCING STEEL; STRUCTURAL STEEL ERECTION; AND STRUCTURAL STEEL REPAIRS.]

**5 = Water, sewer, and utility lines?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES WORK RELATED TO DRAINAGE LINES AND SYSTEMS.]

**6 = Painting, striping, and marking?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES STRUCTURAL STEEL PAINTING; WATERPROOFING; RAISED PAVEMENT MARKERS; AND REFLECTIVE PAVEMENT MARKINGS.]

**7 = Fencing, guardrails, barriers, and signs?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES GUARDRAILS AND ATTENUATORS; SIGNING; AND FENCING.]

**8 = Electrical work, lighting, and signal systems?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES HIGHWAY LIGHTING; STANDARD TRAFFIC SIGNALS; AND FIBER OPTIC CABLE INSTALLATION, SPLICING, TERMINATION, AND TESTING FOR TRAFFIC SIGNAL SYSTEMS AND INTELLIGENT TRANSPORTATION SYSTEMS.]

**9 = Landscape and erosion control?**

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES SOIL STABILIZATION; TEMPORARY SOIL EROSION AND SEDIMENT CONTROL; TIEBACK INSTALLATION; EARTH RETAINING STRUCTURES; LANDSPACING; MOWING; AND HERBICIDAL SPRAYING.]

**10 = Concrete work?**

**11 = Traffic control and flagging services?**

**12 = Trucking and hauling?**

**A5. Is this the sole location for your business, or do you have offices in other locations?**

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

**A6. Is your company a subsidiary or affiliate of another firm?**

1=Independent – **SKIP TO B1**

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – **SKIP TO B1**

99=(REFUSED) – **SKIP TO B1**

**A7. What is the name of your parent company?**

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

**B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency in Idaho?**

1=Yes

2=No – **SKIP TO B3**

98=(DON'T KNOW) – **SKIP TO B3**

99=(REFUSED) – **SKIP TO B3**

**B2. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

**B3. During the past five years, has your company received an award for work on any part of a contract for a state or local government agency in Idaho?**

1=Yes

2=No – **SKIP TO B5**

98=(DON'T KNOW) – **SKIP TO B5**

99=(REFUSED) – **SKIP TO B5**

**B4. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

**B5. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector organization in Idaho?**

1=Yes

2=No – **SKIP TO B7**

98=(DON'T KNOW) – **SKIP TO B7**

99=(REFUSED) – **SKIP TO B7**

**B6. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

**B7. During the past five years, has your company received an award for work on any part of a contract for a private sector organization in Idaho?**

1=Yes

2=No – **SKIP TO B9**

98=(DON'T KNOW) – **SKIP TO B9**

99=(REFUSED) – **SKIP TO B9**

**B8. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

**B9. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company qualified and interested in working with the Idaho Department of Transportation as a prime contractor?**

*[NOTE TO INTERVIEWER: IF ASKED, "QUALIFIED" MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO ITD CONTRACTS.]*

*[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ITD, RECORD VERBATIM.]*

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**B10. Is your company qualified and interested in working with state or local government agency in Idaho as a prime contractor?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**B11. Is your company qualified and interested in working with the Idaho Department of Transportation as a subcontractor, trucker/hauler, or supplier?**

*[NOTE TO INTERVIEWER: IF ASKED, "QUALIFIED" MEANS READY, WILLING, AND ABLE TO PERFORM WORK OR PROVIDE GOODS RELATED TO ITD CONTRACTS.]*

*[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ITD, RECORD VERBATIM.]*

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**B12. Is your company qualified and interested in working with a state or local government agency in Idaho as a subcontractor, trucker/hauler, or supplier?**

*[NOTE TO INTERVIEWER: IF ASKED, "QUALIFIED" MEANS READY, WILLING, AND ABLE TO PERFORM WORK OR PROVIDE GOODS RELATED TO ITD CONTRACTS.]*

*[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH THE ITD, RECORD VERBATIM.]*

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**Now I want to ask you about the geographic areas your company serves within Idaho. As you answer, think about whether your company could be involved in potential transportation-related projects throughout the entire state or only within specific regions.**

**C1. Is your company able to serve all of Idaho or only certain parts of the state?**

1=All of the state– **SKIP TO D1**

2=Only parts of the state

98=(DON'T KNOW)

99=(REFUSED)

**C1a. Is your company able to do work or serve customers in any part of the northern panhandle, ITD District 1, which is based in Coeur D'Alene?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**C1b. Is your company able to do work or serve customers in any part of the southern panhandle, ITD District 2, which is based in Lewiston?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)



**C1c. Is your company able to do work or serve customers in any part of southwestern Idaho, ITD District 3, which is based in Boise?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**C1d. Is your company able to do work or serve customers in any part of south central Idaho, ITD District 4, which is based in Shoshone and includes Twin Falls?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**C1e. Is your company able to do work or serve customers in any part of southeastern Idaho, ITD District 5, which is based in Pocatello?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**C1f. Is your company able to do work or serve customers in any part of central Idaho, ITD District 6, which is based in Rigby and includes Idaho Falls?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**D1. About what year was your firm established?**

1=NUMERIC (1600-2015)

9998 = (DON'T KNOW)

9999 = (REFUSED)

**D2. What was the largest contract or subcontract that your company was awarded during the past five years in either the private or public sector? This includes contracts not yet complete.**

*[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]*

- |  |  |
|--|--|
| 1=\$100,000 or less                      | 9=More than \$20 million to \$50 million     |
| 2=More than \$100,000 to \$250,000       | 10=More than \$50 million to \$100 million   |
| 3=More than \$250,000 to \$500,000       | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million     | 12=\$200 million or greater                  |
| 5=More than \$1 million to \$2 million   | 97=(NONE)                                    |
| 6=More than \$2 million to \$5 million   | 98=(DON'T KNOW)                              |
| 7=More than \$5 million to \$10 million  | 99=(REFUSED)                                 |
| 8=More than \$10 million to \$20 million |  |

**D3. Was that the largest contract or subcontract that your company bid on or submitted quotes for during the past five years?**

- 1=Yes – **SKIP TO E1**
- 2=No
- 98=(DON'T KNOW) – **SKIP TO E1**
- 99=(REFUSED) – **SKIP TO E1**

**D4. What was the largest contract or subcontract that your company bid on or submitted quotes for during the past five years in either the private or public sector?**

*[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY]*

- |  |  |
|--|--|
| 1=\$100,000 or less                      | 9=More than \$20 million to \$50 million     |
| 2=More than \$100,000 to \$250,000       | 10=More than \$50 million to \$100 million   |
| 3=More than \$250,000 to \$500,000       | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million     | 12=\$200 million or greater                  |
| 5=More than \$1 million to \$2 million   | 97=(NONE)                                    |
| 6=More than \$2 million to \$5 million   | 98=(DON'T KNOW)                              |
| 7=More than \$5 million to \$10 million  | 99=(REFUSED)                                 |
| 8=More than \$10 million to \$20 million |  |

**E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [*firm name* / *new firm name*] a woman-owned business?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is Black American, Asian, Hispanic, Native American or another minority group. By this definition, is [*firm name* || *new firm name*] a minority-owned business?**

1=Yes

2=No – **SKIP TO F1**

98=(DON'T KNOW) – **SKIP TO F1**

99=(REFUSED) – **SKIP TO F1**

**E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, Native American, or another minority group?**

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) \_\_\_\_\_

98=(DON'T KNOW)

99=(REFUSED)

**F1. Dun & Bradstreet lists the average annual gross revenue of your company, just considering your location, to be [*dollar amount*]. Is that an accurate estimate for your company's average annual gross revenue over the last three years?**

1=Yes – SKIP TO F3

2=No

98=(DON'T KNOW) – SKIP TO F3

99=(REFUSED) – SKIP TO F3

**F2. Roughly, what was the average annual gross revenue of your company, just considering your location, over the last three years? Would you say . . .**

**[READ LIST]**

1=Less than \$1 Million

6=\$16.6 Million - \$18.5 Million

2=\$1 Million - \$4.5 Million

7=\$18.6 Million - \$24 Million

3=\$4.6 Million - \$7 Million

8=\$24.1 Million or more

4=\$7.1 Million - \$12 Million

98= (DON'T KNOW)

5=\$12.1 Million - \$16.5 Million

99= (REFUSED)

**F3. Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .**

**[READ LIST]**

1=Less than \$1 Million

6=\$16.6 Million - \$18.5 Million

2=\$1 Million - \$4.5 Million

7=\$18.6 Million - \$24 Million

3=\$4.6 Million - \$7 Million

8=\$24.1 Million or more

4=\$7.1 Million - \$12 Million

98= (DON'T KNOW)

5=\$12.1 Million - \$16.5 Million

99= (REFUSED)

**G1. We're interested in whether your company has experienced barriers or difficulties in Idaho associated with starting or expanding a business in your industry or with obtaining work. Do you have any thoughts to share on these topics?**

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

**G2. Would you be willing to participate in a follow-up interview about any of those issues?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**H1. Just a few last questions. What is your name?**

1=VERBATIM

**H2. What is your position at [*firm name / new firm name*]?**

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9=(OTHER - SPECIFY) \_\_\_\_\_

99=(REFUSED)

**Thank you very much for your participation. If you have any questions or concerns, please contact the Idaho Department of Transportation, Diane Steiger, Civil Right Program Manager, Office of Civil Rights, Phone (208) 334-8884 or [diane.steiger@itd.idaho.gov](mailto:diane.steiger@itd.idaho.gov).**

# APPENDIX D.

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## Marketplace Analysis



## APPENDIX D.

### Marketplace Analyses

**Figure D-1.**  
**Percentage of all workers**  
**25 and older with at least a**  
**four-year degree, ITD**  
**Study Area and the United**  
**States, 2010-2014**

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 ITD Study Area, respectively.

The ITD Study Area includes the state of Idaho and Spokane County in Washington.

Source:

BBC Research & Consulting from 2010-2014 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/>.

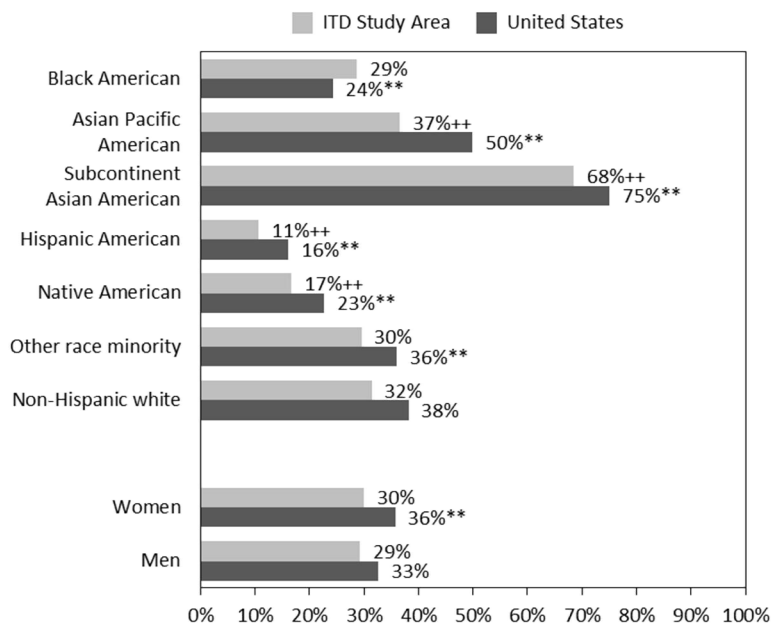
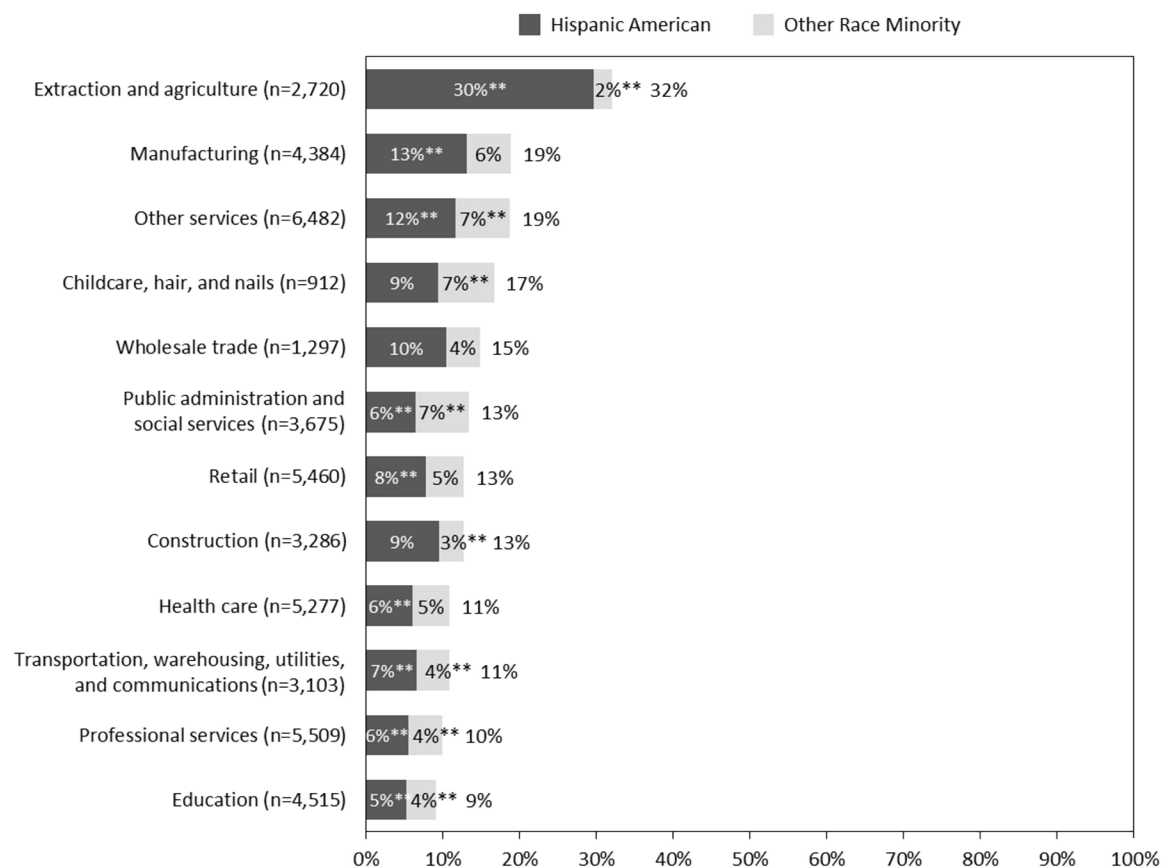


Figure D-1 indicates that, compared to non-Hispanic white Americans working in the ITD study area, smaller percentages of Hispanic Americans and Native Americans have four-year college degrees. In contrast, larger percentages of Asian Pacific Americans and Subcontinent Asian Americans have four-year college degrees.

**Figure D-2.**  
**Percent representation of minorities in various industries in the ITD Study Area, 2010-2014**



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

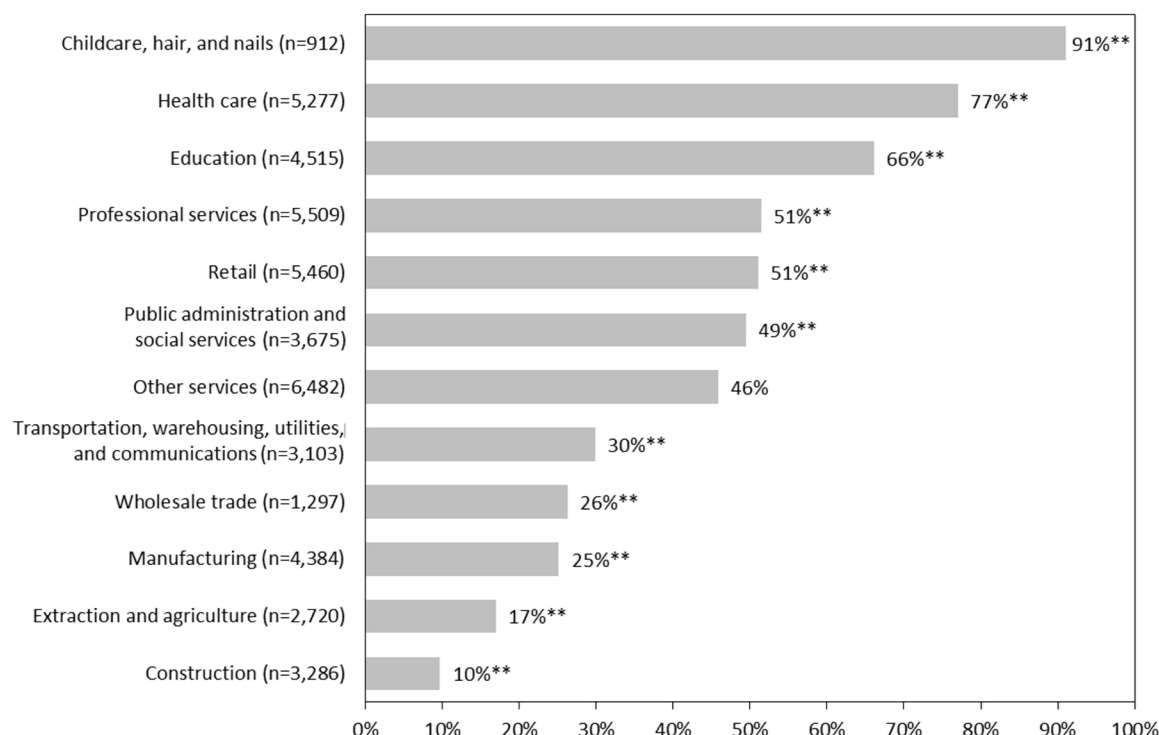
The representation of minorities among all ITD Study Area workers is 9% for Hispanic Americans, 5% for other race minorities, and 15% for all minorities considered together.

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

Source: BBC Research & Consulting from 2010-2014 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 D-2 indicates that the Idaho Study Area industries with the highest representations of minority workers are other extraction and agriculture; manufacturing, and other services. The Idaho Study Area industries with the lowest representations of minority workers are transportation, warehousing, utilities, and communications; professional services; and education.

**Figure D-3.**  
**Percent representation of women in various industries in the ITD Study Area, 2010-2014**



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

The representation of women among all ITD Study Area workers is 46%.

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 2010-2014 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 D-3 indicates that the ITD Study Area industries with the highest representations of women workers are childcare, hair, and nails; healthcare; and education. The ITD Study Area industries with the lowest representations of women workers are manufacturing; extraction and agriculture; and construction.

**Figure D-4.  
Demographic  
characteristics of  
workers in study-  
related industries  
and all industries,  
ITD Study Area and  
the United States,  
2000**

Note:

\*\* Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 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/>.

ITD Study Area	All Industries (n= 41,147)	Construction (n= 3,349)	Professional Services (n= 468)
<b>Race/ethnicity</b>			
Black American	0.7 %	0.3 %	0.6 %
Asian Pacific American	1.4	0.3 **	1.9
Subcontinent Asian American	0.1	0.0	0.9
Hispanic American	5.4	4.4	1.1 **
Native American	1.9	2.9	1.2
Other race minority	0.4	0.4	0.2
<b>Total minority</b>	<b>9.9 %</b>	<b>8.4 %</b>	<b>5.9 %</b>
Non-Hispanic white	90.1	91.6	94.1
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>			
Women	45.2 %	10.3 % **	31.1 **
Men	54.8	89.7 **	68.9 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
United States	All Industries (n= 6,832,970)	Construction (n= 480,280)	Professional Services (n= 58,221)
<b>Race/ethnicity</b>			
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
<b>Total minority</b>	<b>27.3 %</b>	<b>24.5 %</b>	<b>16.7 %</b>
Non-Hispanic white	72.7	75.5 **	83.3 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>			
Women	46.5 %	9.9 % **	26.0 **
Men	53.5	90.1 **	74.0 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

Figure D-4 indicates that in 2000 there were smaller percentages of Asian Pacific Americans and women working in the ITD Study Area construction industry than in all industries considered together. There were smaller percentages of Hispanic Americans and women working in the ITD Study Area professional services industry than in all industries considered together.

**Figure D-5.  
Demographic  
characteristics of  
workers in study-  
related industries  
and all industries,  
ITD Study Area and  
the United States,  
2010-2014**

Note:

\*\* Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

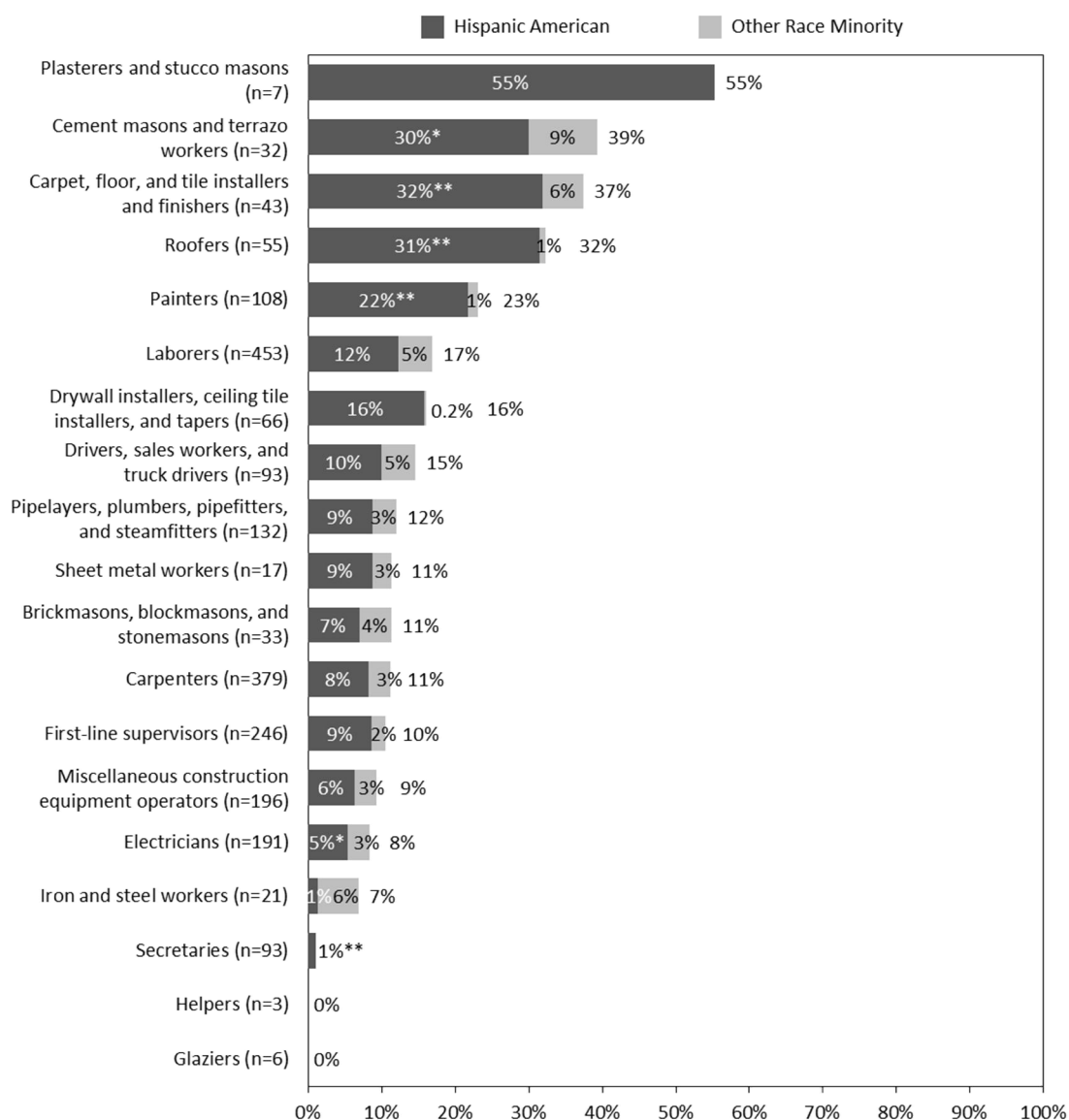
Source:

BBC Research & Consulting from 2010-2014 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/>.

ITD Study Area	All Industries (n=47,347)	Construction (n=3,286)	Architecture and Engineering (n=465)
<b>Race/ethnicity</b>			
Black American	1.1 %	0.7 %	0.4 %
Asian Pacific American	2.0	0.6 **	1.3
Subcontinent Asian American	0.2	0.0	0.0
Hispanic American	9.4	9.5	2.4 **
Native American	1.8	1.7	0.6
Other race minority	0.1	0.1	0.0
<b>Total minority</b>	<b>14.6 %</b>	<b>12.7 %</b>	<b>4.7 %</b>
Non-Hispanic white	85.4	87.3 **	95.3 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>			
Women	46.0 %	9.7 % **	23.5 % **
Men	54.0	90.3 **	76.5 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
United States	All Industries (n= 7,609,782)	Construction (n= 467,817)	Professional Services (n=76,126)
<b>Race/ethnicity</b>			
Black American	12.1 %	5.9 % **	5.1 % **
Asian Pacific American	4.5	1.6 **	5.9 **
Subcontinent Asian American	1.2	0.3 **	1.8 **
Hispanic American	15.8	24.7 **	7.8 **
Native American	1.1	1.3 **	0.8 **
Other race minority	0.2	0.2	0.2
<b>Total minority</b>	<b>35.1 %</b>	<b>34.1 %</b>	<b>21.6 %</b>
Non-Hispanic white	64.9	65.9 **	78.4 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>			
Women	47.2 %	8.9 % **	25.6 % **
Men	52.8	91.1 **	74.4 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

Figure D-5 indicates that there were smaller percentages of Asian Pacific Americans and women working in the ITD Study Area construction industry than in all industries considered together. There were smaller percentages of Hispanic Americans and women working in the ITD Study Area professional services industry than in all industries considered together.

**Figure D-6.**  
**Percent representation of minorities in selected construction occupations in the ITD Study Area, 2010-2014**



Notes: \*\* Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

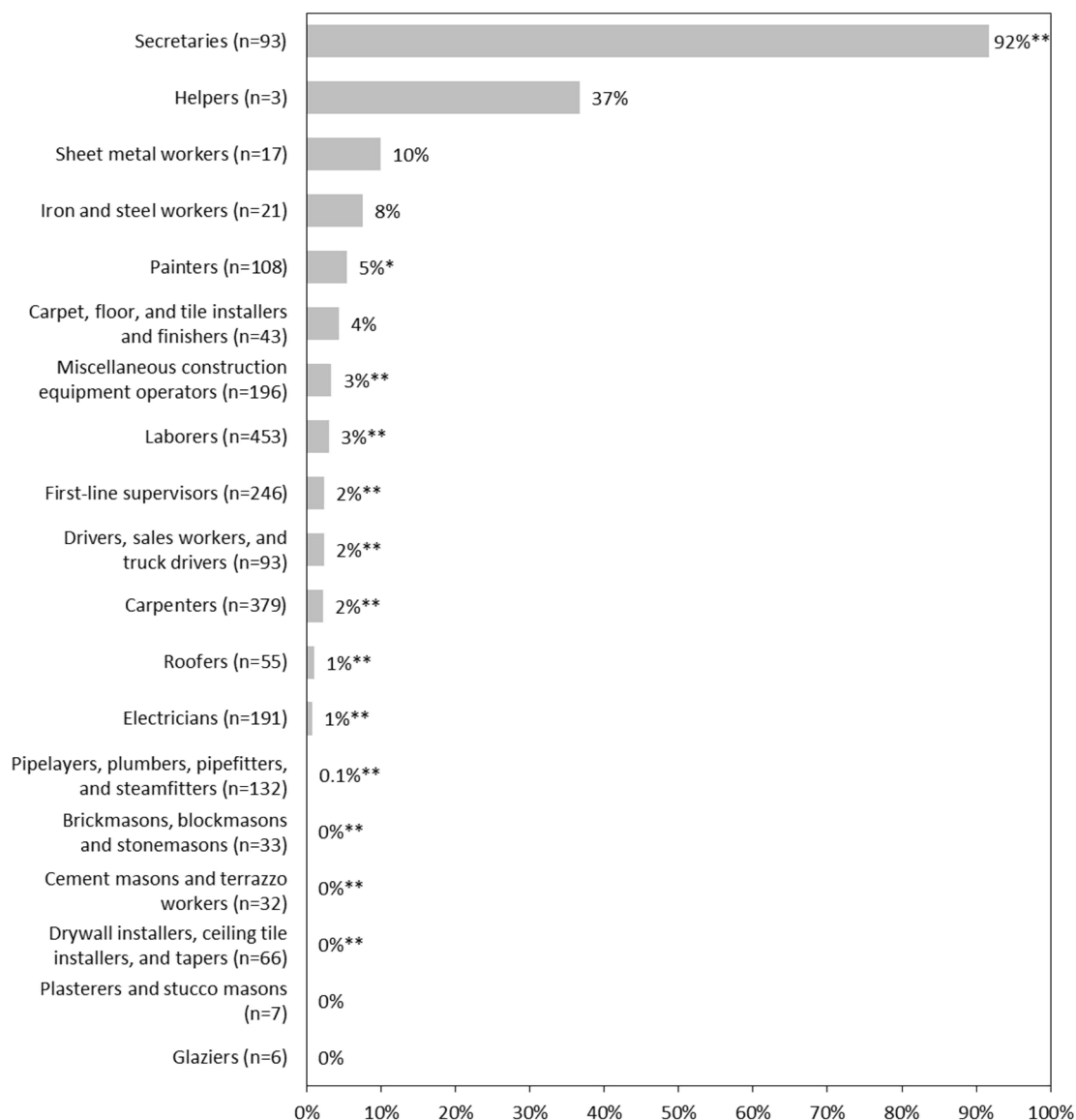
The representation of minorities among all ITD Study Area construction workers is 9% for Hispanic Americans, 3% for other race minorities, and 13% for all minorities considered together.

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 2010-2014 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure D-6 indicates that the ITD Study Area construction occupations with the highest representations of minority workers are plasterers and stucco masons; cement masons and terrazzo workers; and carpet, floor, and tile installers and finishers. The ITD Study Area construction occupations with the lowest representations of minority workers are secretaries, helpers, and glaziers.

**Figure D-7.**  
**Percent representation of women in selected construction occupations in the ITD Study Area, 2010-2014**



Notes: \*\* Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of women among all ITD Study Area construction workers is 10%.

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 2010-2014 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure D-7 indicates that the ITD Study Area construction occupations with the highest representations of women workers are secretaries, helpers, and sheet metal workers. The ITD Study Area construction occupations with the lowest representations of women workers are plasterers and stucco masons; glaziers; drywall installers, ceiling tile installers, and tapers; cement masons and terrazzo workers; and brickmasons, blockmasons, and stonemasons.

**Figure D-8.**  
**Percentage of workers who worked as a**  
**manager in the construction industry, ITD**  
**Study Area and the United States, 2010-**  
**2014**

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.

The variable for Subcontinent Asian Americans does not appear in this analysis, because there were no observations in the construction industry.

Source:

BBC Research & Consulting from 2010-2014 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/>.

ITD Study Area	Construction
<b>Race/ethnicity</b>	
Black American	2.9 %
Asian Pacific American	3.0
Hispanic American	2.7 **
Native American	9.9
Other race minority	26.8
Non-Hispanic white	8.2
<b>Gender</b>	
Women	3.3 % **
Men	8.2
<b>All individuals</b>	<b>7.7 %</b>
United States	Construction
<b>Race/ethnicity</b>	
Black American	4.4 % **
Asian Pacific American	8.8
Hispanic American	2.9 **
Native American	5.1 **
Other race minority	11.0
Non-Hispanic white	9.4
<b>Gender</b>	
Women	6.4 % **
Men	7.6
<b>All individuals</b>	<b>7.5 %</b>

Figure D-8 indicates that, compared to non-Hispanic white Americans, a smaller percentage of Hispanic Americans work as managers in the ITD Study Area construction industry. In addition, compared to men, a smaller percentage of women work as managers in the ITD Study Area construction Industry.



**Figure D-9.**  
**Percentage of workers who worked as a**  
**manager the professional services industry,**  
**ITD Study Area and the United States, 2010-**  
**2014<sup>1</sup>**

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.

Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and Other race minorities were combined into the single category of "Minority" due to limited sample size.

Source:

BBC Research & Consulting from 2010-2014 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/>.

ITD Study Area	Professional Services
<b>Race/ethnicity</b>	
Minority	0.0 %
Non-Hispanic white	3.7
<b>Gender</b>	
Women	0.0 % **
Men	4.6
<b>All individuals</b>	<b>3.5 %</b>
United States	Professional Services
<b>Race/ethnicity</b>	
Minority	2.8 % **
Non-Hispanic white	4.2
<b>Gender</b>	
Women	1.9 % **
Men	4.5
<b>All individuals</b>	<b>3.9 %</b>

Figure D-9 indicates that, compared to men, a smaller percentage of women work as managers in the ITD Study Area professional services industry.

<sup>1</sup> The estimate of 0 percent of women and minorities working in the local engineering industry who are managers indicates that no women or minorities in the survey sample reported working in the local engineering industry as a manager. The adjusted standard error for the estimate of women managers is 4.6 percent, which means that there is a 95 percent probability that the true percentage of women working in the local engineering industry who are managers is somewhere between 0 percent and 4.6 percent. The adjusted standard error for the estimate of minorities manager is 2 percent, which means that there is a 95 percent probability that the true percentage of minorities working in the local engineering industry who are managers is somewhere between 0 percent and 2 percent.

**Figure D-10.**  
**Mean annual wages,**  
**ITD Study Area and the**  
**United States, 2010-**  
**2014**

**Notes:**

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 the United States as a whole and ITD Study Area, respectively.

**Source:**

BBC Research & Consulting from 2010-2014 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/>.

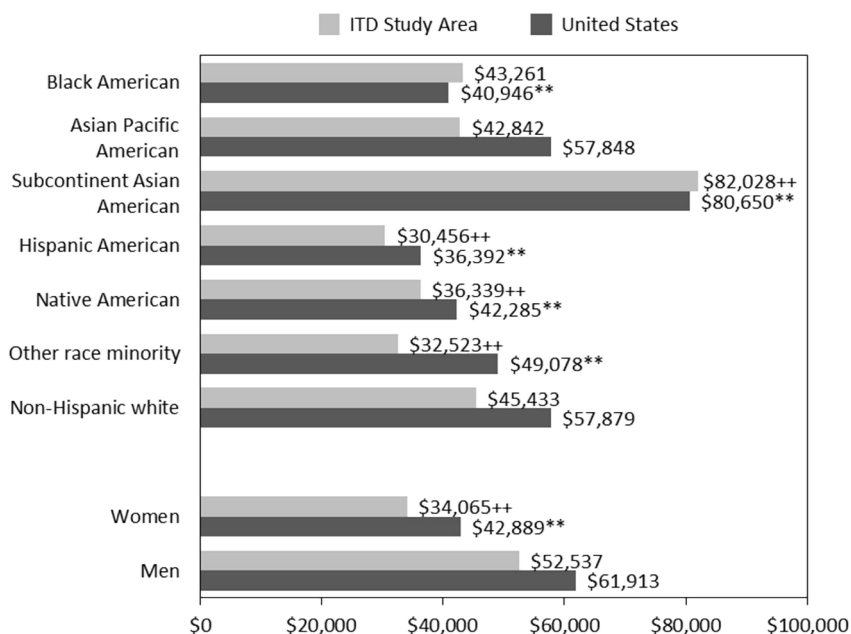


Figure D-10 indicates that, compared to non-Hispanic white Americans, Hispanic Americans, Native Americans, and other race minorities in the ITD Study Area exhibit lower mean annual wages. In addition, women in the ITD Study Area exhibit lower mean annual wages than men.

**Figure D-11.**  
**Predictors of annual wages**  
**(regression), ITD Study Area, 2010-2014**

**Notes:**

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.

**Source:**

BBC Research & Consulting from 2010-2014 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	6615.334 **
Black American	0.854 **
Asian Pacific American	1.001
Subcontinent Asian American	1.196 *
Hispanic American	0.943 **
Native American	0.891 **
Other race minority	1.050
Women	0.766 **
Less than high school education	0.861 **
Some college	1.167 **
Four-year degree	1.544 **
Advanced degree	2.275 **
Disabled	0.793 **
Military experience	0.958 **
Speaks English well	1.293 **
Age	1.057 **
Age-squared	0.999 **
Married	1.145 **
Children	1.011 **
Number of people over 65 in household	0.897 **
Public sector worker	1.127 **
Manager	1.302 **
Part time worker	0.365 **
Extraction and agriculture	0.900 **
Construction	0.926 **
Wholesale trade	1.030
Retail trade	0.865 **
Transportation, warehouse, & information	1.060 **
Professional services	1.037
Education	0.644 **
Health care	1.103 **
Other services	0.756 **
Public administration and social services	0.855 **

Figure D-11 indicates that, compared to being a non-Hispanic white American in the ITD Study Area, being Black American, Hispanic American, and Native American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.85 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man in the ITD Study Area, even after accounting for various other personal characteristics.

**Figure D-12.**  
**Predictors of annual wages**  
**(regression), United States, 2010-2014**

**Notes:**

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.

**Source:**

BBC Research & Consulting from 2010-2014 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	7846.998 **
Black American	0.865 **
Asian Pacific American	0.957 **
Subcontinent Asian American	0.960 **
Hispanic American	0.911 **
Native American	0.872 **
Other race minority	0.927 **
Women	0.786 **
Less than high school education	0.851 **
Some college	1.201 **
Four-year degree	1.667 **
Advanced degree	2.305 **
Disabled	0.795 **
Military experience	1.004 **
Speaks English well	1.335 **
Age	1.058 **
Age-squared	0.999 **
Married	1.113 **
Children	1.013 **
Number of people over 65 in household	0.910 **
Midwest	0.876 **
South	0.893 **
West	0.983 **
Public sector worker	1.120 **
Manager	1.312 **
Part time worker	0.368 **
Extraction and agriculture	0.931 **
Construction	0.919 **
Wholesale trade	0.963 **
Retail trade	0.754 **
Transportation, warehouse, & information	1.029 **
Professional services	1.056 **
Education	0.661 **
Health care	1.008 **
Other services	0.708 **
Public administration and social services	0.829 **

Figure D-12 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 \$0.87 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 D-13.**  
**Home Ownership Rates, ITD**  
**Study Area and the United**  
**States, 2010-2014**

Note:

The sample universe is all households.

**\*\***, **++** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for the United States as a whole and ITD Study Area, respectively.

Source:

BBC Research & Consulting from 2010-2014 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/>.

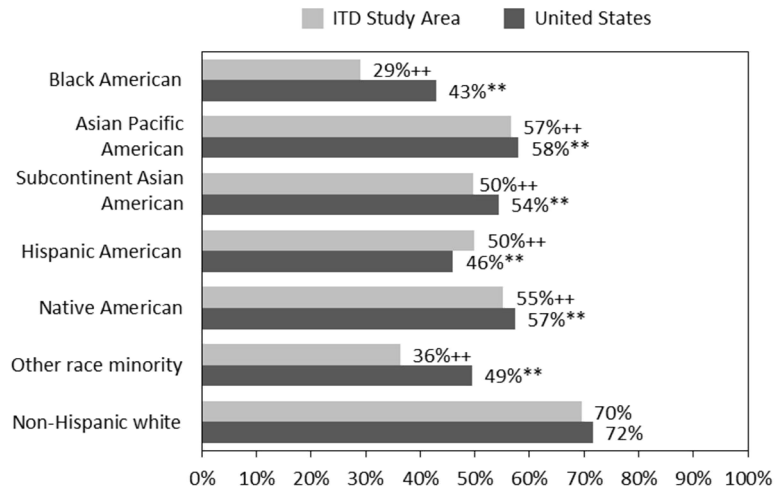


Figure D-13 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and other race minorities in the ITD Study Area own homes.

**Figure D-14.**  
**Median home values,**  
**ITD Study Area and the**  
**United States, 2010-2014**

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2010-2014 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/>.

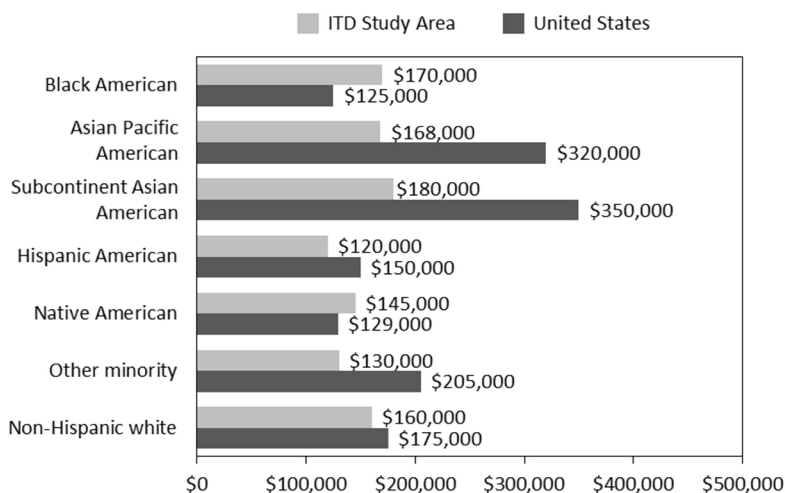


Figure D-14 indicates that Hispanic American, Native American, and other race minority homeowners in the ITD Study Area own homes of lower median values than non-Hispanic white American homeowners.

**Figure D-15.**  
**Denial rates of**  
**conventional purchase**  
**loans for high-income**  
**households, ITD Study**  
**Area and the United**  
**States, 2007 and 2014**

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 2014. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.

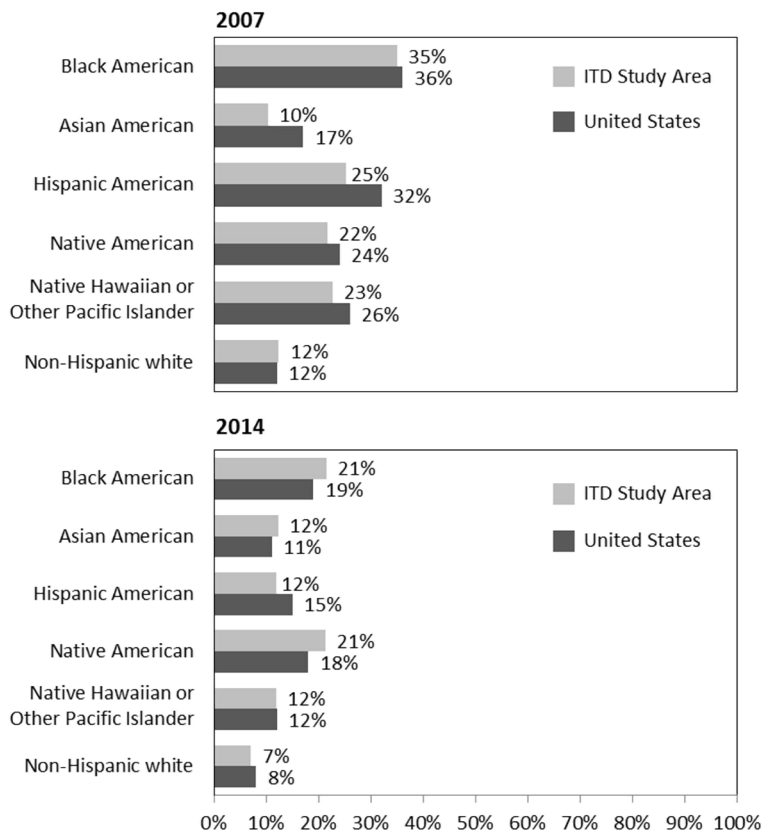


Figure D-15 indicates that in 2014 Black Americans, Asian Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in the ITD Study Area were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.

**Figure D-16.**  
**Percent of conventional**  
**home purchase loans that**  
**were subprime, ITD Study**  
**Area and the United**  
**States, 2007 and 2014**

Source:

FFIEC HMDA data 2007 and 2014. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.

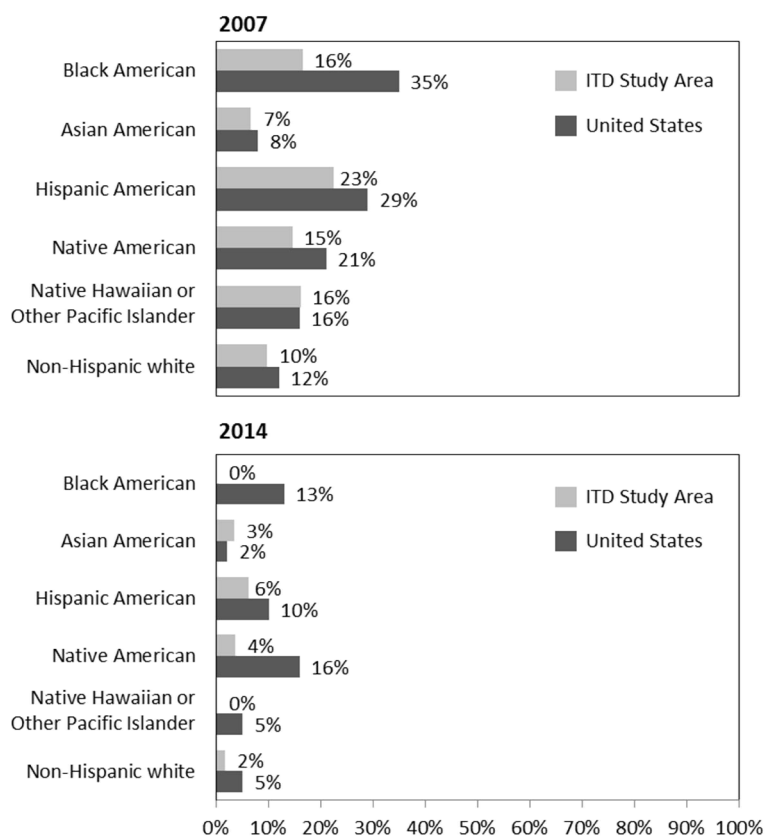


Figure D-16 indicates that in 2014 Asian Americans, Hispanic Americans, and Native Americans, in the ITD Study Area were awarded conventional home purchase loans that were subprime at a greater rate than non-Hispanic white Americans.



**Figure D-17.**  
**Business loan denial**  
**rates, Mountain**  
**Region 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 Mountain Region consists of Montana, Wyoming, Idaho, Nevada, Utah, Colorado, Arizona, and New Mexico.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

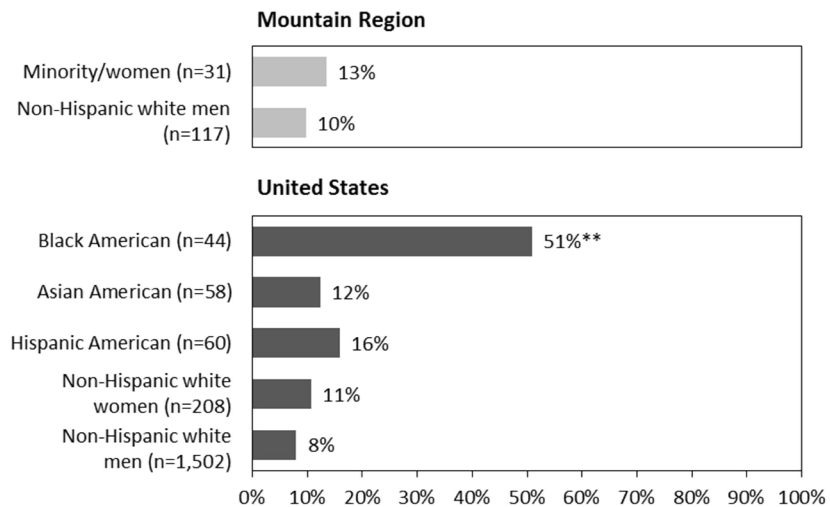


Figure D-17 indicates that in 2003 Black American-owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men.

**Figure D-18.**  
**Businesses that did not**  
**apply for loans due to**  
**fear of denial, Mountain**  
**Region 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 Mountain Region consists of Montana, Wyoming, Idaho, Nevada, Utah, Colorado, Arizona, and New Mexico.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

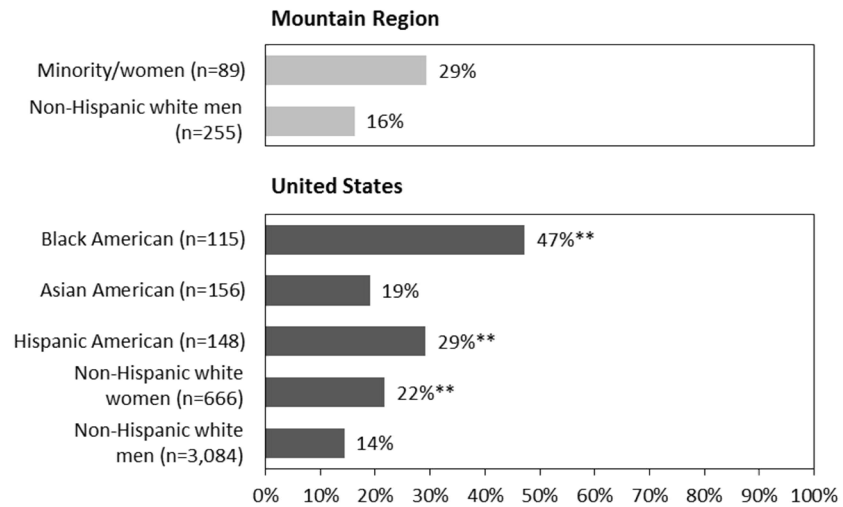


Figure D-18 indicates that in 2003 Black American-, Hispanic American-, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

**Figure D-19.**  
**Mean values of approved**  
**business loans, Mountain**  
**Region 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 Mountain Region, respectively.

The Mountain Region consists of Montana, Wyoming, Idaho, Nevada, Utah, Colorado, Arizona, and New Mexico.

Source:

BBC Research & Consulting from 2003  
 Survey of Small Business Finance.

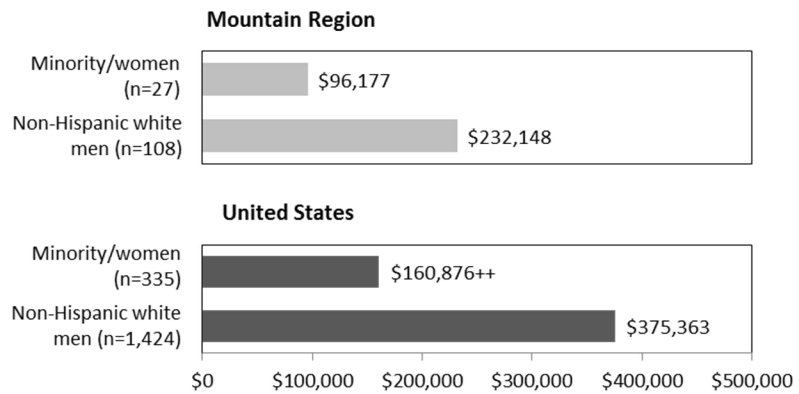


Figure D-19 indicates that in 2003 minority- and woman-owned businesses in the United States who received business loans were approved for loans that were worth less than those for which businesses owned by non-Hispanic white men were approved.

**Figure D-20.**  
**Self-employment rates in the**  
**Construction industry, ITD Study Area**  
**and the United States, 2000**

Notes:

\*\* 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.

Subcontinent Asian American and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

Source:

BBC Research & Consulting from 2010-2014 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/>.

ITD Study Area	Construction
<b>Race/ethnicity</b>	
Black American	26.2 %
Asian Pacific American	27.9
Hispanic American	9.3 **
Native American	16.1
Other minority group	35.3
Non-Hispanic white	25.9
<b>Gender</b>	
Women	22.6 %
Men	25.2
<b>All individuals</b>	<b>25.0 %</b>
United States	Construction
<b>Race/ethnicity</b>	
Black American	15.2 % **
Asian Pacific American	21.3 **
Hispanic American	12.2 **
Native American	19.2 **
Other minority group	22.2 *
Non-Hispanic white	25.4
<b>Gender</b>	
Women	16.8 % **
Men	23.3
<b>All individuals</b>	<b>22.6 %</b>

Figure D-20 indicates that in 2000 Hispanic Americans working in the ITD Study Area construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans.

**Figure D-21.**  
**Self-employment rates in the**  
**professional services industry, ITD**  
**Study Area and the United States,**  
**2000**

Notes:

\*\* 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.

Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and Other race minorities were combined into the single category of "Minority" due to limited sample size.

Source:

BBC Research & Consulting from 2010-2014 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/>.

ITD Study Area	Professional Services
<b>Race/ethnicity</b>	
Minority	2.2 %
Non-Hispanic white	11.3
<b>Gender</b>	
Women	5.5 % **
Men	13.2
<b>All individuals</b>	<b>10.8 %</b>
<b>United States</b>	
<b>Professional Services</b>	
<b>Race/ethnicity</b>	
Minority	7.8 % **
Non-Hispanic white	14.2
<b>Gender</b>	
Women	7.5 % **
Men	15.1
<b>All individuals</b>	<b>13.2 %</b>

Figure D-20 indicates that in 2000 women working in the ITD Study Area professional services industry exhibited lower rates of self-employment than men.

**Figure D-22.**  
**Self-employment rates in the**  
**Construction industry, ITD Study Area**  
**and the United States, 2010-2014**

Notes:

\*\* 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.

The variable for Subcontinent Asian Americans does not appear in this analysis, because there were no observations in the construction industry.

Source:

BBC Research & Consulting from 2010-2014 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/>.

ITD Study Area	Construction
<b>Race/ethnicity</b>	
Black American	5.5 %
Asian Pacific American	21.5
Hispanic American	12.2 **
Native American	29.4
Other race minority	64.8
Non-Hispanic white	26.1
<b>Gender</b>	
Women	21.8 %
Men	25.0
<b>All individuals</b>	<b>24.6 %</b>
<b>United States</b>	
<b>Construction</b>	
<b>Race/ethnicity</b>	
Black American	18.4 % **
Asian Pacific American	23.6 **
Hispanic American	17.8 **
Native American	18.5 **
Other minority group	24.1 **
Non-Hispanic white	26.8
<b>Gender</b>	
Women	16.3 % **
Men	24.6
<b>All individuals</b>	<b>23.9 %</b>

Figure D-22 indicates that Hispanic Americans working in the ITD Study Area construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans.

**Figure D-23.**  
**Self-employment rates in the**  
**professional services industry, ITD**  
**Study Area and the United States,**  
**2010-2014**

Notes:

\*\* 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.

Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and Other race minorities were combined into the single category of "Minority" due to limited sample size.

Source:

BBC Research & Consulting from 2010-2014 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/>.

ITD Study Area	Professional Services
<b>Race/ethnicity</b>	
Minority	6.7 %
Non-Hispanic white	13.4
<b>Gender</b>	
Women	6.4 % **
Men	15.1
<b>All individuals</b>	<b>13.0 %</b>
United States	Professional Services
<b>Race/ethnicity</b>	
Minority	8.3 % **
Non-Hispanic white	13.0
<b>Gender</b>	
Women	7.4 % **
Men	13.6
<b>All individuals</b>	<b>12.0 %</b>

Figure D-23 indicates that women working in the ITD Study Area professional services industry exhibited lower rates of self-employment than men.

**Figure D-24.**  
**Predictors of business ownership in**  
**construction (regression), ITD Study Area,**  
**2010-2014**

Notes:

The regression included 3,031 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.

The variables for Black American was dropped from this analysis, because the variable perfectly predicted business ownership.

The variable for Subcontinent Asian American was not included in this analysis, because there were no observations.

Source:

BBC Research & Consulting from 2010-2014 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	-3.1077 **
Age	0.0642 **
Age-squared	-0.0005 **
Married	0.2409 **
Disabled	-0.1586
Number of children in household	0.0317
Number of people over 65 in household	0.1413
Owns home	0.0395
Home value (\$000s)	0.0009 **
Monthly mortgage payment (\$000s)	0.0096
Interest and dividend income (\$000s)	0.0119
Income of spouse or partner (\$000s)	0.0014
Speaks English well	0.2695
Less than high school education	-0.3187 **
Some college	0.0725
Four-year degree	0.1332
Advanced degree	-0.1208
Asian Pacific American	-0.0246
Hispanic American	-0.1068
Native American	0.3382
Other race minority	1.0836 *
Women	-0.2694 **

Figure D-24 indicates that, compared to being a man in the ITD Study Area, being a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.



**Figure D-25.**  
**Disparities in business ownership rates for ITD Study Area construction workers, 2010-2014**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	24.5%	32.3%	76

Notes: 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 2010-2014 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 D-25 indicates that non-Hispanic white women own construction businesses in the ITD Study Area at a rate that is 76 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

**Figure D-26.**  
**Predictors of business ownership in**  
**professional services (regression), ITD**  
**Study Area, 2010-2014**

Notes:

The regression included 425 observations.

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

Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and Other race minorities were combined into the single category of "Minority" due to limited 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.

Less than high school and Speaks English well were dropped from the model, because those variables perfectly predicted business ownership.

Source:

BBC Research & Consulting from 2010-2014 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	-2.2528 **
Age	0.0267
Age-squared	-0.0001
Married	0.0313
Disabled	-0.4031
Number of children in household	0.0498
Number of people over 65 in household	0.4236 **
Owns home	-0.2251
Home value (\$000s)	0.0004
Monthly mortgage payment (\$000s)	-0.1009
Interest and dividend income (\$000s)	0.0017
Income of spouse or partner (\$000s)	-0.0014
Some college	0.2356
Four-year degree	0.3985
Advanced degree	0.3690
Minority	-0.2737
Women	-0.3343

Figure D-26 indicates that minorities and women do not exhibit a significant difference in the likelihood of owning a professional services business.

**Figure D-27.**  
**Rates of business**  
**closure, expansion, and**  
**contraction, Idaho and**  
**the United States, 2002-**  
**2006**

**Notes:**

Data include only non-publicly held businesses.

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

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

**Source:**

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

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

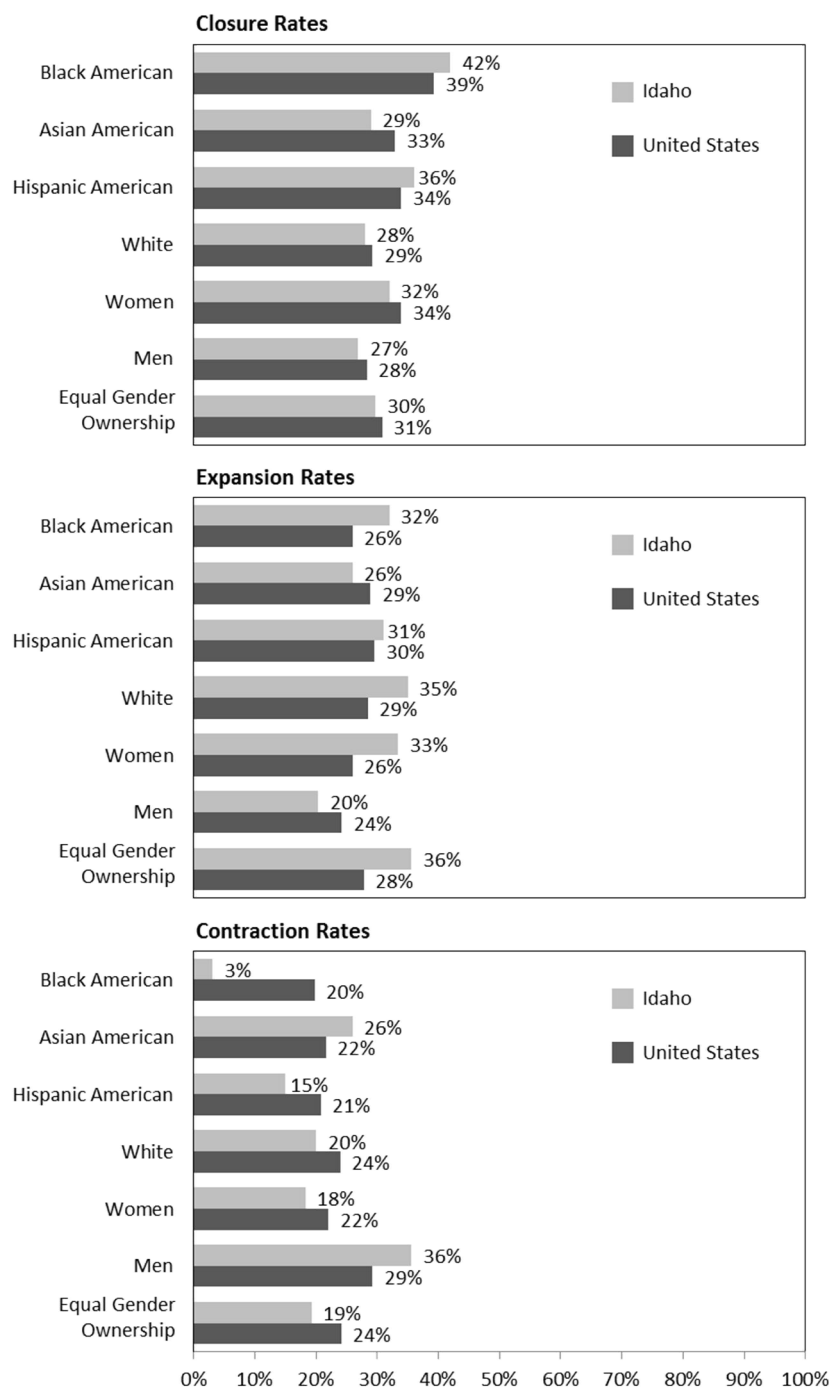


Figure D-27 indicates that Black American-, Asian American-, and Hispanic American-owned businesses in Idaho show higher closure rates and lower expansion rates than white American-owned businesses. Woman-owned businesses in Idaho show higher closure rates than businesses owned by men. Asian American-owned businesses in Idaho show higher contraction rates than white American-owned businesses.

**Figure D-28.**  
**Mean annual business**  
**receipts (in thousands),**  
**Idaho 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.

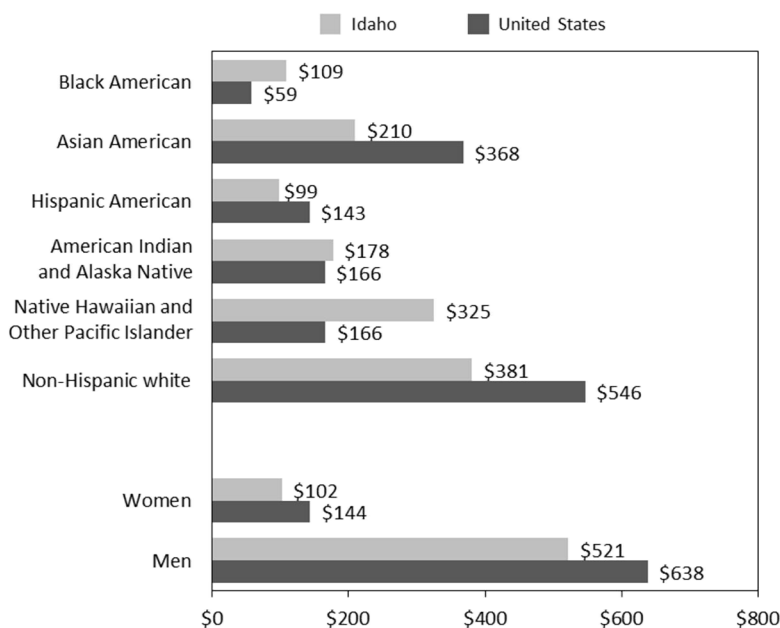


Figure D-28 indicates that in 2012 Black American-; Asian American-; Hispanic American-; American Indian and Alaskan Native-; and Native Hawaiian and Other Pacific Islander-owned businesses in Idaho showed lower mean annual business receipts than non-Hispanic white American-owned businesses. In addition, woman-owned businesses in Idaho showed lower mean annual business receipts than businesses owned by men.

**Figure D-29.**  
**Mean annual business owner**  
**earnings, ITD Study Area and**  
**the United States, 2010-2014**

**Notes:**

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars.

**\*\***, **++** 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 ITD Study Area, respectively.

Subcontinent Asian American and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

**Source:**

BBC Research & Consulting from 2010-2014 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/>.

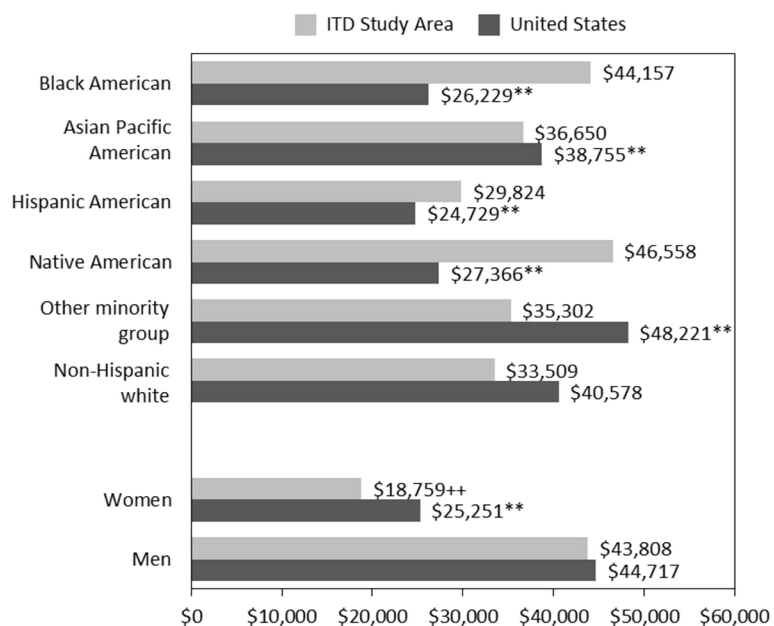


Figure D-29 indicates that the owners of woman-owned businesses in the ITD Study Area earn less on average than the owners of businesses owned by men.

**Figure D-30.**  
**Predictors of business owner earnings**  
**(regression), ITD Study Area 2010-2014**

**Notes:**

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 2014 dollars.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, 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.

Subcontinent Asian American and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

**Source:**

BBC Research & Consulting from 2010-2014 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	322.501 **
Age	1.196 **
Age-squared	0.998 **
Married	1.153 *
Speaks English well	0.723
Disabled	0.473 **
Less than high school	0.770 *
Some college	1.217 **
Four-year degree	1.189
Advanced degree	1.748 **
Black American	2.814 *
Asian Pacific American	1.283
Hispanic American	0.920
Native American	0.859
Other minority group	0.475
Women	0.393 **

Figure D-30 indicates that, compared to being the owner of a business owned by men in the ITD Study Area, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

**Figure D-31.  
Predictors of business owner earnings  
(regression), United States, 2010-2014**

**Notes:**

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 2014 dollars.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, 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.

Subcontinent Asian American and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

**Source:**

BBC Research & Consulting from 2010-2014 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	429.642 **
Age	1.156 **
Age-squared	0.999 **
Married	1.253 **
Speaks English well	1.172 **
Disabled	0.584 **
Less than high school	0.751 **
Some college	1.060 **
Four-year degree	1.327 **
Advanced degree	2.001 **
Black American	0.835 **
Asian Pacific American	1.119 **
Hispanic American	1.058 **
Native American	0.687 **
Other minority group	1.155 **
Women	0.533 **

Figure D-31 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 E.**

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## **Qualitative Information**



# APPENDIX E.

## Qualitative Information from Personal Interviews, Public Hearings, and Other Meetings

Appendix E presents qualitative information that the study team collected through in-depth personal interviews, public hearings, written testimony, telephone surveys, and focus groups conducted as part of the disparity study. Appendix E is presented in 12 parts:

- **A. Introduction and Background** describes with whom the study team met to collect the information summarized in Appendix E and how that information was collected. *(page 2)*
- **B. Background on the Organization and Transportation Industry in Idaho** summarizes information about how businesses become established and how companies change over time. Part B also presents information about the effects of marketplace conditions and business owners' experiences pursuing public and private sector work. *(page 3)*
- **C. Competitive Strategies** summarizes information about how firms attempt to market themselves and what they believe it takes to be competitive in their industry. *(page 18)*
- **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 23)*
- **E. Potential Barriers to Doing Business with ITD** presents information about potential barriers to doing work for ITD and other public agencies. *(page 29)*
- **F. Idaho State and Local Agencies** presents information about working with or attempting to work with agencies in Idaho. *(page 47)*
- **G. Any 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 environments for minorities and women. *(page 54)*
- **H. Additional Information Regarding any Race-/Ethnicity- or Gender-based Discrimination** includes additional information concerning potential race-/ethnicity- or gender-based discrimination. Topics include stereotypical attitudes about minorities and women and allegations of a "good ol' boy" network that adversely affect opportunities for minority- and woman-owned businesses. *(page 63)*

- **I. Insights Regarding Business Assistance Programs, Changes in Contracting Processes, or Any Other Neutral Measures** presents information about business assistance programs and efforts to open contracting processes. *(page 68)*
- **J. Insights Regarding the Federal DBE Program or Any Other Race-/Gender- Conscious Program** presents information about the Federal DBE Program. Interviewees discussed benefits of the program, program outreach, and program monitoring and enforcement. *(page 81)*
- **K. MBE and DBE Certification** presents information about the MBE and DBE certification process. It also presents information about advantages and disadvantages that subcontractors experience because of their certification as a DBE, MBE, WBE, or their experiences with abuse of the program. *(page 84)*
- **L. Any Other Insights and Recommendations Concerning Idaho Contracting or MBE/DBE Programs** presents other comments and insights regarding contracting in Idaho and with Idaho agencies. *(page 92)*

## A. Introduction and Background

BBC Research & Consulting conducted public hearings and in-depth personal interviews between August and October, 2016. During the interviews and hearings, participants had opportunities to discuss their experiences working in the local transportation contracting industry; experiences working for Idaho agencies; experiences with potential barriers and/or discrimination based on race/ethnicity/gender; and other matters relevant to doing business in the Idaho marketplace. Throughout the study process, ITD and the BBC study team encouraged business owners to submit written testimony and comments concerning these matters.

**Information from public hearings.** As part of the disparity study, the study team scheduled three public hearings within the state of Idaho. The public hearings were conducted in:

- Coeur d’Alene (August 25, 2016; comments identified with the prefix “CDA”);
- Pocatello (August 30, 2016; comments identified with the prefix “POC”); and
- Boise (August 29, 2016).<sup>1</sup>

Public hearing participants represented businesses and organizations throughout the state. The numbering of comments from a particular public hearing (e.g., CDA #1, CDA #2) indicates the order in which participants gave oral testimony at the hearing. For simplicity, Appendix E refers to both public hearing participants and those providing written testimony as “interviewees” in the same way as individuals interviewed at their businesses. For some of these individuals, race/ethnicity and/or gender are unknown.

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<sup>1</sup> Note that no attendees submitted verbal or written testimony at the Boise public hearing.

**Written testimony.** ITD and the study team encouraged business owners to submit written testimony to the study team. Business owners who were able to attend the public hearings were able to submit testimony by filling out a form or sending their comments via email to the study team. Those who could not attend public meetings could also submit comments via email, which was advertised in public hearing documents available online after the meetings. Testimony and/or comments were submitted by 101 individuals. Those comments appear throughout Appendix E and are identified by the prefix “WT.”

**Complaint log.** The study team examined ITD’s complaint log for the study period in order to examine information related to the interview topics. Only complaints that intersected with the study’s topics are included in Appendix E, identified by the prefix “COM.”

**In-depth personal interviews.** The study team conducted in-depth personal interviews with 23 Idaho-based businesses and two associations between August and October, 2016. Most of the interviews were conducted with the owner, president, chief executive officer, or other officer of the business. Interviewees included individuals representing construction businesses, engineering businesses, suppliers, and other services businesses. Interview participants were obtained primarily from the agencies’ contractor, subcontractor, and vendor data.

The interviews included discussions about interviewees’ perceptions and experiences regarding the local transportation contracting industry; Idaho agencies contracting policies and practices; any allegations of unfair treatment of minorities and/or women; and experiences with certification programs (e.g., the DBE Program and the MBE Program).

Of the businesses interviewed, some work exclusively or primarily as prime contractors or subcontractors, and some work as both. Some businesses were MBEs, some were WBEs, and some were non-Hispanic white male-owned. Some businesses were DBE-certified and/or ESB-certified. All of the businesses conducted work in Idaho. All interviewees are identified in Appendix E by random interviewee numbers (i.e., #1, #2, #3, etc.).

Because interviewees were often quite specific in their comments, the study team reports interviewee comments generally in many cases to minimize the chance that interviewees or other individuals or businesses mentioned during the interviews could be identified. The study team reports the gender of each business owner and whether each interviewee represents a DBE-certified business.

## **B. Background on the Organization and Industry**

Part B summarizes information related to:

- How businesses became established (*page 4*);
- Ability to perform different types and sizes of contracts (*page 6*);
- Experiences pursuing public- and private-sector work (*page 7*);

- Challenges for small business success (*page 11*); and
- Marketplace conditions (*page 13*).

**How businesses became established.** Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

**Many firm owners worked in the industry before starting their own businesses.** [e.g. #13, #22, #26] Examples from the in-depth interviews include the following:

- A female owner of a DBE-certified firm said that she worked for a large consulting firm before deciding to start her own business. She decided to start her own firm after she had given a specialized solution to a client and the firm was not interested. She said, “It was just something they weren’t comfortable with... I decided to just go ahead and work for myself, because I figured there was no reason not to try. That was 16 years ago. I’m still in business.” [#2]
- A male representative of a DBE-certified, woman-owned firm, when asked how the firm was formed, said the owner was already doing similar work for other companies in connection to the Native American Lands Environmental Mitigation Program. He said, “[The program was] picked up by the Army Corps of Engineers to administer it. [The Corps] suggested to [the owner] that it would be a good idea if ‘you just started your own company, you know this better than anybody.’ She did, and we’ve had contracts with the Corps ever since.” The firm was formed in 2005. [#3]
- The male owner of an uncertified firm owns a trucking company that has provided service to the Northwest private sector for about 11 years. After leaving a large public agency (where he also received his CDL) and working for other trucking companies, he decided to go into business for himself. [#23]
- A female owner of a DBE-certified firm started the business in 2013. She and her husband are the only employees, and they both worked in the consulting engineering field for several years prior to starting the business. She explained that while her background was more on the environmental side, his was on the civil side. She said, “We decided that after so many of years of doing this [and] working for other people, that we would give it a shot and see if we could [do it], between the two of us.” [#21]
- The male owner of an uncertified firm said he runs a framing, dry wall, painting, and roofing company which was started in Idaho in 1999. He started in landscaping and began to see the disadvantages faced by minorities. He ended up combining roofing, framing, dry walling, and other skills he had gained and opened his firm. He said, “[My main purpose is] being a spokesperson and to provide opportunities for minorities and their families.” [#19]
- The male owner of a DBE-certified firm said he started his business by harvesting, transporting, and selling firewood in Pocatello and some of the surrounding cities. He added that in 1988, he purchased 10 acres of land and set up his office. He then acquired additional equipment and was awarded a few forest service contracts clearing timber for roads. He explained that since then, it has expanded from roads and campgrounds to bridges,

demolition, water and sewer systems, heavy transportation, commercial buildings and remodels, design-builds and construction management. [#20]

**Many interviewees indicated that relationships familiarized them to working in the industry and were instrumental in business establishment.** [e.g. #15, #18, #24, #25, #26] For example:

- The non-Hispanic white male owner of a small business, when asked about the formation of the firm, said that the company was founded by his stepfather in 1982 and was split into two corporations in 2015 to allow him to operate in a different region of the state. He noted that the two companies have similar names and continue to work cooperatively as separate entities. [#4]
- The female representative of a DBE-certified firm said the firm was started by her mother over 30 years ago. At the time, her mother was a single mother with six children and a seventh-grade education. She said, “She’s my mom, my hero. She has built this business into an amazing legacy. She has expanded her education immensely, and has worked hard to build this business.” Her mother (the founder) was working in construction and saw a need. She started out with two signs and a car, and then the business grew from there. [#17]
- The female owner of an uncertified firm stated that the parent corporation was formed 10 years ago. Approximately 10 years ago, she began working with a company that was eventually purchased by the firm’s parent corporation. She is a landscape architect and project manager and started at the firm in its current form in 2011. At the time, the company was formed by her husband. She became full owner after her husband died earlier this year. She is now the sole owner and the company has nine employees. [#6]
- A male owner of a DBE-certified firm, when asked about his personal background at the firm, said he owns the firm in partnership with his brother. Both brothers worked at the firm under the founding owner. Following the owner’s death, they purchased the company and have been running it since. He estimated that they purchased the company in 1995. [#1]
- A male owner of a DBE-certified firm, when asked how he started his company, said he had an opportunity to buy a truck from someone he worked with in North Dakota. He said, “It was just the right time. The window just opened up for me. Things were slowing down in North Dakota...the opportunity arose for me to buy a truck... I don’t want this opportunity to pass me up. It’s been life changing. It’s been the most amount of money I’ve made in my life in the shortest amount of time. It’s like the Publishers Clearinghouse for me.” [#7]
- The male and female co-owners of a non-Hispanic white firm, when asked about how they started the company, said they moved to Idaho to purchase the company from a personal acquaintance. The owner said, “We were interested in staying in one place, not traveling anymore.” The firm was originally a woman-owned, family company founded 45 years ago. [#9]

**One interviewee indicated that the firm has been around for a long time and has seen changes in industry.** A male representative of a non-Hispanic white male owned company, when asked about the company's history, said, "The business started more than 100 years ago and it just slowly grew. It originally was actually a hide and fur company... If you think of the early 1900s, Montana, Washington, Idaho, all that, fur was where the money was." He explained that the company evolved into steel processing and recycling services after the World Wars and dropped its hide and fur line within the last decade. [#8]

**Ability to perform different types and size of contracts.** Interviewees discussed changes over time in the type of work their company has performed, the amount of travel required for work, and the transitions to different types of contracts. For example:

- A female owner of a DBE-certified firm, when asked about the size of contracts she performs, said her contracts range from several thousand dollars to several hundred thousand dollars. She stated, "We don't even shop for [contracts that are] less than \$4,000...Those larger contracts are, certainly since 2008-9, are hard to come by." [#2]
- A male representative of a DBE-certified, woman-owned firm, when asked about the size of contracts the company performs, indicated that the company works on multi-million dollar projects. He stated, "We have two NEPA contracts, one with the Forest Service and one with the Parks Service, and both of those are worth up to 20 million." The firm has current projects in Alaska, New Mexico, Texas, Maryland, Virginia, New York and Guam. He added that some work takes them to unexpected locations. He said, "A lot of these places are really remote, especially the ones in Alaska." [#3]
- A female representative of a non-Hispanic white male-owned business, when asked about the size of contracts the company performs, stated that their projects are generally large. She said, "[Our contracts are] typically between one and five million... [The five million dollar contract is the company's] biggest project to date." She added that the company performs smaller contracts in addition to the large ones. When asked how far away the firm would seek business, she indicated that their range is about a two-hour drive to include north and north-central Idaho, western Montana and eastern Washington. [#5]
- A male representative of a non-Hispanic white male owned company said the company has approximately 44 sites throughout the northwest, including locations in Idaho, Washington and Utah, and can accommodate large and small orders. When asked about sales at his branch, he noted that a \$10,000 sale of materials is considered large and happens about once a month. He stated, "Some [sales] would get upwards of that, usually they're pretty small. I would say 90% of them are under [\$10,000]." [#8]
- The female owner of a DBE-certified firm, when asked about sizes of contracts they bid or propose on, stated that the low range is \$25,000 and the high range is around \$1.5 million. She added that the majority of their projects are conducted out-of-state in locations like California, Nevada, and Oregon. [#15]

- The female owner of an uncertified firm, when asked what size contracts the company bids on or performs, said, “We can bond up to \$1 million, so that’s our limit.” She added that larger projects can be bid through two joint venture companies. Her firm can do work in Washington, Idaho, Montana and Alaska and is prepared to do work in Colorado and Utah, but has not yet performed work in either state. [#6]
- The male representative of a non-Hispanic white male-owned firm said he provides products, but uses material from supply houses in order to provide their electrical services. They do electrical installation in grocery stores, schools, businesses and so forth. Contracts range from \$60,000 - \$9 million. The firm works primarily within the Idaho Falls market area. [#16]
- The female representative of a DBE-certified firm explained that their current contracts range goes up to \$200,000. In the past, their contracts went up to \$1.5 million, but the firm restructured to make the business more profitable. She went on to add that Southeast Idaho is the primary focus of the business, but they also do work throughout Idaho and Wyoming. [#17]
- A female owner of a DBE-certified firm, when asked what size contracts the firm bids on, stated that the largest has been somewhere between \$200,000 - \$500,000. She said, “We focus on what people would consider smaller projects.” [#21]
- The male owner of a DBE-certified firm, when asked how far he travels for projects, stated that he has traveled up to 300 miles for work. More recently, however, his firm has become more localized. [#27]
- A male owner of a DBE-certified firm, when asked about the size of contracts they perform, said that most of the company’s projects are small but he believes those can lead to bigger jobs. He said, “[Those will lead to projects] that you can make real money on.” [#1]
- The male and female co-owners of a non-Hispanic white firm, when asked about the sizes of contracts the firm bids on or performs, indicated that they would not limit themselves in terms of contract size, and instead would increase personnel to accommodate a project. The owner said, “[We] don’t think that we would have a cap on [a bid] because generally people will come to where the work is...Then if you do achieve a big job or you’re rewarded a big job, then you just advertise that you need temporary help and [are] willing to pay for it.” The firm currently employs two full-time employees and has two contractors. [#9]

**Experiences pursuing public- and private-sector work.** Interviewees discussed their experiences with the pursuit of public- and private-sector work.

- A female representative of a non-Hispanic white male-owned business, when asked about differences getting work in the public versus private sector, indicated that they work about evenly in both sectors. She explained that the two market sectors tend to balance each other. She added, “Where in public work, it’s just steady; they always have a project that needs to get done. There [are] federal grants and state grants that are always coming out. So you may

not have the boom of money that you would get when the housing market is going cuckoo, but you have steady money.” [#5]

- A male representative of a non-Hispanic white male owned company explained that his customers include cities, counties, highway districts, Forest Service, and fabrication shops, among other types. He said, “If they can purchase it ... we’ll sell it to them.” [#8]
- The male and female co-owners of a non-Hispanic white firm said they have done limited public sector work. For those projects, they were contacted directly by a local school. They said they learn about other public sector projects through newspaper articles and contractors. The majority of their work is in the private sector. [#9]
- A female representative of a non-Hispanic white male-owned firm indicated that there are substantial differences between working in the public sector versus the private sector, explaining that public sector work tends to be more complicated. She said, “With our private-sector work, we know the requirements of the customer going in, because we have worked with them before... [But] with public-sector work, the requirements can vary from job to job.” [#14]
- The female owner of an uncertified firm said, “Our business has always been private sector, mostly word-of-mouth and then just working for private developers doing anything from a subdivision to a mixed-use development. We’ve done a little bit of public works stuff but not a lot.” She added that the firm is trying to pursue opportunities under its SBA 8a certification and will see changes in their mix of public and private work. [#6]
- The male representative of a non-Hispanic white male-owned firm, when asked about the difference between private sector jobs compared with public sector jobs, said the only real difference is that you need a public works license for public jobs. He said, “The majority of the firm’s work is private with a 70/30 or 80/20 split.” He added that public sector work is much more stringent and cumbersome for the contractor. However, he also said that lax working conditions in the private sector can lead to a bad working relationship. He said that with government work, often times the specifications add cost but no benefit. He explained, “With our business, if we submit the lowest bid then we get the work, if we don’t submit the lowest bid, we usually don’t get the work.” He noted that there have been times in the private sector when they do not have the lowest bid, but still get the job because primes or owners prefer their company’s work. [#16]
- The female representative of a DBE-certified firm claimed private and public sector jobs are vastly different. With private sector jobs, a simple agreement is signed and a PO issued, then work is billed against the PO. With public contracts, especially Federal Highways contracts, it is much more detailed and complicated. She estimated that about 30 percent of their current work load is private and about 70 percent is public. [#17]
- The male representative of a DBE-certified firm, when asked about the differences in private and public sector work, said the work itself is pretty much the same. He added that the major difference between private sector and public sector jobs is the cost of materials, because public sector contracts typically require a specific seed mix. [#18]



- A female owner of a DBE-certified firm stated that she performs approximately 70 percent private and 30 percent public projects. She also indicated that the proportion may fluctuate depending on if they are working with the Forest Service. [#21]
- A male representative of an uncertified female owned firm stated that they primarily work in the private field, and that they have not had many opportunities for public sector work. He said, “We’ve never had the opportunity to do public, or just... I guess we’ve never [had a] contract with any public agencies.” [#24]
- The male owner of a DBE-certified firm stated that he mainly performs private sector work; private sector work is about 70% of his business. [#26]
- A male representative of construction trade association, when asked if the member firms receive mostly public or private work, stated that it depends on the industry. He explained, “Most of our members do both. When you get to the highway side, it’s a little more restrictive. I would say that on the building side is probably 80 percent private funded and 20 percent public funded. And then the highway side is the opposite... But the same guys who are building roads for ITD will also do roads for a new subdivision, will do sewer and gutter for a commercial project.” [#25]

**Some interviewees stated their preferences for and the advantages to working in the private sector rather than the public sector.** For example:

- A male representative of a DBE-certified, woman-owned firm estimated that 5 percent of the company’s work is from private sector and non-profit clients, and 95 percent is from public sector, most of which are federal government agencies. He explained, “Commercial [projects] are usually easier to do... Because they have less regulations you have to follow. You still have to follow all the environmental rules, and all the federal laws and regulation, but when you work for the Air Force, or the Department of Energy, they add additional requirements.” [#3]
- A female representative of a non-Hispanic white male-owned business, when asked about differences working in the public versus private sector, responded that public sector projects have more regulations and paperwork requirements. She said, “In the private sector, oftentimes, you're building a subdivision. You have to build it to city standards, but they don't necessarily have an inspector out there every day watching every single move you make. Your pipe gets tested and then if it passes it's great and everything moves on. The levels of the rules involved are less; the paperwork, the amount of paperwork and hoops you have to jump through on a municipal project are much higher.” [#5]
- The male owner of an uncertified firm, when asked about the proportion of work coming from the public and the private sectors, said “A lot of my business is private work, not public, because a lot of the time my firm is not given the chance to come onto a project.” He also mentioned that his drilling company works with the public sector and his construction companies focus on private contracts. In explaining his desire to stay away from public work, he said, “The public sector is harder, because you have to pay more on insurance and workman’s comp, whereas with private just showing proof is enough. In the public sector,

[there is] a lot of check withholding that a lot of minorities can't afford, and a lot of small businesses won't work with public because of the payment issues. It's easier to get private work than public work." [#19]

- A female owner of a DBE-certified firm, when asked if it is easier to work in the public or private sector, stated that private sector projects are easier because their firm tries to be very competitive and offer low prices. [#21]
- The male owner of a DBE-certified firm, when asked about the mix of private and public sector work, said that it is about 50/50. He said it is easier to work in the private sector because there is less paperwork and most of the subcontractors do the site work, leaving him with curbs, gutters, and driveways. [#27]

**Many interviewees preferred working in the public sector rather than the private sector.** [e.g. #2, #22] For example:

- A female representative of a non-Hispanic white male-owned business stated that compensation for public sector work is more reliable than private sector work. She said, "[Municipal clients] can't go out and bid a project if they don't have the money to cover it. They just can't... they're not allowed to do that. A developer can go rack up all sorts of debt and then file bankruptcy and take you right along with them." [#5]
- A male representative of a non-Hispanic white male owned company said payments from public sector projects are dependable, whereas a rapport is needed with private sector clients. He said, "Usually public sector [payments]... are always on time...When you sell to the public [sector], you're not going to have to worry about the payment, but if we have a \$10,000 order to a private [customer], then we have to know who we're selling to there." [#8]
- A male owner of a DBE-certified firm, when asked about working in public versus private sector, said there is job security associated with public sector work that lasts for weeks or longer. He said, "[With public work], it's not like you have to try to market yourself every day... Nothing's ever secure so it's kind of stressful in that sense, but it's worth it while it's good, so I'm just trying to prepare for the worst." [#7]
- The non-Hispanic white male owner of a small business, when asked about profitability of private versus public sector jobs, said that he is forced to be more competitive for private sector clients because they tend to do a lot of price comparisons. He said, "It seems when you get private clients, a lot more [of them] call around to get different prices... you tend to have to be more competitive....[private clients] can call up 15 different surveyors and get prices. Whereas I don't think the government does that." [#4]
- A male representative of construction trade association, when asked about the differences in working in the public versus private sector, stated that there is more money available in the public sector. He explained, "[A lot of large public] projects have [finished] now so it's loosened up [the funding] and made it more available for small, midsize, and a few large projects... So a lot of contractors have good diversity in their portfolio." On the private side, he noted that it was more variable because the timing, private money, and economic

pressure may converge and then dry up for six months. Public money may be more consistent. During the recession, most firms were only doing public work. [#25]

- Male managers of a business development organization said that public sector contracting has peaked recently in an attempt to use funding before the end of the fiscal year. A manager explained, “The month of September, which we just completed, there were a lot of awards of contracts from the Forest Service and BLM. As a matter of fact, probably two-thirds of the Idaho awards were either Forest Service or BLM trying to get their money committed that was left over before they lost it... It's use or lose. There was a glut of contracting the month of September, literally. All kinds of it...They were racing to get solicitations out, racing to get the proposals in, racing to get the bids evaluated and awarded.” [#10]

**Disadvantages or barriers to business success for a small business.** Interviewees discussed some of the difficulties that small businesses face that affect success.

**Many firm owners struggle to find good employees or provide stable levels of employment for their employees.** Having the right amount of labor available for business growth and expansion was frequently cited as a barrier to business success. [e.g., #4, #9, #14, #17, #18, #22, #27, WT #48, WT #49, WT #52, WT #53, WT #54, WT #55, WT #56, WT #57, WT #58, WT#59] For example:

- A male owner of a DBE-certified company, when asked about personnel, said he struggles to find enough qualified workers and sometimes makes compromises on the people he hires. He said, “Right now, it's really hard to find help. Two years ago, we were paying \$8 an hour. We're starting people at \$10 now and it's still hard to find people that want to actually work... [As a result of not finding enough people], you get guys that are kind of questionable but you use them anyway... As long as you've got some competent people to lead three or four people, we can do it. It's been a struggle. That's the biggest thing is trying to get help.” [#1]
- A female owner of a DBE-certified firm, who currently has no employees, discussed her experiences hiring part-time employees. She said, “I have hired and tried to hire [local university] students to help out with some office efforts and teach [them] stuff like that. I found it to be an utter failure. They are bored too soon... They don't know how to manage their time and so they're happy to do it while in the middle of the semester but as soon as finals comes around, they don't want to do it anymore. For me, it's not worth my time because now I've spent a lot of time training and then they go away. It's ludicrous for a small business to bother.” [#2]
- A male representative of a DBE-certified, woman-owned firm said, “[Finding quality people] is probably our biggest issue as a small business... We're burning everybody out, that's really a problem for us...We don't have enough people.” He stated that another challenge is employee turnover. He explained, “I like to develop our employees... Unfortunately when you do that, our clients scoop them up. We've lost several of our good employees to the Army Corps, or to the Department of Energy, or whoever the contractors are. That's a risk. They get better benefits with the bigger companies working for the government.” [#3]

- A female representative of a non-Hispanic white male-owned business said there is a lack of worker availability and that drug and alcohol use is an issue. She stated, “There's not a lot to choose from... We've had several [applicants] that can't pass their drug test... Over this construction season, there were probably four of them that we tried to hire; they couldn't pass a drug test.” She also mentioned that the North Dakota oil boom had impacted worker availability and wage expectation. She said, “[Potential employees are] coming back from North Dakota, and they're used to making tons of money and don't want to work for what the going wage is in Idaho... They were making you know 20, 30 [dollars] or more an hour plus overtime, and so they were cashing in.” [#5]
- Male managers of a business development organization, when asked about clients' experiences with personnel/labor, said there is a general shortage of qualified workforce for both professional and construction-related sectors. An interviewee said, “There are just not enough qualified people to hire to be able to grow their business like they want to, and this is growth. This isn't contracting. This is just business growth... Some of the specialty skills are not prevalent enough that they can find them.” [#10]
- A representative of an uncertified firm said that a challenge is hiring employees, writing, “It's very difficult to find anybody that wants to work. The more government rules and regulations make it difficult to stay in business and also healthcare cost have sky rocketed.” [WT #50]
- A representative of an uncertified firm said, “The hardest part is finding qualified drivers and people willing to work. It's industry wide.” [WT #51]
- A male representative of construction trade association stated that his agency is actively trying to target and attract people into the construction industry. He explained, “During the recession we laid off lots of employees. Those employees either went to college or found other work or they moved out of Idaho, and now that we're building again, we need people to come back to work, and we turn around and find out they're not here anymore... We're spending a lot of effort to attract people to come back and work construction.” He explained that his agency has enacted a program to recruit more workers. He said, “We work directly with middle schools and high schools, guidance counselors and shop teachers, to identify people who aren't [interested] in college, and we try to get them into a trade school. We work with the Department of Veterans Affairs for returning military members who are coming back [but] do not have a career to come home to... Military service translates very [well with] construction, because they work hard, they show up on time, they pass the drug test... And then we're working with the Small Business Center to identify minority owners and women and other groups that have an interest but haven't had a direct connection. [We also work] with the state recruitment efforts... they have a whole 'Come to Idaho' campaign going.” [#25]

**A few interviewees shared some other barriers they have faced in the expansion or growth of their firms.** For example:

- Male managers of a business development organization, when asked if there are additional difficulties a small business, minority-owned or woman-owned firm faces in the marketplace, said all businesses face the same problems. An interviewee said, “Especially for a startup. They’re looking for funding, hopefully free money, and the federal government doesn’t give grants to startups. It just doesn’t work that way. Neither does the state of Idaho. They’re looking for space. They’re looking for what is it that I’m going to do once the business grows up because I enjoy being an entrepreneur now, but what am I going to do with it? In that sense, they all face the same problem.” He went on to say that many businesses that they work with face the challenge of not having enough financial education. He said, “Most of them aren’t financially prepared. That’s the biggest problem.” [#10]
- A representative of an uncertified firm said, “[Work] does not pay very well in Idaho. Wages are low.” [WT #43]
- The female owner of a DBE-certified firm said that it is rare to come across a private client with the funds necessary to conduct a geothermal project. However, she stated that Idaho is becoming more aware of the geothermal resources and doing more exploration as a result. [#15]

**Marketplace conditions.** Interviewees discussed changes they had seen in the local marketplace over the last few years.

**Several firms indicated that the marketplace conditions were favorable for them.** [e.g., #18, #26, WT #20] For example:

- A female representative of a non-Hispanic white male-owned firm, when asked about current marketplace conditions in the local area, explained that the marketplace is currently very good for them. The company niche is related to what two large clients need. She explained, “We have [Large Client 1] and [Large Client 2], they keep us really busy. If they were gone it would be completely different.” [#14]
- The male owner of an uncertified firm, when asked about the current marketplace conditions, said the construction market is doing well and there are plenty of work opportunities. He added, “Idaho does a great job of marketing what’s out there through magazines like the *Idaho Business Review*.” [#19]
- The male owner of a DBE-certified firm, when asked about marketplace conditions, said that he stayed busy by working for someone else during the recession and didn’t really see a negative effect, and things are going well for business currently. He said, “It’s just getting better and better I think... We’re getting busy still, and it’s that time of the year when they ship the water off and the irrigation, and so there’s a lot of stuff to be done, and then the cold coming and the asphalt, everybody’s trying to pave and [be] paid for the jobs before winter comes.” [#27]

- A male representative of construction trade association, when asked about the ability to find work in Idaho, stated that there is currently a lot of work. He explained, “A couple years ago we were successful in getting more state resources put towards highways. And that has resulted in a significant increase in the work that ITD, the local highway authorities, are putting out... Some of my highway guys have complained the building guys are stealing some of their workers and that kind of stuff. But there's a lot of work available right now in Idaho, both public and privately funded.” [#25]
- The male representative of a non-Hispanic white male-owned firm, when asked about the growth of his firm, said his firm took a huge hit in 2008. He said, “The economy slumped and nobody was building. We went from approximately 20 employees down to about six employees for three or four years. We have been gaining ever since.” He said the economy is pretty good right now and the company would like to get up to around 25 employees. He added that he thinks their firm’s circumstances are very similar to other similar firms in the area. [#16]

**Some interviewees reported that their firms are seeing more growth.** [e.g. #1] For example:

- A female owner of a DBE-certified firm, when asked about the growth of her firm, stated that the growth has been slow but steady. She said, “That's part of starting out a new firm. We are younger [and] starting a technical firm. So I think our growth this year has increased. We'll probably be at industry standard this year but prior to this year we weren't.” [#21]
- A representative of an uncertified firm said, “Every day, trying to keep up with equipment and trying to gain capital to keep going. Just trying to grow and expand but it's a slow growth.” [WT #24]
- A male representative of a DBE-certified, woman-owned firm, when asked about the growth of the firm, said “It's kind of exploded because [the Army Corps of Engineers] gave [us] a few small projects...We started getting into little bigger stuff...Our revenues have gone up at least 4 to 5 times since ... We expect it probably to double again this year... We've got a back log that's huge right now. It just depends on getting approval from state agencies on documents that we provided, and maybe if those hit we could easily double our revenue this year.” [#3]
- A male representative of a non-Hispanic white male owned company said the company’s sales can be impacted by changes in the housing and construction market – which are both growing. He stated, “Definitely when housing's going, rebar is going to sell a lot more. In big construction, rebar is going to sell a lot more, but other than that it's just random. Most of these are probably fabrication shops or it just ranges greatly. If construction is booming, usually rebar is the hot one just because they work it into all the concrete, always has rebar.” [#8]

**Several interviewees noted that their industry has become more competitive.** [e.g. #4, WT #32, WT #40, WT #6] For example:

- A male owner of a DBE-certified firm, when asked about trends in the public and private sectors, said he has seen prices drop in recent years and has noticed a correlated increase in competition. He stated, “The prices are coming down. Last year, two years ago, if you bid something, you were almost guaranteed to get it. But there was only us and a couple of guys bidding and now there's five guys bidding the same project. It's gotten a whole lot tougher to compete with the other companies.” He mentioned that it may have to do with a rebounding economy, explaining, “I'm sure that the economy's picked up, there was less people doing what we were doing, now there's starting to be more and more people doing what we do... I can compete. We just got to figure out where we're getting beat and we haven't figured that out yet.” [#1]
- A representative of an uncertified firm said, “There is a competitive market. Hard to get ahead of the game. Competitive rates compared to keeping the business profitable has been difficult within obtaining contracts.” [WT #36]
- A representative of an uncertified firm said, “It's just hard to get in the door. There are so many companies that do certain things.” [WT #9]

**Many interviewees noted that the recession had fundamentally restructured the marketplace and firms had to adjust in creative ways.** For example:

- The non-Hispanic white male owner of a small business, when asked about current marketplace conditions, said there has been less competition since the economy improved. He said, “I think when the economy went down the toilet, there were a lot of guys just trying to stay alive. [They] kind of started their own business and kind of working [out of] their houses for as cheap as possible. There were a lot of people. The work then got spread thin, and then you just couldn't get the jobs that make any money because everyone else was doing [work] so cheap just to stay alive. When it kind of picked back up, you saw a lot of those guys go back to work for some of the bigger firms.” [#4]
- A female representative of a non-Hispanic white male-owned business, when asked about marketplace conditions, said the company owner began doing more public sector work after the economic downturn. She said, “I think in one way it helped him focus away from private work into municipal work. Municipal work is guaranteed money. Private work is what kills a contractor.” She added, “I think that the economic downturn took a lot of contractors who did public and private, and if they were smart... they drove their business more to the public works sector.” [#5]
- A female owner of a DBE-certified firm, when asked about current marketplace conditions, stated that they are still a new company and though they have worked with a few clients, their biggest goal is to compete as a small company in a large company landscape. She explained, “You know, I bet if we were to sit down with [large companies], all those guys would say the market is really tight just because there's not a lot for the Boise market itself. It's not a big pie here in the South West portion or all of Idaho...We don't want to be in that

pool... Everybody has learned don't deal with residential development and focus on just doing the smaller jobs and you can make a good living out of it." [#21]

- The female owner and female representative of an uncertified firm said that the recession compelled them to look for new kinds of work, which kept the firm afloat. An interviewee said, "We did work we probably would never have scrounged for, but we got it. We actually started soliciting work... We knew that the county keeps a calendar of what kind of applications are coming in and then we would...write to those people and state that, 'If you're not being represented we'd love to help you' and gosh, we started getting all kinds of projects. Wedding venues and camp grounds and RV parks and then we ended up making a decent amount of money doing that, just kind of staying alive, but we had to get very creative." [#6]
- A male owner of a DBE-certified firm, when asked about current marketplace conditions in the local area, explained that business goes through cycles. He said his firm weathered the recession of 2008 fairly well, but he noticed there did not seem to be new firms coming up through the ranks. He said, "Idaho is small state...I had competitors, and you're pretty much on a friendly basis with them, and so if they won, that was good. If you won, that was good, and so the work was somehow spread out and shared. I'm not seeing that this time... I'm not seeing anybody new." [#13]
- The female representative of a DBE-certified firm, when asked about local market conditions, said overall it has been fairly consistent. She said, "Some areas [like environmental services] have gone up, other areas [like pilot car services] have gone down." [#17]
- A representative of an uncertified firm said, "It has been hard since the changes and regulations that Obama has put on the street. We had to move our crusher to North Dakota to have to work to sustain the company. Projects were less in Idaho. We did not have the same projects to bid on because bigger companies come in." [WT #29]
- A representative of an uncertified firm said, "The only difficulties we had were during the crash. Everyone would be bidding on the same projects. That was only because the economy took a dive." [WT #41]

**Some interviewees noted that public project opportunities are lower than years past.** For example:

- Male managers of a business development organization, when asked about marketplace conditions, explained that federal contracting is diminishing, which negatively impacts small businesses. An interviewee said, "[We] have noticed... federal contracting opportunities have been shrinking. As the dollars get tighter, the federal government's not spending as much, and when they are, they are going back to start to bundle contracts; which will take small businesses out of the running, because they can't perform on the entire contract. And they're not looking so favorably right now on joint ventures or teaming arrangements...We have historically done about \$4.5 billion worth of federal contracting in the state of Idaho. We are down to about... \$2.2 - \$2.3 billion this last fiscal year. I mean, that's a lot of



opportunities. Because we are a rural western state, BLM and the Forest Service write the most contracts in the state of Idaho, total number wise, but their contracts are not all that big. You'll get a couple that are half a million, maybe a million, but most of them are in the 20 to 25, 30, \$35,000 range, somewhere in that neighborhood. The big money spender in the state is the Department of Defense - Mountain Home Air Force Base and the Department of Energy out at the [Idaho National Laboratory] site." [#10]

- A representative of an uncertified firm said, "With the economy being so low it can be so difficult. Also, with the election year we are waiting on funding from the state on certain road projects." [WT #18]
- A male representative of an uncertified firm sent written testimony on the lack of funding for traffic development. He stated, "Transportation funding (local, state, and federal) is not sufficient to expand the system to the level necessary to support traffic growth and future development. This funding deficit reduces public infrastructure design work, as well as reduces private infrastructure design work since most developments are not able to cover the cost of expanding the public infrastructure through private funding." [WT #2]

**Several interviewees noted the recovery did not hit all sectors of Idaho's geography.** For example:

- Male managers of a business development organization said that most of their private sector clients' business has not been growing. An interviewee said, "Right now, [private sector business] seems to be holding steady. They're not gaining any ground, but they've stopped losing. When I look around at what's going on the valley as compared to the rest of the state when we were out and about, the valley seems to be doing a little better, growing a little more. The rest of the state's kind of just stagnant, if not losing, but that's just my personal observation." [#10]
- The male owner of a DBE-certified firm, when asked about the current marketplace conditions in the local area, said that market conditions are currently poor. He said, "The work is infrequent, and budgets are small. Because of this, projects are becoming more competitive." He also mentioned that his travel radius is about 1200 miles now, but when he was an 8A firm, his radius was about 300 miles. He explained that because the marketplace conditions have affected the whole northwest region, he had to expand his radius in order to find work. [#20]
- The male owner of an uncertified firm, when asked about the current marketplace conditions explained that the market for his firm is good due to his good relationship with the freight company, but that is has been difficult on other businesses. He said, "If you look at a lot of other guys out there, it's tough. Fuel has skyrocketed; oil has skyrocketed; mechanical has skyrocketed. Everything you can think of has gone up, but the cost you get for a load is flat-lined, and it has been for 10 years." [#23]
- A representative of an uncertified firm said, "Everyone has had trouble, but when work is available, we do okay." [WT #19]

- A representative of an uncertified firm said, “An ongoing problem in this area [is that] there's no growth and with no growth, we cannot expand.”[WT #23]
- A representative of an uncertified firm said, “The economy has been pretty darn slow, so it's hard for people in Idaho to make money.” [WT #22]
- A representative of an uncertified firm said, “I don't see a lot of projects available in our region.” [WT #31]
- A male representative of an uncertified female owned firm, when asked about current marketplace conditions, stated that the real estate housing market in Pocatello is improving. He said, “[The market is] starting to heat up. It's still depressed, but it's starting to heat up, but other areas like Boise I've looked at appears to be heating up quite a bit more. It seems like there's a lot of building going on, so we've done some of that [private sector work] in Pocatello. I would say here in Southern Idaho, we're a little slower than the rest of the state.” [#24]

### C. Competitive Strategies

The study team asked firm owners and managers about how firms market themselves and stay competitive in their industry. Topics that were discussed included:

- Networking and building relationships (*page 18*);
- Good business sense (*page 20*); and
- Other factors (*page 22*).

**Networking and building relationships.** Interviewees shared many comments on the importance of networking and building good relationships with customers and other companies.

**Some interviewees indicated that getting out into the community and networking is important for successful business.** For example:

- A female owner of a DBE-certified firm, when asked how her firm markets itself, said she has made personal contacts within Idaho but finds networking at industry conferences more valuable. She stated, “I have to go to this [industry meeting] every year... Sometimes I talk to people and they want me to work for them. It takes them five years to pull it together but if I don't go, I don't have that working for me.” [#2]
- The female owner and female representative of an uncertified firm said that making personal contacts with agency representatives is highly successful, but it is an investment of staff resources and travel expenses. The staff participate in conferences, make presentations, propose on projects, and travel extensively to personally visit new and potential clients. The interviewee said, “It is [successful] for us and I don't know that it would be for everybody.” She added that they sometimes go to great lengths to meet personally with key contacts. For example, she said, “We got a call from the Army Corps last week on Tuesday and the person there said, ‘We think we have a project for you. Do you

want to talk about it on the phone or come over?’ and I said, ‘We’re coming over.’” The contracting officer later said he would not have awarded her firm the contract if they had not made the trip. [#6]

**Many interviewees noted that many opportunities are found through contacts.** [e.g. #18, #22, #23, #24] For example:

- The male and female co-owners of a non-Hispanic white firm, when asked how the firm markets itself, said personal referrals are more effective than other advertising. The owner said, “The word-of-mouth is still, hands down, the best. It’s a good referral from a job that you’ve done and somebody’s happy with your work...We also have an incentive program with our employees. If they give a business card to someone, even if it’s a family member, and that person uses us, then they get a percentage of the profits.” They added that customers find them by Google searches, newspaper or phone book ads, and Home Advisor leads. [#9]
- The male representative of a non-Hispanic white male-owned firm said that for the most part they do not directly market themselves. Instead, they find out about jobs through trade magazines and then put together bids. They also often receive calls from general contractors asking if they will bid on the project. [#16]
- The male representative of a DBE-certified firm said they advertise on Craigslist, outreach to the previous owner’s contacts, and have a website. He added that the private sector work that comes in is about a 30/30/30 split between each of those marketing avenues. [#18]
- The non-Hispanic white male owner of a small business said he relies on name recognition and reputation. He said, “[Together with our sister company,] we’ve been around for so long that our name’s out there. You don’t really have to market per se as much as a new company starting. They didn’t have the same client base and background... Right now, it’s so busy of just people, walk-ins finding us and calling us, that I don’t really go out and search for work.” [#4]

**Some interviewees noted the importance of good customer service and relationships.**

Interviewees mentioned that customer relationships provide the opportunity for repeat customers and referrals. For example:

- A male owner of a DBE-certified firm noted that relationships are instrumental in attaining work. He explained that the close relationship with a prime contractor meant his firm would accommodate special requests with short lead times. He said, “We had a really good relationship with [private company]... They’d call us and say, ‘I need a sweeper,’ at 10 o’clock. They could call now [at 8:00 a.m.] and say ‘I need...’ and we’d try to accommodate them.” [#1]
- A male representative of a DBE-certified, woman-owned firm when asked about how the firm markets itself, responded that it is a combination of making personal visits and providing excellent job performance to generate repeat business. He explained, “It’s the relationships that help us be successful; it’s not winning the project, it’s building that

relationship with the client so that they trust you. That requires you to do good work, and that's why we try to be transparent at everything." He added that other marketing efforts include submitting proposals in response to RFPs, RFQs and other solicitations. [#3]

- The male and female co-owners of a non-Hispanic white firm, when asked about staying competitive in their industry, indicated that being competitive comes down to service and performance. The owner said, "I think our main thing is building relationships with the existing general contractors in the area, building relationships with the business owners, and then just a word-of-mouth for the individuals." [#9]
- A female owner of a DBE-certified firm, when asked about what it takes to be competitive in this business, stated that it is how they interact with their clients. She explained that when a client calls, "The owners are answering... [The clients] know you jump through hoops for them and that's nice for them, too." [#21]

**Building a good reputation and maintaining a high quality business was noted as a key factor to success by several interviewees.** For example:

- A male owner of a DBE-certified firm, when asked how his firm markets itself, said maintaining a presence in front of clients by doing routine jobs is key. He said, "We have a huge customer base... Not a lot of profit in it, but it keeps your name in front of them every month, and if they look for something else, 'Oh, yeah, [Interviewee Company] has been doing this for five years, let's give them a shout.' I really do believe, even though there's not a lot of profit... it keeps you out there to where people remember you." [#1].
- A female representative of a non-Hispanic white male-owned firm, when asked what it takes to be competitive in their line of business, mentioned communication as a key factor. She said, "Constant contact with your customer makes a big difference." [#14]
- The female owner of a DBE-certified firm, when asked what it takes for a firm to be competitive in her line of work, stated that useful services, focused expertise, a good team, and a respected reputation are all key factors. [#15]
- A male representative of a non-Hispanic white male owned company said that their marketing and reputation relies on quality service. He explained, "Our service is our best marketing tool. Our service and our people... Our service is what we pride ourselves on over anything else... I would assume price is king to start with, but then I think availability and serviceability are 1 A and B. Anybody can sell off of price." [#8]

**Good business sense.** Interviewees discussed having good business sense, including the importance of being honest in pricing, doing hard work, providing quality, and being flexible with the changing marketplace. Examples included:

- The male owner of a DBE-certified firm, when asked what it takes to be competitive in his field, said that good management, understanding the work provided, and the ability to manage the time and assets associated with that work are all keys to success. [#20]

- The non-Hispanic white male owner of a small business, when asked what it takes to be competitive, said “The number one thing is price...I think that's probably the number one reason why we do so many more surveys is because our price can be so much lower. We don't have the same overhead as the bigger firms. Our process makes it so that we don't have as much time into a job. We charge the same hourly for our rates and everything, but we can do the jobs much cheaper.” [#4]
- The female owner and female representative of an uncertified firm, when asked what it takes to be competitive, said it is a combination of responsiveness to customer needs and being at the right place at the right time. The interviewee said, “It is being willing to do what it takes to get the job done, any job... Just giving somebody what they want...being responsive and capable and friendly... Some of it is timing. We found on some projects we just happen to appear right place right time.” [#6]
- Male managers of a business development organization, when asked what it takes for a firm to be competitive, said that it differs depending on industry. They further explained that reliance on government contracts can be harmful to businesses. An interviewee said, “I would say for a business to be successful, and this, to me, is probably the key: you can't rely on the federal government to be your primary income stream. Everything else you do, if you are still relying on the federal government to be your income stream, you have the wrong business model. I tell every business, large or small that I talk with, government contracting needs to be secondary or tertiary income stream. It needs to be something that you can pull out of your hip pocket to keep your people busy and employed.” [#10]
- The male representative of a non-Hispanic white male-owned firm, when asked what it takes to be competitive in this line of business, said that the first thing was providing quality work. He also said being a competent estimator was essential. He explained, “If you bid a job too low, something is either going to give in regards to quality or you lose money on the work.” He expressed that another important element to staying competitive is honoring the one-year warranty and fixing any issues that may arise. He also added, “Just good honest work practices.” [#16]
- The male owner of a DBE-certified firm, when asked what it takes to be competitive, said that it was performing work on a low budget. He recalled an experience in receiving a \$500,000 project that he finished in a year and a half and only used a portion of the budget. He said, “Why should I spend \$50,000 instead of \$14,000 if [it] will get the same results?” He explained that he doesn't focus on dollar signs, but on how to solve the environmental concern. [#26]

**Some interviewees indicated that hard work that is performed consistently and correctly are important for success.** For example:

- A male owner of a DBE-certified firm said that doing simple things like arriving on time and being responsive to customer needs will earn repeat business. He said, “I know it's going to seem so simple actually. You got to show up. You got to be there on time... It's always just putting your best foot forward. Showing up on time when you say you're going to be there

and having your truck available for when they need you...To stay competitive, you literally have to be at their beck and call.” [#7]

- The female owner of an uncertified firm, when asked what it takes to be competitive in this field, said that quality of work is key. She also expressed her success is tied to her reputation in the industry. [#22]
- A male representative of an uncertified female owned firm, when asked what it takes to be competitive in his line of business, said, “[Being] trustworthy and getting the job done when you say you’re going to get it done [is key to success].” [#24]

**A few interviewees mentioned that being flexible, adaptable, and doing the kind of work that is in demand in the current market is a key to success.** For example:

- The female representative of a DBE-certified firm, when asked what it takes for a firm to be competitive in her line of work, said that it involves a constant learning process. She said, “It is ever changing, knowing where you need to put more money in bids, and where you have to go lower... In the past, ITD used to put out what I call proper bids that specified quantities and conditions. Now they are asking for lump sums... You figure out what you need to do.” [#17]
- A male owner of a DBE-certified firm, when asked about being competitive in his line of business, indicated that diversity of services is important to being competitive. He explained that a competitor has grown larger than his company, but his firm is more diverse. He said, “He can try to corner the market, but we're going to hang in there because we've got lots of other things we do.” [#1]

**Other factors.** Interviewees discussed other factors that are important to business success. For example:

- A female interviewee, who provided public comment in a public hearing testimony, discussed the importance of reinvesting in her business and putting a high value on her workforce. She explained, “Two years ago, I made \$1.2 million. We worked our guts out ... Two years ago when I made [over a million], I brought home only \$32,000... So every dime of that went back into my trucks, into my drivers, into licensing, the fees, taxes... It’s not like I’m making gobs of money. I am trying to do a good job of facilitating a great business... [My drivers] are away from their family and only get to be home for a couple of weeks. \$2,000 doesn’t cut it anymore... So I try to take less, give my drivers more, so that they can make better money.” [CDA #1]
- Male managers of a business development organization said they help companies prepare to do business with government entities. A manager explained, “[Our organization can help small businesses] get registered to do business with the federal government all the way up to reviewing [a company’s] bid proposal solicitation, to making sure that they haven’t forgotten anything or they haven’t missed anything...We can also help them do market research and [review] current and upcoming contracts and past contracts...One of the services that most of our clients like the best is our BidNet’s notification, which is where

[clients] give us keywords and states they're willing to work in, and we plug it into the big computer and send [clients] a daily email for matches that we find when we search about 2,250 websites...[including] a lot of commercial websites...We also search for state and local websites. We search newspapers, their websites. We search like the American General Contractors' Association" the Defense Logistics Agency, and Defense Internet Bid Board System." [#10]

## D. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Prime contracting primarily (*page 23*);
- Mix of prime contract and subcontract work (*page 24*);
- Work primarily as subcontractor or supplier (*page 25*);
- Prime contractors' methods for choosing subcontractors (*page 25*); and
- Subcontractors' methods for obtaining work from prime contractors (*page 28*).

**Prime contracting primarily.** Some businesses indicated that they mostly perform work as a prime contractor. For example:

- The male owner of a DBE-certified firm, when asked if he works as a prime or subcontractor, stated that he likes to work as a prime and dislikes working as a subcontractor. He recounted an experience working as a sub for a civil engineer. He said, "[The civil engineer] had a very bad attitude and manner...I wrote all the proposals... [and then] interpreted it, provided it for [the civil engineer]... She didn't have the skill." [#26]
- A male representative of an uncertified female owned firm, when asked if the firm is primarily a prime or subcontractor, stated that they prefer to be primes. He said, "[We'd rather] keep control of the jobs we're doing." [#24]
- The male owner of an uncertified firm, when asked how often his firm does work as a prime contractor or as a subcontractor, said his firm is almost exclusively a prime. He explained that the firm occasionally subs out some work, but usually only when he wants to go on vacation. [#23]
- A female owner of a DBE-certified firm, when asked about her work as a prime or subcontractor, stated she never works as a subcontractor because her type of work is not really relevant in a subcontracting role. She commented that she has had little success with marketing to prime contractors, stating, "I did initially go to a number of firms in the state to see if I could do some of that work as well, and there was nothing. The contractor even had no idea how to use me. There were no [DBE] requirements for it. There [weren't] even any requirements for [my specific skillset], let alone anybody who knew how to do that. I got exactly nowhere with that." [#2]

**Mix of prime contract and subcontract work.** Many businesses indicated that they do a mix of prime and subcontractor work depending on the project. [e.g. #6, #20] For example:

- A male owner of a DBE-certified firm estimated that 60 percent of the company's work is from private sector and 40 percent public sector, although he's noticed a downward trend in public sector work over the past year. He noted that the company acts as general contractor for small private or local public sector projects but will subcontract on large public sector projects. He said, "[We prime] very little through ITD because most of the stuff is too big for what we do." [#1]
- A male representative of a DBE-certified, woman-owned firm, when asked about the company's role as a prime or subcontractor, said that the company works in both capacities; they work as a prime contractor on smaller projects but for larger projects, they perform as a subcontractor. [#3]
- The non-Hispanic white male owner of a small business stated that he works more frequently as a prime contractor than as a subcontractor, but will work in both capacities. [#4]
- A female representative of a non-Hispanic white male-owned business said the company works in both capacities. When acting as the prime contractor, she noted, "Almost every job we hire subs... There's almost always something on a project that will require a sub." [#5]
- A male owner of a DBE-certified firm, when asked about his work as a prime or subcontractor, said that most of his firm's contracts are pre-qualified term agreements with ITD. He said, "Which to me is heaven. I like working directly for ITD." His firm works for ITD providing professional services as both a prime contractor and subcontractor. [#13]
- A female representative of a non-Hispanic white male-owned firm said that most of her firm's contracts are performed as primes. She estimated that they work about 80 percent as a prime and 20 percent as a subcontractor. [#14]
- The female owner of a DBE-certified firm said 90 percent of her work is conducted as a prime contractor and the other 10 percent is as a subcontractor. [#15]
- The male representative of a DBE-certified firm, when asked about the work his firm conducts, stated his company is typically a subcontractor on public jobs, but a prime on residential. They work as far north as Sandpoint, as far south as Lewiston, in the Spokane area, and in western Montana. [#18]
- The female owner of an uncertified firm, when asked how often her firm does work as a prime contractor or as a subcontractor, said, "When I work with owners, I'm a prime, but when I work with architects, I'm sub. I work for the architect on behalf of the owner." [#22]
- The male owner of a DBE-certified firm, when asked about his experience performing prime or subcontract work, said that he works as both a prime and subcontractor, but prefers to be the prime. [#27]



- A female owner of a DBE-certified firm said, “[We are approximately] 80 percent prime right now, 20 percent sub ... In most of the non-federal or the government ones, we’re prime. And then we’re sub for a lot of the federal government type work.” [#21]

**Work primarily as subcontractor or supplier.** Some businesses indicated that a subcontract or supplier role was more fitting for their business. [e.g. #9, #17, WT #101] For example:

- A male representative of a non-Hispanic white male owned company, when asked if the firm works as a prime or subcontractor, stated that the company does not work in a contractor role, but instead works in a materials supplier and processor role. He explained, “Usually the subcontractor or the general contractor will come to us on a culvert deal or something, then we’ll bid just for the culvert, but no services to go with it... I think that probably makes it a little easier for us, because then we’re just there to deliver product and we don’t have to actually work with anybody.” [#8]
- A male manager of a business development organization shared that Idaho companies earn a significant amount of money in the subcontracting role. He stated, “Subcontracting, really, if we were to pull our report...It’s in the hundreds of millions of dollars that Idaho companies make subcontracting....There’s a lot of good money, and I have to tell you, personally, that’s where I steer young, small businesses if they want to get into federal contracting. I steer them towards subcontracting because they get experience working on a federal contract without all the heartache.” [#10]
- The male representative of a non-Hispanic white male-owned firm, when asked about his firm’s work as a prime or subcontractor, said that his firm is almost exclusively a subcontractor. He explained that approximately one in 50 jobs will have [their specialty] as its main focus. In those instances they will bid as a prime, but those are usually smaller jobs. For the small prime jobs that need specialty work done, his firm may hire a subcontractor. [#16]
- The male owner of an uncertified firm, when asked how often his firm works as a prime contractor or as a subcontractor, said his firm is always a subcontractor because his firm is never given the opportunity to be a prime in Idaho. [#19]
- A representative of an uncertified firm said, “It is hard as a smaller company, six trucks or less, to get work. Usually, we have to go through many subcontractors. It’s hard to even get a bid in if you’re smaller. We have to go through the larger contractors.” [WT #100]

**Prime contractors’ methods for choosing subcontractors.** Interviewees indicated different methods for choosing subcontractors. For example:

- A male owner of a DBE-certified firm, when asked about using subcontractors, says relationship and pricing both factor into hiring a subcontractor. He said, “One’s a little friendlier to us. He’s small, just starting out and we’ve known him for 10 years. He worked at a different company. Once he started his own, anytime we get a job we try to throw work his

way and try to help him out. It works both ways. He'll give us a little better price than the big guy out there. It's all the same game." [#1]

- A female owner of a DBE-certified firm, when asked how she selected subcontractors, indicated that she is selective and hires reliable professionals. She said, "When I do hire [subcontractors], I hire people who it's their business. They've got a good track record. Nobody's kidding around. No interns, nothing like that. ... I also hire people that I know and I've worked with, and I get them. Little businesses can't absorb messing things up." [#2]
- A non-Hispanic white male owner of a small business, when asked about subcontractor selection, said that he prefers to give the client a referral to another contractor, rather than hiring a subcontractor. He said, "If there is something outside of my scope beyond surveying and engineering, I'll usually have [the client] contract directly with the sub[contractor]. I don't really want to be a project manager over all the others, or be responsible for making sure [of] their scheduling." [#4]
- Male managers of a business development organization, said that "the few large primes that we do have in the state are usually all the time looking for subcontractors, so they hold subcontracting days," and that their organization also brings small businesses together to meet with the prime contractors. They added, "The other thing is it could be two small businesses, one as a prime, and that's what most of the subcontracting is in the state is a small business gets a job, and they hire someone else to come in and do the parts that they can't, and that's fine. You're starting to see a lot more of small businesses hiring small businesses that are just like them." [#10]
- A female representative of a non-Hispanic white male-owned business, when asked how they select subcontractors, stated that the process is largely based on a subcontractor's price. She said, "They all send in quotes...For the most part it's quote-based. If the prices are close and we prefer working with one over the other, then we might go that way, but in most [cases], there are some funding agencies that require you to do it a certain way with your subcontractors. Usually where federal funds are involved." She further explained difficulties in finding DBE-certified subcontractors. She said, "It's not that we wouldn't hire them, it's just [that] they don't apply...If you find an MBE or a WBE [around here], I would say 90% of the time it's landscape or traffic control...When we go on the plan holder's list to subcontract our bids, asking for MBE, WBE quotes. Do we get them? Very rarely. The list is almost null around here." [#5]
- The male owner of an uncertified firm, when asked how he selects subcontractors, said he mostly conducts drug tests and background checks. He explained he also conducts random drug tests, and added, "I will not take registered sex offenders because my daughter is at the sites during the summer and I don't want to jeopardize her future." He went on to mention that his selection is also based on trust and loyalty. [#19]

**Many interviewees noted that subcontractors are often selected based on existing relationships.** [e.g. #13, #14, #20, #22, #23] For example:

- A male representative of an uncertified female owned firm, when asked how the firm selects subcontractors, said that they choose people they know or have heard good things in word of mouth. [#24]
- A male representative of a DBE-certified, woman-owned firm, when asked if the firm hires DBEs as subcontractors, responded that they commonly do. He said, “My philosophy is that you try to build up those relationships with other small businesses. It pays back in the long run. I mean, I still get pay backs from years ago, working with small businesses now that are larger. Where if I need help they'll come and help me just like that. When you're small businesses, you have to stick together.” [#3]
- The female owner of a DBE-certified firm stated that when she selects subcontractors based on familiarity or as a result of personal recommendations. [#15]
- The female owner and female representative of an uncertified firm said that personal recommendations from other subcontractors are helpful when selecting subcontractors. The owner said she spends time interviewing potential subcontractors. She said, “If it's a good match of personality then we try them out.” [#6]
- The male representative of a non-Hispanic white male-owned firm, when asked about how he selects subconsultants, indicated that price and relationships both play a role. He said, “[We choose] pretty much like everyone else does - low bid... Firms you work with often can have the best numbers, because they know what is required and they are familiar with how you work.” [#16]

**Interviewees discussed the role of DBE-certification plays when selecting subcontractors.** For example:

- A male representative of construction trade association, when asked if the association's prime members try to solicit DBEs for subcontracting projects, stated that he knows DBEs are being hired by primes, but doesn't know if it is because they are DBE or just good at what they do. He was not sure how primes find DBEs. He stated, “Nobody's ever come to me and said, ‘We have a problem finding [DBEs]’ or ‘We can't find them.’ Part of that is because we have general overall state goals. We don't have project-specific goals in Idaho... As we've done more and more to discuss [the DBE program] at our meetings, then I've seen the primes discuss it amongst themselves.” [#25]
- The male owner of a DBE-certified firm, when asked about the process of selecting subcontractors, stated that he prefers to do most of the asphalt and concrete work himself and maybe only use a subcontractor for the pipe work. He explained, “That's the only way to make money to me because you got to do it all yourself.” For projects that he does need a sub for, he said he would likely choose someone that he already knows. When asked if he specifically looks for other DBE contractors, he stated, “I would if there was some around,

but I don't think there's any around." He continued by saying that there are a lot of different certifications and that limits eligible subs to work with. [#27]

- A female owner of a DBE-certified firm, when asked how the firm selects subcontractors, stated that it is through reputation and relationships. She said, "[We choose who is] referred and [if we] previously worked with them. We try to work with local, smaller [firms]...If you're chasing [the project] as an owner, you're chasing it differently [because you have to know where] you can cut your costs out. You can make money and it just might not be as much. So by using other DBE's or other smaller firms, that's the way we can control prices when we're chasing projects." [#21]
- The female owner and female representative of an uncertified firm explained that they have not solicited DBEs due to lack of availability in the area. An interviewee explained, "We haven't had that opportunity really because in local work there just aren't any [DBEs], there's none that we know of and I think we probably know of every sub in every discipline that is what we do." [#6]

**Subcontractors' methods for obtaining work from prime contractors.** Interviewees discussed finding work opportunities through networking and other relationships. [e.g. #13, #22, #26] For example:

- A female representative of a non-Hispanic white male-owned business, when asked how they know about jobs, said they use a combination of information sources. She said that their main source is through a Plan Center, but they also hear about jobs through word of mouth, explaining, "Some of the engineers, if they like you, they will give you a heads up that their project is out to bid." She added that they also use mypublicnotices.com because it searches the majority of newspapers in the area. [#5]
- A male owner of a DBE-certified firm indicated that persistence is important when seeking subcontract work. He said, "[I make phone calls to contractors] every morning, try to find work... You have to be [persistent], otherwise you're not going to get anything, and so finally I annoyed one enough, I think, that they were like, 'All right, let's give this guy a shot. Go ahead. He's been calling us nonstop.'" He continued by saying that it takes time to earn trust of contractors and to get hired. He stated, "It took a while to get started, to get your foot in the door and actually get these guys to use you a couple times and then trust you, and then show that you're going to be there all the time...it started out as a testing phase... They would use me for one day out of the week and then call me the next week and then use me for two days out of the week. Then they would wait two weeks and then call me again, but you show up, you do your thing, you keep your paperwork straight with them, easy-peasy. Send them a nice, clean invoice." [#7]
- The male and female co-owners of a non-Hispanic white firm, when asked how they get on projects as a subcontractor, said it is primarily word of mouth among the company's existing client list and other contractors. They also indicated that work is referred to them because of residual goodwill generated by the company's previous owners. The owner said, "There's been a lot of loyalty for that family in this valley and so they've got a pretty good reputation... [We've] got some good [primes] that [we've] already said 'Yeah, [we] like

working for this guy.' [We] haven't had any poor experiences with general [contractors] yet....Not in Idaho, anyway." [#9]

- Male managers of a business development organization acknowledged that primes select subcontractors based on established relationships, but said they still encourage small businesses to market to large primes. An interviewee said, "The difficulty for our small businesses becoming a sub to a large prime...is the large primes already have established who their subs are. They've been working with them for years. They know who they are. However, that being said, you still need to market to them because when that company in Osceola, Florida wins the contract in Moscow, Idaho, it is much cheaper for him to hire subs in Moscow or the surrounding area than it is to bring his crew from Osceola all the way to Idaho." [#10]
- The male owner of an uncertified firm said there are primes he prefers to work with or has an established a relationship with. He also added that there are several primes that he will not work with due to racial discrimination. [#19]
- The male owner of a DBE-certified firm said that he relies on marketing systems and providing bids to general contractors in order to find work with primes. When asked about his experience of working with DBE primes, said he prefers to work with DBE primes, because of their awareness of the DBE program. He explained, "This is how my firm got to where it's at." When asked if there was a difference with working with DBE primes over non-DBE primes, he stated in the case of contractual and monetary relationships, there is no difference. [#20]
- The male owner of a DBE-certified firm, when asked how he finds a way to work on projects as a sub, explained that it is often the result of long-term trading relationships. He stated, "But there [are] the subcontractors [who will] just jump in and do it, like if somebody subs me out, then they'll say, you know, if you need something over on that job, then I'll come help you, and we'll kind of just trade." [#27]

## **E. Potential Barriers to Doing Business with Public Agencies**

The study team asked interviewees about potential barriers to doing work for public agencies, including ITD. Topics included:

- Learning about work and marketing (*page 30*);
- Bonding requirements and obtaining bonds (*page 32*);
- Insurance requirements and obtaining insurance (*page 34*);
- Obtaining financing or access to capital (*page 35*);
- Prequalification requirements (*page 37*);
- Experience and expertise (*page 37*);

- Licenses and permits (*page 38*);
- Prevailing wage, project labor agreements, or any requirements to use union workers (*page 39*);
- Other unnecessarily restrictive contract specifications (*page 40*);
- Bidding processes (*page 41*);
- Non-price factors public agencies or others use to make contract awards (*page 44*);
- Timely payment by the agency or prime (*page 44*); and
- Any additional disadvantages or barriers based on being a minority- or woman-owned small business (*page 46*).

**Learning about work and marketing.** Interviewees discussed learning about work as a barrier to doing business with public agencies.

- The male owner of a DBE-certified firm, when asked if it was easier or harder to find out about ITD jobs, said it was about the same. He said, “The biggest difference is knowing where to go, where they advertise, how they advertise.” He added that the process has gotten better and has become a more centralized solicitation advertisement arena. He explained, “Before things changed it was such that you had to know where to look on the internet or know someone who is designing the project.” He believes that the process is now easier and it is possible to find jobs from multiple agencies. [#20]
- A female interviewee, who provided public comment in a public hearing testimony, discussed some challenges after receiving emails about jobs. She said, “How in the heck do you read those, and who do you contact on those? There's no information on there who to contact... I can't figure it out.” [CDA #1]
- A female representative of a certified firm said, “I've had a difficulty breaking the contract and the Ward system. First navigating it and then understanding it and actually using it and making it function for me.” [WT #4]
- The female representative of a DBE-certified firm said her firm is familiar with the fair bidding processes. She explained that they monitor bids on the ITD website, private entities, and municipalities. They also maintain a website, Facebook page, and Instagram account. She also mentioned that the new Qwest bidding system is a good resource because it provides lists of all the primes and the necessary bidding information. She did not mention problems with using the online systems. [#17]
- The male owner of an uncertified firm, when asked if it was easier or harder to find out about ITD opportunities, said that it is easy. He mentioned that he has worked with the Small Business Association at Boise State University, and said the ITD jobs are easy to find, but difficult to get. [#19]

- A female owner of a DBE-certified firm, when asked how her firm markets itself, stated that she was the primary person to do so and participates in several industry events. She explained, “We have been trying to market ourselves to a lot of Federal, State and local agencies. So we go to things like the procurement technical assistance centers, events and we go to the SBA’s events and we go to trainings. And then I’ve also tried to reach out to new clients via email and phone...and through our associates [by] referring each other stuff.” [#21]
- A male owner of a DBE-certified firm indicated there are plenty of opportunities to market his firm. He said ITD’s DBE Program Coordinator calls him ‘the marketing king.’ He equates his success to being persistent. In addition to marketing to ITD, he mentioned that he has marketed the firm to the Idaho National Lab and the SBA 8A program. [#13]
- A male representative of a DBE-certified, woman-owned firm stated that informal business networks provide information about jobs. He said, “Sometimes you’ll hear about projects, especially when you’re out talking to the small business people because they do know what’s coming up and the different installations.” [#3]
- The male owner of a DBE-certified firm indicated that he receives information about opportunities through word of mouth. He confided that he already has a relationship with most of the primes and markets himself through the quality of the work he performs. He continued by saying that if he is not staying busy through those relationships, he will try to find his own work. He said, “I get a little help from the Idaho Business Network which sends me information [daily] on stuff being bid.” He explained that bidding through ITD has been easy. He stated, “Because of their website and everything, you can go up there and look at it, find out what everybody’s got planned, the plan holders list, and then they actually show you the job of who got the job, and then that kind of gives me the idea. If I’ve been [with a prime] and he says I’m going to only use you, then if they get the job, then I know I got the job.” [#27]
- A male owner of a DBE-certified firm, when asked about learning about work and marketing, indicated he was eager to know more. He said, “I don’t know any other ways [than Craigslist and phone calls] to market right now...I don’t know if you guys have ideas how to market ourselves. Obviously I’m open to anything that will work or suggestions and everything but besides that it’s just throwing an ad up in Craigslist and then getting a call from a guy.” [#7]
- Male managers of a business development organization, when asked about their clients’ marketing activities, said that a challenge for small businesses is that they have limited staff. The interviewee added, “I have a class on marketing the federal government. We talk about this. I tell them upfront, ‘Marketing the federal government, doing your market research is a time-extensive effort’, and it is. Mom and Pop and Johnny Joe don’t have the resources available to them to do the market research, but since there’s only [the two of us covering] all 44 counties in the state of Idaho, we don’t have the time either to do that.” He went on to add that the technology can be a barrier, saying, “Either they’re computer illiterate, and they tell you that upfront... [or] they drive two or three hours to the public library to get online to DSL, which is slow, or they got to wait for their grandkid to come over to do it for

them...How many of them do it? Probably even after we talk to them, probably a very small percentage. Very, very small.” [#10]

- A representative of an uncertified firm said, “[A challenge is] marketing and not paying high costs for it.” [WT #74]

**Difficulty finding work with public agencies.** Many interviewees indicated that they had difficulties finding out about opportunities to work with public agencies. For example:

- A female owner of a DBE-certified firm indicated that it has been difficult to find work through ITD. She explained, “I know that there's [information] on their websites there's stuff and I'm signed up for through Ptech for their emails. It seems like for the stuff that we know that they need, I never see it. And I know that it has to be like storm water pollution prevention plans and environmental cleanups. I never see that stuff.” She suspects that these opportunities are folded into a larger project and self-performed by the winning firm. [#21]
- The male and female co-owners of a non-Hispanic white firm mentioned that they struggle to find public sector opportunities. Additionally, the interviewee said, “[We] could be extremely competitive in this market right now, [but are not yet positioned to bid on public sector projects].” [#9]
- A representative of an uncertified firm said, “The governor is doing a ‘Buy Idaho’ campaign [and many] contracts are awarded to out of state companies.” [WT #44]
- A representative of an uncertified firm said, “The biggest issue is just breaking in to the contract area. We haven't been in the industry for very long, so ramping up and scaling up for contracts is the toughest part.” [WT #3]

**Bonding requirements and obtaining bonds.** Interviewees discussed the ease or difficulty of obtaining bonds.

- Male managers of a business development organization, when asked about clients’ experiences with bonding, said that bonding is an issue for business. A manager said, “If they're doing construction and it's federal, and I think state might be also [an issue]... We have a lot of companies that can bond on construction, say to \$2 million, but when the construction project comes down, then the total value of the project is \$10.5, \$15, \$20 million dollars. They can't bid because they can't bond it.” He added, “There are several ... Well, a couple of things they can do. The SBA has what they call a surety bond guarantee where it's just like a loan that the SBA would guarantee a certain percentage of it. They have a surety bond guarantee that says the same thing, that if the company defaults, we'll repay the bank whatever percentage that is, I honestly don't know off the top of my head. It's like a VA home loan. Same thing. You can also form joint ventures with another small or large company, whether populated or unpopulated, it doesn't matter, but you can use the bonding capability of the other company in addition to your own to reach that goal.” [#10]



- The female owner and female representative of an uncertified firm said that the work their firm does in the public sector is construction-based and they have had issues with bonding. The owner said, “We know we can get the jobs. We’re really good at that. We write killer proposals, so we can lure them with our [8a] status, the Feds. We can reel it in with our competitive great proposal, but we can’t do the work by ourselves because we can’t get bonding because we’re females in construction and we’re just starting out.” [#6]
- The male owner of a DBE-certified firm stated that his ability to work on projects is very dependent on bonding. He explained, “I’m having a hard time with bonding, so [for] this little project, I was able to bond it with my own funds and use a certified check basically.” He further explained that getting a bond is like getting a credit report and he has been denied bonding before. [#27]
- A male representative of construction trade association mentioned that bonding is not as much of a barrier as it used to be. However, he stated that the expanding workforce and increasing wages cause problems. He said, “The margins get thinner, so finance becomes even more of an issue because then our projects are more expensive.” [#25]
- A male representative of a DBE-certified, woman-owned firm said it can be difficult to obtain bonds because the company is small. He explained, “That’s always an issue, but it’s because we’re small business. We don’t have assets so it’s hard to bond stuff. We have had to bond some projects, so I don’t think it’s because it has anything to do with us being a DBE, it’s just because we’re a small company.” [#3]
- A female representative of a non-Hispanic white male-owned business stated that there are inconsistencies between State of Idaho requirements versus the bonding company’s requirements. She explained, “If the bonding company’s willing to bond you, but you’re hindered by the state [requirement] to have this amount of working capital in order to bid that, then you can’t bid it. So that also limits your playing field... [Whereas in Washington], if you can bond, you can bid it... If they’re willing to give you a bond, well then, one, if you get the job, it’s covered by your bond. So what does it matter if you have that working capital? If they go under, then that’s on them. That municipality still gets their money – because it’s covered by the bond. So why is the state getting involved and limiting and hamstringing the contractors? If they can go out and get a bonding company that will agree and let them bond that, more power to them.” [#5]

**Some respondents stated that bonding is not an issue for their business.** [e.g. #1, #2] For example:

- The male and female co-owners of a non-Hispanic white firm, when asked about bonding, said that bonding has been easy because it goes off their credit standing. [#9]
- The male owner of a DBE-certified firm, when asked about issues regarding bonding requirements or obtaining bonds, said he has not experienced issues with bonding. He also said, “If you have been successful enough to ask for a bond, in other words you got through the financial hurdles and have expertise with the job, and have developed a verbal and

written relationship, when you first start on the project, they don't look at you that way [based on ethnicity.] I haven't come across one yet." [#20]

**Insurance requirements and obtaining insurance.** Interviewees discussed whether insurance requirements and rates were barriers for their businesses.

**Many interviewees said insurance requirements and high insurance rates are barriers.** [e.g. WT #72] For example:

- A male owner of a DBE-certified firm, when asked about insurance, expressed a desire for all types of insurance costs to go down, including health insurance, equipment, automobile policy, and workman's compensation. He indicated that employee-related health insurance has especially been a challenge as the costs have increased. In recent years, the owners have considered discontinuing this benefit. He noted, "It's incremental.... It all adds up. A couple years ago we thought maybe just dropping it all together and just saying .... You find your own insurance.... We've hung in there and we probably will. The more expensive it gets, the harder it is to justify keeping health insurance." [#1]
- A male representative of a DBE-certified, woman-owned firm noted that insurance is a challenge for the company because their offices are located across the country. He said, "We have to go to each state individually, for at least workman's comp. It's kind of tough just being a small business, because we have to have that coverage in every state we have employees. It's a little more expensive for us to do it, which probably isn't fair, but it's the way it is. Even on risk too, we sometimes, because we're so small, we have higher rates of that.... [A larger company] can get a better rate, and I understand that." [#3]
- The male owner of a DBE-certified firm, when asked about barriers obtaining insurance, said that he is able to maintain his current insurance. However, he noted that it is getting more expensive for him, particularly health insurance. [#27]
- A male representative of construction trade association said that receiving medical insurance and worker's compensation is an issue. He said, "That kind of stuff in Idaho is really one of the lowest and it's also pretty poor coverage. A lot of our people not only do the minimal workers' comp, but have [an] accident and stuff above and beyond that as well, because workers' comp in Idaho, if you have an injury, it'll cover getting you through physical therapy and back to work, but it's not an ongoing [process]." [#25]

**Some interviewees have not had problems with insurance.** [e.g., #7, #9, #20, #26] For example, the male owner of an uncertified firm, when asked about issues with insurance requirements and obtaining insurance due to race/gender/ethnicity, said, "Of all four states I work with, Idaho is very respectful, upfront, and understanding. The Secretary of State and the Bureau of Occupation are very willing to work with you to make sure everything is complete and done right, and they want to see a minority-owned business succeed." [#19]

**Obtaining financing or access to capital.** Financing and access to capital is important for small businesses. Business owners and representatives discussed whether obtaining financing has been a barrier.

**Many interviewees discussed the difficulty for small businesses to get financing and access to capital.** For example:

- The male owner of an uncertified firm, when asked about any issues obtaining financing due to race/ethnicity/gender, said he has experienced financial discrimination due to his race. He stated, “I walked in to a supplier who refused to open an account for me. I needed to be on a cash account first.” He said that when he asked the supplier why, the supplier said, “I just can’t.” He went on to say, “People judge the cover of a book before reading the first chapter.” [#19]
- A female interviewee, who provided public comment in a public hearing testimony, discussed some of her first experiences trying to attain financing. She said that she was first denied a loan because she had a DBE business.. When she spoke to another bank, she had another negative experience. She said, “He [the banker] wanted my husband to be there. I said, ‘My husband doesn’t own the business. I do. I run the business. I’m the one that will be signing.’ And he said, ‘First and foremost, I want your husband to come in.’ Okay, so I said, ‘All right.’ I went out to the car, called my husband. I said, ‘He wants to see you,’ and he said, ‘[Laughs] Why?’” She stated that the banker eventually said she could apply for an SBA loan, which would take six months, but she never heard back from him even though she completed the application and left approximately 15 voice messages. At the third bank, the banker told her that SBA takes a long time and that DBE is not guaranteed funding for the bank – information that was counter to everything she had seen in online applications about SBA loans. She felt the bankers had a lot of miscommunication and unwillingness to assist. [POC #1]
- A representative of a certified firm said, “You can’t get anyone to give a business loan anymore.” [WT #60]
- A representative of an uncertified firm said, “The biggest problem I have is raising enough capital to get going. There is not a lot for small businesses that I have seen in our line of work.” [WT #61]
- A female representative of an uncertified firm said, “Finding a loan for small businesses is quite hard. They’d rather deal with the big people.” [WT #77]
- The male owner of a DBE-certified firm, when asked about barriers to obtaining financing, stated that he has had several bad experiences. He explained, “Over the years, it’s getting better, but yeah, at first, it was a definite barrier. You knew you could do something, [but] you didn’t have the funding to back yourself up.” [#27]
- A male representative of an uncertified female owned firm expressed that obtaining financing can be a barrier for business, especially a woman-owned business. He explained, “When you go and you talk to a bank, or financial institution, when they find out it’s a

woman owned company they tend to want to scrutinize a little more than if it wasn't. Fortunately for us, we know a lot of people. But I imagine if we didn't know people it would be probably a problem." [#24]

- The male owner of an uncertified firm, when asked about issues obtaining equipment due to race/gender/ethnicity, said dealers and banks are more hesitant to give him a loan to purchase equipment. He said, "They expect you to just have the money right up front. They assume that because of the color of your skin you just always have cash and no bank account." [#19]

**Several interviewees indicated that financing and access to capital have not been barriers for them.** [e.g. #13, #26, #7, #25] For example:

- A male representative of a DBE-certified, woman-owned firm said getting financing is difficult for small businesses, but that his firm has not needed much financial support. He explained, "We've been very lucky, we've been able to self-finance everything so far. We have no debt, we never had debt, except for maybe a car loan once or twice; occasionally we'll buy extra vehicles." [#3]
- The male and female co-owners of a non-Hispanic white firm stated they did not apply for financing and instead relied on personal savings for their business. They said, "The reason we haven't had to do any financing is because that was something that we had worked on for years...We saved. We used our savings... You want to talk about an uneasy feeling when you use all your money up and then you're sitting there just scratching your palm. Man, that's tough." [#9]
- A male owner of a DBE-certified firm, when asked about obtaining financing, said that obtaining financing has been great in part due to the personal relationship he has with the banker. He added, "You could go down and talk to your banker and say I need a loan for my sweeper....They've been great to work for, and so financing's been good." [#1]

**A few interviewees noted that financing was made possible through helpful assistance agencies.** For example:

- A female owner of a DBE-certified firm, when asked about obtaining financing, said she that SCOR was helpful in the financing process. She said, "I happened to find a really good banker at [Bank Name] and the people at SCOR helped me put together a really good business plan.... SCOR helped me figure how to present it to [the bankers].... [SCOR] was really good at helping me present it in a way the bank wanted it, but it wasn't that I changed how I came up with the money." Furthermore, she noted that financial assistance programs were instrumental in her ability to start her business. She recalled that the Idaho Prime plus zero loan helped establish her business. She said, "They are physical resources you need to run your business ... like buying a truck or an airplane. I've used it for two loans and the banker that I first found it with, he funded part of my loan through that and the other part of the loan amount through a standard business loan and then a line of credit. It got my business off the ground. Without that program I wouldn't be in business. It was huge." [#2]

- A female owner of a DBE-certified firm mentioned through the DBE program, she was also able to receive some grant money for about \$1,000. She used the money to purchase a laptop for her business. [#21]

**Prequalification requirements.** Interviewees discussed prequalification requirements, and whether those had been a barrier to business success.

**Some interviewees stated that prequalification requirements are a barrier for small businesses.** [e.g. #23, WT #15] For example:

- The female owner and female representative of an uncertified firm, when asked about prequalification requirements, said that agency consideration of firm experience versus individual experience is too restrictive. She said, “It's just frustrating that we just can't break that barrier just because our firm doesn't have that experience. We're all smart, qualified...We've got the experience working on these projects and we're capable. It's just that nobody wants to give a firm that hasn't performed a 5 mile stretch of highway the chance, even though that's just the inherent nature of being a civil engineer is you know how to design a road.” [#6]
- A female owner of a DBE-certified firm, when asked about prequalification requirements, stated that prequalification requirements can be a barrier to small businesses. She said, “I think often times more so than gender I think it's like we don't get considered because we're just small. And so it just even on smaller projects I think a big office can handle it better than a small. So I don't know if that's gender discrimination but it is size discrimination. It's a barrier to get the experience so you can match the prequalification.” [#21]
- A female representative of a non-Hispanic white male-owned firm, when asked about potential barriers, said pre-qualification requirements are a barrier, specifically in regards to safety certification. While it is no longer an issue for her company, safety certification requires a certain number of years' experience to become certified, but she noted that you cannot get the work to gain the experience unless you are already certified. [#14]

**Experience and expertise.** Interviewees discussed how experience and expertise had been a barrier to business success.

- A female representative of a non-Hispanic white male-owned firm said experience and expertise can sometimes be a barrier. She explained, “We are a very small community. If someone moves on everyone knows, and they know that no one else is as skilled.” [#14]
- The female owner of a DBE-certified firm, when asked if she had faced any barriers due to her experience or expertise, stated that [her field] is a tough one for women to get into. She also added that she can only think of three other similar firms run by women. [#15]
- The female owner and female representative of an uncertified firm felt that experience was a barrier and expressed frustration about public agency staff that made suggestions to them about getting on rosters for small works projects. She said, “We're always encouraged just to get on your small works roster and then ‘if we have something we'll throw it to you and see

how you perform' but that's just their way to kind of get you off their front doorstep... I think we're just kind of discouraged a little bit about going after some of the jobs that we have to bid against just because we don't have that past performance as a firm but we've got the capabilities to do so." [#6]

- The male representative of a non-Hispanic white male-owned firm said experience and expertise are barriers. He explained that there are some specialty areas within the industry that do not fit their skill set. If they cannot find a competent sub, they have to walk away from those jobs. [#16]
- A representative of an uncertified firm said, "Qualifications based process has a year limit on experience. We think this does not provide a clear showing of our experience." [WT #12]

**Licenses and permits.** Some interviewees indicated that not having knowledge about how to get licenses and permits has been an issue. For example:

- The non-Hispanic white male owner of a small business, when asked about licenses and permits, cited frustration with the City of Nampa's Planning and Zoning Department when submitting applications and permits. He said, "It is one of the worst agencies to deal with." [#4]
- A female representative of a non-Hispanic white male-owned business, when asked about licenses and permits, expressed pronounced frustration about Idaho's public works licensing requirements and said it is a significant obstacle for small contractors. She said, "I have so many friends that are contractors who don't get their public works license in Idaho because of the process you have to go through... I know a lot of littler contractors who do more in Washington than they do in Idaho because they can go higher without having to jump through the process." [#5]
- The male and female co-owners of a non-Hispanic white firm said licensing is a large barrier, but it depends on the state. The owner said, "[Licensing is a] major hindrance...Just the organizational part of the licensing for the states, that's probably been our biggest hurdle to overcome. Not so much for Idaho, but the Washington licensing, the [Labor and Industries] department, is very difficult." They added that because the business is located near the border of Idaho and Washington, "Half of our business should be in Clarkston (Washington). In the reciprocal agreement that Washington basically does not have with Idaho, is a major hindrance. They had it once and they just dropped it a year and a half ago." They went on to describe Idaho's licensing process as "Easy and very straightforward. It was achievable." [#9]
- Male managers of a business development organization there can be several layers of licensing requirements. An interviewee said, "In the state of Idaho, there is no requirement for a general business license. Now, that being said, there are some industries that require state license. Then, in addition to that, you have to check with either the city or the county, depending on where your business is located as to whether there are city or county licenses that are required to do work in that area...There's also a public works license that has to be obtained if you do public works." [#10]

- The female representative of a DBE-certified firm, when asked about barriers regarding licensing and permits, said that they have had to downgrade some licenses due to cash flow issues. [#17]
- A representative of an uncertified firm said, “We opened a store in Boise and it took a little longer opening dealing with the inspection and permitting process.” [WT #95]
- A representative of an uncertified firm said, “The requirements to get a public works license in Idaho are very strict and has been a barrier for this company.” [WT #73]

**A few interviewees noted that they had no problem receiving licenses and permits.** [e.g. #1, #24] For example, a female owner of a DBE-certified firm, when asked about licenses and permits, said she routinely works with the FAA and has a good working relationship with them. She said, “They have a job to do. I’ve got a job to do and I have had no problems with anybody on that effort.... They go find out whatever I need to do and I just do it. I run a real business. I don’t care what they want. As long as they tell me what they want, I just provide it. It’s no big deal.” [#2]

**Prevailing wage, project labor agreements, or any requirements to use union workers.** Interviewees discussed prevailing wage requirements that agencies place on certain public contracts, as well as other wage-related issues.

**A few interviewees indicated that prevailing wage and union requirements could present a barrier to working on public contracts.** For example:

- A male owner of a DBE-certified company, when asked about working with unions, said the firm has only one experience working with a union and he likely would not do it again. He said, “We got it done but it was just horrible with paperwork and you had to sign your guys up for a month of union and they had to join the union. It was like, really? We’re putting up signs. We’re going to be here less than 30 days. They required you to join the union. It was a nightmare.” He added that his employees “liked it because they were getting paid huge money.” [#1]
- A male representative of an uncertified female owned firm, when asked about any issues working with unions, stated that he did have barrier there. He explained, “We’ve tried a couple of times, but often times there’s a lot of barriers there. They’ll have a lot of rules and regulations that they have to go by. That often times slow up jobs. So we don’t work with them too much.” [#24]
- Male managers of a business development organization, when asked clients’ experiences as union or non-union employers, noted that Idaho is a right-to-work state and that as employers, the small businesses they work with are faced with two varying pay structures. An interviewee said, “Commercial work in construction is done a lot cheaper than federal work in construction... The Federal Service Act of 1965, when that kicks in, the pay you have to pay people is a lot higher than you normally pay them. It’s union scale.” [#10]

**In one interview, it was noted that prevailing wage or union requirements are not a barrier when working on public projects.** Specifically, the male and female co-owners of a non-Hispanic white firm stated that they occasionally compete with the union for available workers, but it generally has not been a problem for them. The owner explained, “All the union electrical businesses in this area, there was one and they sold....The recession took them under, so there is not a union contractor in this area.” [#9]

**Other unnecessarily restrictive contract specifications.** Interviewees discussed contract specifications that they believe to be unnecessarily restrictive, noting such things as excessive paperwork, insurance, and software requirements. For example:

- The non-Hispanic white male owner of a small business, when asked about contract specifications, said that ITD and ACHD specifications are so restrictive that it makes a potential project unprofitable for a small business. He stated, “In order to get some of those contracts you pretty much [have to] change the way you do things...A lot of things that I see on ITD work, or ACHD on some of the bigger ones, is wanting things drawn in AutoCAD to certain layers, and to certain datum, and laid out a certain way. Some of that stuff it seems kind of silly, but they want it done this way and only this way when there's actually more than one way to do it that might be better. So, you pretty much [have to] set up your software to mimic their software in order to match it.” [#4]
- A female representative of a non-Hispanic white male-owned business, when asked about unnecessarily restrictive contract specifications or bidding procedures, stated that excessive editing during the ITD review process can impede the bidding process. At a previous position with an engineering firm, she said, “We'd send in specs [to an ITD engineer]... we would get edits back on specs and they were getting hung up over on the semantics of ‘there’ or ‘this’ or some wording stuff, and we're holding up bidding this project over the wording in the specifications... [ITD reviewers were] worrying about the wrong thing. I understand that if it's wording that could lead to a contractual problem in the future. But it's just preferential grammar wording.” [#5]
- The female owner and female representative of an uncertified firm said that sometimes solicitations are written so specific that it eliminates many bidders. An interviewee said, “[A contracting officer may be more comfortable with one specific contractor, and so will] make the solicitations so restrictive that only company X is technically qualified to put in a bid on it.” [#6]
- The female representative of a DBE-certified firm stated that they constantly experience issues with specification inconsistencies and interpretation, which often costs them thousands of dollars. [#17]
- A representative of an uncertified firm said, “[Public agencies] are very difficult to work with and their specifications are too stringent.” [WT #13]
- A representative of an uncertified firm said, “It is very, very difficult to stripe highways in Idaho. Specifications are very hard to meet.” [WT #14]



- A male owner of a DBE-certified company reported frustration with the ITD approval process for paint used on road projects. He stated, “It’s really hard to make your own paint. I’m not sure how you go about it, so we buy ITD spec paint because that’s what they require.... The same with the glass beads you just put on top of it. You’ve got to have it all certified and you got to have all the paperwork.” [#1]
- A representative of an uncertified firm said, “I wish I was better at [gaining public sector work]. There is opportunity but it depends on time devoted. It puts barriers on small companies. [Public agencies] specifically demand all designs are done doing Microstation. I am unconvinced that it’s necessary.” [WT #17]

**Bidding processes.** Business owners and representatives discussed the bidding process and potential barriers to be awarded contracts.

**Several interviewees noted that the “lowest bidder” award had negative consequences and that the process needs more flexibility.** For example:

- A female representative of a non-Hispanic white male-owned business stated that allowing public officials a small amount of flexibility when awarding contracts could result in projects that cost less in the long-run. She explained, “Public works is all about the lowest bidder... Sometimes the low bid contractors are the ones who buy a project and spend the whole project creating change orders to make up for the cost difference that they left on the table...It is unfortunate the way they have public bidding that there’s not a little bit of leeway in that public bidding scenario. [Public officials] would say if there was a threshold, like if you said the low bidder was a million dollars and you can award to any bidder that’s within 5% of the low bidder, 1%, whatever,[it would allow an agency to award to a contractor] based on past experiences.” [#5]
- Male managers of a business development organization said that a lot of government projects are awarded to Idaho companies that can perform the work for a competitive price. An interviewee said, “There’s lots and lots of bids out there, and for the most part, a lot of them are going to Idaho companies because they can bid less. If they do, they can, because it’s the travel time and the overhead and all this good stuff, and that’s the way it should be within state contracting. They don’t do preferences, but they do lowest bid, and your in-state entity should be able to bid lower than out-of-state entities on most of the projects. But a lot of them don’t. A lot of them price themselves out of the market, and Idaho will you see...It’s not uncommon to have Washington or Oregon companies up here working in Idaho, Nevada, because they bid lower...State statute right now says lowest bidder...There are no preferences given for in-state, out-of-state or any set-asides. It’s lowest bid. That’s the statute.” [#10]
- A representative of an uncertified firm said, “People in Utah come and bid on our jobs, and underbid just to get the jobs.” [WT #2]
- A female owner of a DBE-certified firm, when asked about her experience trying to get work in the public sector, responded that the 1972 Brooks Act provision – which grants engineering and architectural firms the ability to be selected based on their qualifications

and experience rather than price – is often a battle for them, as they are classified as environmental engineering and therefore not covered by the act. She explained, “With any public entity, if they have any federal money that comes into their agency and they do engineering the engineering professional services, it's supposed to be [rates negotiable]. But for some reason, environmental engineering services... it's [lowest bidder].” [#21]

- Male managers of a business development organization suggested that both the state and ITD convert to a best-value contracting system instead of lowest bidder. An interviewee said, “Not lowest bidder. That's still the problem with Idaho procurement. It's still lowest bidder by statute, and you sometimes get what you pay for. That's why the federal government went away from lowest bidder – they weren't getting the quality service stuff, so they said wait a minute, wait a minute, we got to clean this up. Most of the service contracts now are best value.” [#10]
- The male owner of a DBE-certified firm, when asked about submitting bids, stated that price is the most important factor. He explained, “Well, if I was to bid a job and then I was the low bidder, I would look at the other two bidders that didn't get it and see the distance that I was away from them. I feel I can do it cheaper than they can just by using different methods to make it something easier.” He mentioned that he uses his experience in bidding to adjust his methods to become the lowest bidder in order to win projects. [#27]
- The male owner of a DBE-certified firm compared his experience with ITD to other states. He conjectured, “ITD requires prequalification for projects, whereas Wyoming wants a packet like a DBE packet including work history to know what you have done and what you can do in the future.” He said, “In Idaho, the low bidder generally gets the job, whereas North Dakota wants a little more information...Each state is different.” [#20]

**Some interviewees stated that the bidding process was time consuming and that they did not have the resources or staff necessary to submit bids within the allotted time frame.** For example:

- The non-Hispanic white male owner of a small business said public agency bidding procedures are too cumbersome for a small business and the system prevents a first-time contractor from getting on an approved list. He stated, “It's very time consuming. At the end, there's nothing to show for it because a lot of [agencies] want, ‘Well what jobs have you done for us in the past or other organizations?’ Everyone wants references to previous stuff. If we never get picked for a job, how are we ever going to have references for a job that we've done for you? It just seems like it's a vicious circle.” The interviewee believes the system favors large companies, due to the staff time required to assemble bid responses. He stated, “The big companies have people who specialize in putting together those [bid] packages in order to get those jobs, or get on those [approved vendor] lists. I mean, when you're a small business, you just don't have the ability to do that. It takes a lot of time.” [#4]
- A male owner of a DBE-certified firm stated that bidding and contracting information on the ITD website is difficult to find for contractors new to the process. He said, “It's pretty difficult to figure out what the lingo is, where you're supposed to go...I don't even know if you can actually put a bid in on that site. Personally, I don't know.... [The website is]

designed for these people that have been doing it, these few people that are getting these prime contracts. This handful of people, these companies, it's designed for them, where they know what to do and they've been doing it so they know how to access it. [ITD doesn't] care about anybody else coming and doing it." [#7]

**Some interviewees indicated frustration by the unexpected cancellation of bid opportunities because they had already put in time and resources to complete the proposal.** For example:

- A female owner of a DBE-certified firm mentioned that the federal government shutdown harmed her business. She said, "I had a contract that was in the pipeline. They had decided to hire me. They were within days of making the award. All I do is like, sign and send paper around. And, because the government was shut down, all the money that was going to go to other contracts to get work done, that was pulled to then take care of people in the organization and I lost work. After that, they weren't sure about the repeated potential for that so I didn't get work on the federal government for a number of years." [#2]
- A male representative of a DBE-certified, woman-owned firm said that federal agencies require a cumbersome amount of information when soliciting bids and they generally do not appreciate the time and labor investment that goes into submitting a proposal. He said, "I do not think the federal government understands DBEs very well, because they put us through a lot of hoops to put together a large proposal for a large project. I'll give you an example... We put together a proposal ... about [three inches] thick, requiring a lot of time and effort to find the right people, to cost out everything. We submitted it, and then they came back out, and re-issued it, so you had to re-submit it, and it had 14 more amendments....I'm sure some small businesses spent over \$100,000 just to put these proposals together. Then they cancelled. To me, I thought that would be criminal, but who's going to complain? ... It's not the small business' fault, because we did everything right, put the proposals together. It's very frustrating." [#3]
- Male managers of a business development organization stated that they see a lot of termination of federal contracts. An interviewee said, "The government can terminate for any cause, even for convenience of the government. That's the federal. I don't think the state has that written into their regulations. Even though you may hear someone say, 'Oh, I got terminated because I'm black,' or 'I'm a woman,' or, 'I'm gay,' or whatever. The government can just say it was for the good of the government." He added that when the federal government no longer needs a product or service, they terminate the contract. He explained, "That happens. A lot. A lot. I'm not joking. The government terminates contracts a lot, especially when they're multi-year contracts. Loss of funding. They shift the funding priorities in the agency. They terminate the out years of optional years of contracts. It happens a lot, and it's for the good of the government because they don't have the funding to put to it." [#10]

**One interviewee felt that the bidding process was not transparent and that she struggled to understand their lack of success in bidding.** A female owner of a DBE-certified firm, when asked about the bidding process, said there is a lack of transparency in the process of announcing, bidding, and awarding contracts in Idaho. Recalling a specific experience she stated, "Sometimes they – in Idaho and in other places – there's been a couple times when they have worked to try

to keep me out of [the bidding process], or I don't know where they're advertising. One was last year and I don't know if the contract even went ... I don't know where it went to. I still don't know where it went to. I don't know how Idaho's getting the work done and how that's doing. I've chosen in Idaho not to bother or worry about it. There [are] other states like that right around here. Again, I cannot chase that problem.” The lack of transparency persists even after contracts are awarded. She said, “In Idaho, I know who [a contract] was awarded to but I don't know how that money is getting to [the contractor]. I don't know where [or how] the bidding process is going to them.” [#2]

**In one interview, the interviewees stated that the bidding process revealed a lack of opportunity in their region.** Specifically, the male and female co-owners of a non-Hispanic white firm stated that they are not connected to public works bidding notifications for the region where they want to work. The owner explained, “[We’re] always getting emails for bid invites. [We] turn them down because they're eight hours away .... [We’ll] tell them, ‘If ever something within two hours [comes up]...we would consider that,’ but not four to eight hours away...[We’re] just not in the know yet as far as in the area.” [#9]

### **Non-price factors public agencies or others use to make contract awards.**

Interviewees discussed factors that are perceived to impact contract awarding.

- A representative of an uncertified firm said, “It is difficult to figure out how ITD goes about their selection. When we submit proposals we have heard that non-engineering people review the proposals instead of qualified engineers. Something is very wrong with the selection process with ITD.” [WT #7]
- A representative of an uncertified firm said, “For design contracts they have a design contract requirement to control final design experience over the last five years. That has been causing difficulty. It has precluded us from giving the final design so we can't show the final design experience.” [WT #11]
- The male owner of a DBE-certified firm, when asked about other factors agencies use to make contract awards, stated that the projects often go to firms with more resources. [#26]

**Timely payment by the agency or prime.** Interviewees discussed whether they had issues with receiving timely payment.

**Several owners and representatives indicated that timely payment is a problem.** [e.g. WT #94, #15, #22, #23] For example:

- The male owner of a DBE-certified firm stated that there is a prime he will not work for because of payment issues. He explained, “It was actually a gasket in a big manhole that I put a big structure in there at the treatment plant, and he refused to pay me for that gasket. I had it ordered for that box because I knew they weren’t going to order it, but in my contract it states that they’re supposed to supply all materials.” The gasket cost approximately \$3,000. He is currently in court with the prime to repay the amount. [#27]

- A female owner of a DBE-certified firm, when asked about timely payment problems, stated that longer-term payments are more difficult to bear as a small business. She explained that payment terms are 45 days for primes and 90 days for subs, and that they have more payment problems when performing as a sub. [#21]
- A male representative of a DBE-certified, woman-owned firm, when asked if he was aware of issues related to prime contractors making timely payments, said they have experienced it a few times. He stated, “They’re usually small engineering firms locally... in Idaho, and their problem is they probably haven’t got paid either. That’s few and far between, because our big clients pay us very well.” He added, “We invoiced DOE yesterday, got paid today. That’s how fast it goes sometimes.” [#3]
- The male and female co-owners of a non-Hispanic white firm, when asked about timely payment by customers or prime contractors, stated that payment issues did not start occurring until the economic downturn. The owner said, “We never had, I don’t think, a single person not pay us. After the recession, it was commonplace.” [#9]
- The female representative of a DBE-certified firm said they have experienced delay in payments. She explained that they often suspect that the contractor is holding payment and not complying with the 20-day contract provision. [#17]

**Other interviewees noted that they had not had issues with timely payment by agencies or prime contractors.** [e.g. #18, #20, #24] For example:

- A male owner of a DBE-certified firm expressed that there is a connection between a successful working relationship with a prime and prompt payment for services. He said, “[A large private construction company is] really good to work with. We get along with all of them. We work with all of them... [A different private construction company] seems like the best to pay. You do a job for [that private company], you turn your paperwork in the 25th, when they get their check, they will pay you. They are really good.” However, he also noted that his experience receiving timely payment varied. For example, he stated that he enjoyed private sector work but knows there is a higher risk of non-payment from private sector customers. In contrast, he prefers public sector work because of the financial security. He explained, “[With] public work you’re guaranteed to get paid. That’s the biggest thing.” [#1]
- The female owner and female representative of an uncertified firm, when asked about timely payment, said that private sector clients are generally slower to make payments compared to public sector clients. An interviewee said, “[Public sector payments are] much better [than private sector payments] and we were told that, especially with the federal government, if your forms are done correctly [payments are expedited]. We just had a 4-day turnaround with a federal agency.” [#6]

- Male managers of a business development organization said that ITD's payment process works well. A manager said, "[ITD has] a prompt payment act. The state prompt payment act is better than the federal prompt payment act that ITD uses, so yes. As recent as a year and half ago or something like that, they really started looking in on the primes to make sure that they were paying their subs on time after the sub completed their portion of the work. I've heard some good things recently that the subs are being paid." [#10]

**Additional disadvantages or barriers based on being a minority- or woman-owned small business.** The study team asked interviewees whether there were any additional disadvantages or barriers for minority- or woman-owned businesses. Interviewees noted a variety of barriers associated with being a minority- or woman-owned business. For example:

- Male managers of a business development organization, when asked if there are additional difficulties minority- or woman-owned small businesses face in the marketplace, stated that there are barriers in some industries. An interviewee said, "There are certain industries where there's a definite under-representation of women and minorities in them as the business owner, not necessarily working in them. Although I would say that, too. But as the business owner, I would say there's definitely industries that are definitely under-representative in the state of Idaho...Construction. I can tell you right now. Owners are actually working out and doing the jobs...Engineers is one of them. Yeah, I would agree with that. Heavy duty equipment operators, things of that nature...Most of the consulting is done by firms that are not minority or woman-owned." [#10]
- A female interviewee, who provided public comment in a public hearing testimony, discussed a problem with wage stagnation, or decline, as a result of the de-skilling of labor. She stated, "A large community concern is payment issues [where] individuals are being impacted as we speak. It's distressing to see businesses start up with DBE status and then turn around and pay wages that wouldn't support anyone 30 years ago, and they certainly don't now. I'd like to see opportunities for people to diversify more than just the easiest unskilled labor type stuff." [CDA #1]
- A male representative of a DBE-certified, woman-owned firm said that another barrier for small businesses is simply having enough staff with depth of knowledge and time to understand complex rules and regulations. A lack of understanding about complex tax rules and regulations from one state to another can hurt a small business's bottom line. He said, "It's a lot of the little things that small businesses don't know. I'm afraid a lot of small businesses go into things, get contracts, and then find this stuff out too late. We've been guilty of that, and learning the hard way. New Mexico gross receipt tax was one of those... There goes your profit, right there... the New Mexico Gross Receipts Tax, that's like another 7 or 8 percent.... It applies to the prime contractor, not the first tier subcontractor, but the next tier. Every other tier has to pay that tax, so being a small company if you don't know those rules, it can hurt you." [#3]

## F. Idaho State and Local Agencies

Business owners and managers discussed working with Idaho state and local agencies including:

- Experiences attempting to get work with public agencies (*page 47*);
- Recommendations to improve state agencies' notification and bid process (*page 50*);
- Public Agency payment (*page 50*);
- Recommendations related to improving agency's administration of contracts or payment methods (*page 51*); and
- Other concerns (*page 53*).

**Experiences attempting to get work with public agencies.** The study team asked business owners and representatives about their experiences attempting to get work with public agencies.

- Male managers of a business development organization, when asked what public agencies their clients have worked with in Idaho, stated that their clients work with Department of Defense-Mountain Home Air Force Base, Department of Energy at INL, the Mint, Army Corps of Engineers, Forest Service and BLM. An interviewee said, "The big money spender in the state is the Department of Defense - Mountain Home Air Force Base and the Department of Energy out at the site. The Mint. Army Corps of Engineers. Those are such large jobs, small businesses really can't perform on them.... Department of Energy, Army Corps of Engineers, and Department of Defense spend the most money. Every year. They have the biggest projects. When it comes to actual number of contracts for large Forest Service and BLM. When it comes to actual number of contracts ... Forest Service and BLM [consistently issue] a whole bunch of little contracts [in the range of \$20,000-\$30,000]." [#10]
- The male representative of a DBE-certified firm, when asked about his experiences in working with public agencies in Idaho, said that in the short time that his wife have owned the firm, they have worked with a couple of cities, ITD, and Idaho State Parks and Recreation. He added that getting their public works license was easy and the whole process took less than 48 hours. [#18]
- The female representative of a DBE-certified firm, when asked if it was easier or harder to work with ITD opportunities compared to the other agencies said it depended on the project or the owner. She added that municipalities tend to be easier to work with and quasi-governmental agencies have an extra layer at the corporate level. She stated, "If it is a project directly with ITD, they are pretty easy to work with. If it is with LHTAC, it's an added step in the process and lack of communication. I would rather work with ITD all day long, than work with LHTAC." [#17]

- The male owner of a DBE-certified firm, when asked about his experiences working with public agencies in Idaho, said that he works with ITD, the Department of Energy, the Department of Defense, the General Services Administration (GSA), the Bureau of Reclamation, the Army Corps of Engineers, the City of Idaho Falls, the City of Pocatello, and the City of Rexburg. When asked about the nature of the project, said his firm takes on mostly civil projects, but also takes on industrial commercial construction projects. He added, “There is not just one thing my firm does repetitively.” [#20]
- The male owner of a DBE-certified firm, when asked if he had worked with ITD, stated that he had not. He knows that the Department of Transportation has contaminated stations, but has never been contacted by a department for information about projects. He has also worked for the Department of Environmental Quality and the Department of Health. [#26]

**Many interviewees noted that they have had difficulties getting contracts with public agencies.** For example:

- A female owner of a DBE-certified firm, when asked about her experience with public sector work, responded that she has not been able to get work with ITD. She mentioned that she previously bid on two ITD projects which they were very qualified. She said, “We usually fall in those jobs [as a] number two kind of thing. You know, and so they were close... It's usually the same firms end up getting all the work anyways.” [#21]
- A female owner of a DBE-certified firm, when asked if she had worked with ITD, said she had no experience working with ITD or ITD contractors. She added, “...I did try initially... and I got nowhere with that. When I called the contractors, they had no work [for me].... It's not like I went through the exhaustive list but I chose some that I thought were at least representative and at least in the area. None of the primes had any interest or need for environmental, let alone a DBE firm...They didn't care.” She reported having more luck working with BLM, Idaho National Laboratory, and Idaho Fish and Game's regional office in North Idaho. [#2]
- The non-Hispanic white male owner of a small business, when asked about getting work with public agencies in Idaho, said that he has not had much success with large agencies. He mentioned that he has tried to work with ACHD, BLM, Department of Lands and ITD by applying to their approved vendor lists. He noted that it is a time-consuming process and it is unclear if there is a benefit for his business. Furthermore, he expressed frustration about trying to develop relationships and communicate with agency staff that are spread thin. He explained, “Personnel don't return calls, don't return e-mails. [In Nampa] they lost their senior engineer, and they have one guy trying to do it all... He had just so much on his plate that I think he just blew everyone off. We had one meeting with him, and never heard back from him ever again.” [#4]
- The male owner of an uncertified firm, when asked about his experiences working with or attempting to work with public agencies, said he has wanted to work with public agencies but does not know how to go about doing so. [#23]



- A representative of an uncertified firm said, “I haven't done a lot of work over there [in Idaho] lately. When I started I did. There was one project with the State Preservation Office. I was busy at the time, so I couldn't pursue it. That was about a year ago.” [WT #89]
- A male representative of an uncertified female owned firm, when asked if they have done work with any public agencies, said that the firm has never been hired for a public agency job. He explained, “I went on [public agency's] website, and it seemed to me that there are lots of rules that I could see for all sorts of stuff that a sub had to do [to get paid]. I assume we would be a sub.” The firm does not usually work in a subcontracting role. [#24]

**Some interviewees stated that they have had overall positive experiences working with public agencies.** [e.g. WT #91] For example:

- A male owner of a DBE-certified firm said his firm has built a partnership with ITD. He noted that his firm is often hired by ITD to provide professional services because of the relationships they have developed. He explained, “The people are really good to work with, and what we noticed, too, is that it's a great collaboration...At the end of the day, it's a good product. Our stuff always sails through [the FHWA review process].” He added, “The federal government is really awful to work with.” [#13]
- A representative of an uncertified firm said, “The Department of State has been really good to deal with. I have an engineering license that has been enforced, which was transferred.” [WT #90]
- A male representative of construction trade association, when asked about some of the experiences performing work for ITD, stated that ITD is sometimes slow to respond, but they do listen and respond appropriately. For example, he discussed a project two years ago that required replacing a section of the freeway. ITD wanted to measure one of its efficiency goals as reduced traffic delay, so wanted one lane open. The trade association had several meetings with ITD to convince them that it is less safe for the workers. He said, “The problem with that is that you put up a barrier and you have construction work going and live traffic right next to the workers. And so we convinced [ITD] that even though it inconveniences the travelling public a little, it's much safer if you move them over.” [#25]

**Some interviewees noted a lack of opportunities in their industry to work with public agencies.** For example:

- A male owner of a DBE-certified firm said most ITD projects are beyond what his company does. He said, “Most of the ITD stuff is not specifically what we do.... we've never ventured to that because that's huge and we're just not quite ready to do that.” As a result, he bids as a subcontractor for ITD projects. He stated, “We don't build roads and we don't chip seal. That's mostly what ITD wants is either they're building roads or chip sealing.” [#1]
- A female representative of a non-Hispanic white male-owned business, when asked if the company worked with ITD, stated that the firm has done limited work with ITD, adding, “A lot of the ITD projects that have been out to bid lately have been overlays and things. That's

just not our forte.... there just hasn't been a lot of ITD work that's come out that's been in our wheel [house]. Or that we would be competitive." [#5]

- A representative of an uncertified firm said, "The realignment of the hub zone affected us. We're missing out on work that we used to have the opportunity to get." [WT #99]

### **Recommendations to improve state agencies' notification and bidding process.**

Interviewees shared some recommendations to improve state agencies' notification and bidding process. For example:

- A male owner of a DBE-certified firm, when asked for any recommendations related to improving ITD's administration efforts, discussed his approval of the professional service agreements process with ITD. He said "It was fair. Once your overhead rate is approved, then the business aspect is completed....Then you sit down with client and negotiate the scope of work and how many hours it will take. It is a give and take process." [#13]
- A representative of an uncertified firm said, "[I recommend having more] regulation; some counties have different sets of rules." [WT #97]
- A representative of an uncertified firm said, "[There are] too many regulations to mention, and it gets worse. We need to hire a full time person to stay on top to keep up with the regulations." [WT #98]

**Public agency payment.** Interviewees discussed their experiences with payment from state agencies.

**Several interviewees noted that they have experienced difficulties with payment from state agencies.** For example:

- The male owner of a DBE-certified firm, when asked about experiences receiving payment for work, mentioned that in one public contract, he was only paid every four months. He explained, "It's kind of weird, because even on the payment, the inspector wasn't supposed to sign off the job because of the retainage of their subcontractors getting paid or their materials getting paid for, and then they released the money, and you know it's like we didn't get paid. Well there's nothing we can do." [#27]
- The female representative of a DBE-certified firm said that his firm has declined tremendously over the last six years due in large part to 120 payments coming out of ITD, and the GARVEE bonds. She added, "It is really hard for a small business to function [when] not getting payments on time." When asked clarify the impact of GARVEE bonds, she said getting paid through GARVEE was troublesome. She explained, "We were sitting on thousands and thousands of dollars. Receivables were three, four, up to six months out. That's pretty tough stuff." [#17]
- The female representative of a DBE-certified firm, when asked about her experiences with getting paid by ITD, said it was harder than it is with other clients. She expressed that part of why this happens is that her firm is three or four levels down from the initial payment. She

explained, “In our world, what has to happen is that Federal Highways has to decide to release the funding, and then the state has to decide they will fund our contractors. Per our standard contracts the contractors have 20 days from the time they received funds to pay us. Let’s say there is a 60-day delay somewhere, by the time it gets to us it’s 120 days, and now we have a big cash flow problem.” [#17]

- A male owner of a DBE-certified firm said, “Some of the independent engineers that ITD hires are horrible to get paperwork through and get all the quantities.” [#1]
- A female representative of a non-Hispanic white male-owned business, when asked about payment, said, “The timeliness of the funds can be an issue.” She explained, “[State funding agencies that administer municipal grants] might take 90 days to pay, if they’re busy...And technically you’re in breach of contract. That’s the problem is some of these agencies don’t realize, you’re in breach of contract because it says once the city’s approved it, you have 30 [days to pay]...DEQ now makes them put it at 45 days to pay. Forty-five isn’t even enough for them most of the time. It is usually 60 to 90 days on a DEQ project unless the city has the money to front it. Most of these small little cities who stuck their hand out for a grant don’t have the money to front a \$300,000 pay up.” [#5]

**Some interviewees said that they have not experienced any payment problems with the agencies.** [e.g. #16, #26] For example:

- A male owner of a DBE-certified firm, when asked about his experience getting paid by ITD, said he did not experience payment issues with ITD; however, he did experience payment delay while working as a subconsultant. [#13]
- A male owner of a DBE-certified firm, when asked about his experience getting paid for ITD work, said an advantage of working for ITD or other public agency is the assurance of getting paid. He said, “ITD’s great.... You’re guaranteed to get paid. I know the contractor, kind of slow at paying us when they get paid but, you’re guaranteed to get paid. It’s not like you work in the private sector and somebody bounces a check to you for ten-grand...ITD hasn’t bounced one yet. That makes it better, that you’re guaranteed; once you got the job, eventually you’ll get paid if you keep all your paperwork up.” [#1]
- A male representative of construction trade association, when asked if some members had experienced late payments from ITD, stated that ITD is very good about prompt payment. [#25]

**Recommendations related to improving agency’s administration of contracts or payment methods.** Business owners’ recommendations included such things as payments directly to subcontractors, better communication, and ensuring that small business programs are being followed. For example:

- Male managers of a business development organization, when asked for recommendations related to improving ITD administration of contracts or payment methods, indicated that there are problems with ITD contracting. A manager said, “There’s a huge problem at ITD contracting, and this has nothing to do with DBE. There’s a huge problem with a contracting

shop in that, because it's passed through money from the federal government, they don't account for it correctly or as detailed as they need to...It's not centralized either. That's the other thing. ITD contracting is decentralized out to the little regions...There's nobody at ITD headquarters, per se, that is the macho contractor beating them up, so there's a lot that goes on. The one big project that they did, they just completed two years ago, that they worked on for five or six years at highway 95 whatever that was going on for years and years and years. They made all kinds of mistakes because the local ITD was the contractor, and he wasn't ensuring that stipulations like groundwater contamination and soil erosion was being done and that sort, so there's all kinds of mistakes being done. They since cleaned it up a little bit, but I'm still surprised most of the contracting is still decentralized.” [#10]

- A male owner of a DBE-certified firm, when asked for recommendations related to improving ITD’s payment methods, said that payment through a prime can be a problem. He said, “Sometimes those outside engineering firms can be a pain to get paid through. Maybe ITD needs to hire more engineers.” [#1]
- The female representative of a DBE-certified firm said, “There needs to be more dispute resolution especially when dealing with LHTAC. If they are going to contract inspection and onsite engineering services to a consultant, the specifications need to be more clear. Also, there needs to be more consistency in working with each residency [Resident Engineer], because they all differ.” She expressed the need for more understanding between field workers and engineers, saying, “Our frustration is, we get a set of plans and regarding what looks good on paper doesn’t always work in practical application... and saying to someone, we need to change this, they say, ‘We need seven to 10 days’ advance notice for review.’ Well, the meeting’s on Tuesday and we start construction on Thursday...If we do so, then the prime is waiting on us and they only have so many days to complete the project.” She added that the process is even worse when on LTHAC projects, explaining, “We have issues where the field inspector will approve a modification in the field, sign off on it, and then an engineer refused to pay for it. Well that can’t happen anymore.” [#17]
- The female representative of a DBE-certified firm, when asked if she had recommendations to improve the administration of projects, said clarification would be useful. She said, “Knowing who is in charge would be helpful. Is it the field inspector? Is it the resident engineer? Is it the auditor in Boise? Who has the end say, and who do we go to? We don’t know...The less layers we have, the better.” [#17]
- A representative of an uncertified firm said, “You get conflicting information from the government and it makes it difficult.” [WT #96]
- A representative of an uncertified firm said, “It is too easy for new companies to start and to undercut established business with inferior workmanship.” [WT #103]
- The female owner of an uncertified firm, when asked if she had any recommendations for state programs, said, “[I] don’t like any of them, if you’re the low bidder, you’re the low bidder and [if] you can be responsible and get the work done.” [#22]

- A male representative of an uncertified firm sent written testimony in reference to how ITD administers contracts. He wrote, “ITD is slow to adopt new or innovative traffic engineering/planning techniques and tends to hire the same people over and over to do the same work they’ve done before, which can limit the type of innovation that is delivered for policy, vision, analysis, design, and construction on the state highway system. A clear example of an agency that has embraced innovation is to look at the approach taken by UDOT on their highway system.” [WT #2]
- A male representative of an uncertified firm sent written testimony on the process ITD uses to select consultants. ITD’s existing RFP/ Term Agreement process requires that project managers and key staff have significant ITD experience. He writes, “[This] limits the opportunities for developing new up and coming professionals in the state. We would suggest that ITD revisits their boilerplate RFP questions to open the door for innovative/thoughtful responses to project solicitations – rather than just rolling out the same PMs with 40+ years ITD project management experience. Technical innovation, strong understanding of the project, and good PM practices should be the basis for consultant selection.” [WT #2]
- A male owner of a DBE-certified firm said he attended a small business conference at the Idaho National Lab three years in a row, and laboratory officials kept saying there would be work for small businesses coming out. Finally, after the third year, a lab official said he did not know what was going on. No work ever materialized from that effort. [#13]

**Other concerns.** Interviewees discussed other concerns that they have with ITD. For example:

- A male owner of a DBE-certified firm, when asked about challenges with public sector work, said he was frustrated with the amount of required paperwork and earning the trust of new inspectors. He said, “[ITD paperwork is] a full-time job.” He reflected on a project with ITD and stated, “I think [the inspector] was just new, and he was going to make sure that everybody knew he was the inspector...Once we all got to know each other, we were fine. That’s the way it is with any of them. You got to build a reputation, because he didn’t know us.” [#1]
- A female representative of a non-Hispanic white male-owned business stated that she had experience working with ITD and LHTAC while at a previous job and expressed frustration about a counterproductive dynamic between the two agencies. She said, “Why do you have to have two different agencies? That was just somebody’s [territorial fight] that started that whole LHTAC thing to begin with. It should all be under one umbrella. If it’s under the ITD umbrella and you have a different division that deals with it, that’s one thing, but it should all be the same instead of creating this divisive LHTAC versus ITD. Because there is. There’s a perception of it out there. ITD versus LHTAC. ITD versus LHTAC. Fight. Why do that? That’s not beneficial for anybody other than ITD or LHTAC, whoever’s currently winning the fight.” [#5]
- A female representative of a non-Hispanic white male-owned firm, when asked about potential barriers, said that miscommunication and incomplete information from agencies can be a barrier. She explained that some of their jobs involve working with the EPA, BLM,

or other agencies, but they do not always have access to all of the necessary information. She explained, “We often find ourselves doing a job with the information we have, and they show up and say, ‘Surprise! Nope!’” [#14]

- A male representative of construction trade association, when asked if he had heard of challenges working with ITD, stated that some of the members have had issue with ITD changing in field performance. He explained, “In ITD language, if the contractor and the project manager – who is an ITD employee – have a disagreement, it’s called a dispute. And they can address a dispute and agree [that] the contractor is going to conform to the contract or the contract will be changed to address the issue... If they handle it at that level, it’s just called a dispute and there’s not much paperwork involved. If they can’t agree, then it becomes a claim and it comes up through the system. Until recently, almost every dispute was becoming a claim and it seemed that the ITD field staff had dug in on every little thing.” He mentioned that it is getting better and ITD is working to correct that. However, part of the solution was to decentralize a lot of the decision-making to regional offices. He said, “[Unfortunately], when it doesn’t work, then those regional authorities were autonomous and they could say ‘I know that’s how they do it in Twin Falls, but here in Lewiston, by golly, we’re going to do it this way.’” He mentioned that now ITD is working on bridging the gap. [#25]
- The male owner of a DBE-certified firm, when asked about challenges with the bidding process, stated that he once worked on an environmental remediation process that had been previously awarded to five other firms. The firms all claimed the area was contaminated, but he was the only one who remediated it. He wondered, if the agency already knows there is a problem, why are they bidding jobs so often? [#26]

## **G. Any Other Allegations of Unfair Treatment**

Interviewees discussed potential areas of unfair treatment, including:

- Denied opportunity to bid (*page 55*);
- Bid shopping (*page 56*);
- Bid manipulation (*page 57*);
- Treatment by prime contractors and customers during performance of the work (*page 58*);
- Unfavorable work environment for minorities or women (*page 58*);
- Approval of work by prime contractors (*page 61*); and
- Any double-standards for minority- or women-owned firms when performing work (*page 62*).

**Denied opportunity to bid.** Interviewees discussed whether they had ever experienced being denied the opportunity to bid.

**Some interviewees stated that they had been denied the opportunity to bid.** [e.g., #10] For example:

- The male owner of a DBE-certified firm, when asked if his firm had ever been denied the opportunity to submit a bid or price quote, said that he had. He said, “[It was] because the project coordinator didn’t feel [my] firm was the ‘type’ of company they wanted to work with.” He further explained that he did have another situation with a private sector contractor. He said, “I was told, ‘I don’t want to work with you because I am not comfortable with you’.” [#20]
- The male owner of an uncertified firm, when asked if his firm had ever been denied the opportunity to submit a bid or price quote, said he had. He said, “In 2006, there was a job through the Public Workers License available and I attended an open public safety meeting for the job. I was denied because I didn’t have enough experience to frame a commercial building.” He went on to discuss a 2012 ITD job, saying, “I filled out the paperwork to bring my North Dakota company to Idaho and was denied because of a lack of manpower, and not enough money sitting in a back account. I was told they were looking for a company with a bigger overhead, and they assumed my firm was broke. I was told ‘We just don’t want your company to fail on our behalf.’ From there, me and my team decided it was not even worth it anymore to go through ITD for the job.” [#18]
- A female interviewee, who provided public comment in a public hearing testimony, recalled an experience where she was denied access to work simply because she was a woman-owned business. She had met with a large company and, at first, they did not recognize her from the list of DBEs. When they finally realized that she was, in fact, a DBE, the interaction took a sharp turn. She said that the firm representative stated, “You’re a woman-owned business. I want nothing to do with it.” She asked for an explanation and he responded, “Because women are a pain in the butt.” She further explained, “No, listen. I know you’ve got this big project coming up, and I know you need bellies and I know you need side dumps... You give us two weeks. If my drivers do not out produce, you don’t have to pay me a dime for two weeks. Not a dime. I’ve already talked to me drivers. They’re willing to stake their wages for two weeks on this.” The man asked her to leave his office. [CDA #1]
- A female owner of a DBE-certified firm, when asked if she had been denied an opportunity to submit a bid or quote, responded that she has been denied opportunities to market on term agreements and was turned away by a contracting officer. She recounted that she was trying to contact a person she knew in order to receive a referral and was subsequently sent to a contracting officer. She introduced herself, by phone, and the contracting officer responded unfavorably. She explained, “I got braided over the phone for about 15 minutes by this contracting officer [and he said] I wasn’t supposed to market to anybody [because] if that was allowed then everybody would be taking up all of the 8A County people’s times. That would be an unfair advantage. And he just made me feel like I was trying to do something illegal or untoward. You know, like I was giving money out... It’s bologna because I know for a fact that these people [contracting officers] are going out for lunch with [large

firms] and I wasn't even trying to do that. I was just wanted to introduce myself so I sent the capability statement.” [#21]

**Some interviewees indicated that they had never been denied the opportunity to bid.** [e.g. #17, #24, #9] For example:

- A female representative of a non-Hispanic white male-owned firm said that if they are given the opportunity to bid on a project they will submit a bid. The only time they do not submit a bid is if they do not have the manpower. [#14]
- Male managers of a business development organization, when asked about clients being denied the opportunity to bid, said that it typically does not happen. A manager said, “Okay, the prime chooses their own subcontractors, okay? The prime is not going to contact a company, and then after they've made contact and started working, ‘Oh, don't bother submitting a bid. We're not going to use you.’ Now, to submit as a prime contractor to the federal government, yes, I have heard of people not being able to submit their bid because they didn't get it in on time.” [#10]

**Bid shopping.** Interviewees discussed whether they had experienced bid shopping.

**Many interviewees stated that they have encountered bid shopping, often to appease good faith efforts.** For example:

- The female owner and female representative of an uncertified firm, when asked about bid shopping, said that it happens often. An interviewee added, “I think it's just the nature of [the business] — you've got your clients that are return customers and they're not as worried about the price because they know the value, but we get cold calls all the time like, ‘Hey what do you charge for a site disturbance plan?’ You end up saying whatever and you're always saying the high end so you don't screw yourself later. Then they're like, ‘Oh that was high, I got a different price from the guy down the road.’ And we know who the guy down the road is.” [#6]
- The male owner of an uncertified firm, when asked if he is aware of bid shopping in his field of work, said he sees it all the time in both private and public sectors. He said, “I call it K-Mart shopping, and I won't do work with these companies.” [#19]
- The male owner of a DBE-certified firm, when asked about bid shopping, stated that he is sure it happens, but cannot prove it. He explained, “I think you kind of see it in the numbers, when the numbers are really close. It's like how can everybody be that close? And then [the primes] still profit like a lot.” [#27]
- The male representative of a non-Hispanic white male-owned firm, when asked about potential barriers, said bid shopping and manipulation can be a barrier. He said, “It's not fair. I don't agree with it. It's a shady practice, but it does happen and over the years has probably cost us a job or two, but I don't see it as a barrier.” [#16]



- The female representative of a DBE-certified firm said that she has seen contractors that want to bid shop – for example, they will select several subs and have them split up tasks based on price. She added, “There have been times we’ve had to say, ‘Either take the whole bid or none of it.’” [#17]
- A female representative of a non-Hispanic white male-owned firm, when asked about potential barriers, said bid shopping and manipulation can be a barrier. She explained that their estimator is knowledgeable and experienced. As a result, people in the industry trust their bids. However, there have been instances where their bid prices have been leaked and they have subsequently been underbid by a competitor. [#14]

**A few interviewees noted that they do not see bid shopping.** [e.g. #5] For example, a male owner of a DBE-certified company, when asked about bid shopping, said he has not experienced bid shopping but expressed a desire for prime contractors to “call us and tell us we were a little high... Most contractors, they won't. They'll tell you if you're high, but that's all they're going to tell you, after the bid.” [#1]

**Bid manipulation.** Interviewees discussed whether they have seen or experienced bid manipulation.

**Some interviewees mentioned that bid manipulation does occur.** [e.g. #22] For example:

- The male owner of a DBE-certified firm described an instance of bid manipulation. He said that contracting agents will ask primes to lower their price in order to get a larger part of the contract. He explained, “It actually happened to me, too, because this was only supposed to be like a \$29,000 little project, and they doubled that, and it’s like well since you were so cheap, you know, we’re going to go ahead and give you these other ones on a change order.” He noted that with a change order, he did not have to bid or re-bond. This is significant because the original contract price can then be doubled or even tripled without needing to have a larger bond to cover the difference. [#27]
- The female owner of a DBE-certified firm, when asked if she had faced any issues with bid manipulation, said she may have experienced it. She explained that she bid on a project for a state agency in Alaska and met all the qualifications, but the bid went to local firm. She believes that the winning firm may have been preselected for that particular bid. [#15]
- A female representative of a non-Hispanic white male-owned business, when asked about bid manipulation, said she believes most bids are legitimate but acknowledged that engineers and agencies may manipulate the rules. She stated, “It's not done to exclude a contractor in that respect that I've seen with engineers. It is done, in all honesty, to get the client the best product for the best price. And there will be some contractors who are...going to assume that it's being done to prohibit somebody, but the engineers that I've worked with know that, yes, there are contractors we don't like, but we're not in control of that. It's a public works process....But it's too difficult and it puts the client at too much risk if you did anything hinky with that [process]. There might be a shoddy engineer out there who'd be willing to do that for a client, but most of the time you just leave yourself open to too much

risk. Nobody wants to have to re-bid a project; nobody wants to have to have controversy in trying to award a project.” [#5]

### **Treatment by prime contractors and customers during performance of the work.**

Interviewees discussed the type of treatment they had experienced during work.

**Interviewees gave examples of receiving poor treatment.** For example:

- The male representative of a non-Hispanic white male-owned firm, when asked about treatment by a prime contractor during the performance of the work, said, “Over the course of 30-some years we have run across some contractors that I feel were treating us unjustly, but you learn from it and move on.” [#16]
- The male owner of an uncertified firm said he has received threats to deduct the payment. He said, “Builders use motivations to bully the company into working the job.” [#19]
- A female owner of a DBE-certified firm, when asked about unfavorable work environments, stated that she has had issues with primes not treating her properly because she is female. She explained, “Well one of the primes, he was my former boss, [...and] he still treats me like a young female employee that doesn’t really know what she is doing versus the owner of a company. It was just everything in terms of project management, assignment of responsibilities and just general day to day things... He was pressuring me, not following the plan, going around me a lot.” She also mentioned that contracting officers and some primes tend to defer to her husband, as opposed to working directly with her. [#21]

**Some interviewees indicated that they had not experienced any poor treatment by prime contractors** [e.g. #23, #24] For example:

- A male owner of a DBE-certified firm said prime contractors will hire subcontractors based on price and relationship. He stated, “If you can be the lowest price, and they’re pretty comfortable with you getting the job done, you’re going to get the job whether you’re minority or not. I’ve never had any problem with anybody saying, ‘Oh, you’re a minority. I ain’t going to hire you’.” [#1]
- The male owner of an uncertified firm said that he has not seen any discrimination in his industry. He said, “As the owner of this company, it doesn’t matter if you are black, white, purple, or pink, male, or female. If you can do the job, then great.” [#23]

**Unfavorable work environment for minorities or women.** Interviewees discussed whether they had experienced unfavorable work environments for minorities or women.

**Many interviewees noted instances in which poor treatment based on race and gender has occurred.** [e.g., #20, COM #1, WT #80, WT #62] For example:

- A female owner of a DBE-certified firm, when asked about any unfavorable work environments for minorities or women, said she has experienced unfavorable work environments firsthand. In reference to a past project, she explained, “When the guy first called up, he wanted to talk to the chief pilot. ‘Well, that would be me, you can talk to me.’ ....

‘Well, I really need to speak to the chief pilot. Is he around?’ The operative word there was ‘he’.” She added, “Being female did not help my case there at all. He made us shut down the project. The [bad] part ... was [that] the biologist that wanted the data collected didn't get the work done. [The project] was a pet project of people higher up than that guy. The next year, even though they screwed around again, we ended up working for them.” She further stated that she has repeatedly experienced customers or colleagues not wanting to work with her because she is a woman. She stated, “I've certainly had people try to take me down... Get me replaced or pulled off the project...It happens all the time.” [#2]

- A male representative of a DBE-certified, woman-owned firm, when asked about unfavorable work environments for minorities or women, said he is aware of poor treatment of women, especially in the field. He said, “It is typical for his staff to work] with a lot of different contractors [at project sites]... Our team is predominantly women out there. Some of them can hold their own, but they shouldn't have to, so we deal with that a lot, and our client's very good with that. If we have an issue, that's always taken care of quickly. It's not something we have to worry about [the client] not taking it seriously, but it's the other people. The client's always good, I've never had an issue with the client causing us problems. It's other contractors, or sometimes our own people, and our own people we can take care of.” [#3]
- A male owner of a DBE-certified firm, when asked about unfavorable work environments, said there is it takes more for him to build credibility, but acknowledged it may be because he is new to the business. He said, “[More] than if I was a Caucasian just going in there...they would just take your word for it, more or less, and get you going, and figure everything else out as you go, but get you going right away. Whereas with me, they got to see everything up front, and then get you going. But also, it's hard to tell because it could just be you're new. It's hard to tell. It is a fine line. It could be one way, it could be the other way, or it could be a little of both.” [#7]
- A female interviewee, who provided public comment in a public hearing testimony, relayed an experience with a prime. She said, “[He told me that] if I slept with him, my trucks could go to work...So I basically laughed and told him he was an [expletive.]” [CDA #1]
- The female owner of a DBE-certified firm, when asked if she was treated differently by a prime or a customer during the performance of work, said that she has experienced differential treatment due to her gender. She explained that she has been called “hon,” “sweetie,” and so forth. She went on to say that she believes that this language is innocent, but still feels it is disrespectful and unprofessional. She also added that she has experienced some sexually harassing comments, and even sexual innuendos in the case of one international contract. [#15]
- The female owner and female representative of an uncertified firm stated that they experience stereotypical attitudes in the contracting community. The owner said that recently, a joint venture opportunity almost did not happen because a team of male decision-makers were not in favor of her involvement. She explained, “I go to this meeting and I do my dog and pony show and I go away, and the owner calls a couple of days later and yes, he's interested in a joint venture. He can bring his bonding, his crew, his knowledge of

construction, he's been in the business 35 years, and we'll bring our 8a and our great proposal writing. All is well and we go after a project and we get it, so we're happy, everybody's happy, we're going to make money. Then one of our engineers goes out to the site...he's on site and one of the superintendents that was there, some big guy in his late 50s is like, 'Yeah, who is that woman that was here?...Yeah, she's real ambitious but what does she know about construction?' [Our] engineer just basically said, 'Well, she knows enough that we have the project and you're the sub so it'll work.' [The superintendent said], 'We all voted her down after the meeting...[but] the boss voted her up.' My response to that was 'that's why he's the boss,' he saw the value in it, but you see the misconception...You just don't know all, but what you do know, is that they already had that preconceived notion before I went in." [#6]

- The female representative of a DBE-certified firm, when asked about unfavorable work environment for women and minorities, said that they have seen a lot of sexual harassment in the work place. She explained, "We work in construction. It's still very much a man's world...we have dress codes and do everything possible [to prevent sexual harassment]...Our owner has done an excellent job of educating our employees on what is considered sexual harassment." She added, "It is not as bad as it used to be. It may still be there, but due to several legal cases, everyone is more careful. Once the boundaries are in place, it usually goes well." [#17]
- The male owner of an uncertified firm said he mostly experiences good treatment from certain companies, however, he added that he has seen discrimination due to race. He explained, "There was a job in McCall. The customer felt like we were cheating him out of material and he felt like we were stealing from him, and [that he was] overpaying us. The customer told the builder, 'I understand that they can't afford the finer things.' The customer assumed that he was better than my crew because he has a fancy cabin." [#19]
- The female owner and female representative of an uncertified firm expressed frustrations about unfavorable work environments and pay inequality for women in the workplace. The interviewee said, "I can't really put my finger on it, other than to say, I know when I worked at the county I had a counterpart [who was] paid more, supervised less, and [had] much less education. Then sexual harassment kept going on, kept going on, I reported it and he was fired but it was— couldn't work with the building official because somehow gender was always brought in to every conversation I was having with him." [#6]
- The female owner of an uncertified firm, when asked if she is aware of any issues with discrimination against minorities or women, said that one of her independent contractors has experienced harassment issues at work due to his race. [#22]
- A female representative of an uncertified firm said, "I hit a lot of road blocks because I'm a woman. I can feel the vibes when I'm talking to them. I [have to] just back off and let my husband talk." [WT #77]

**A few interviewees noted that unfavorable conditions have occurred, but not specifically as a result of racial- or gender-discrimination.** For example:

- The non-Hispanic white male owner of a small business, when asked about unfavorable work environments for minorities or women, responded, “I don't know if you've ever been on a construction crew? They're offensive to everyone.” [#4]
- A female representative of a non-Hispanic white male-owned firm, when asked about treatment by a prime contractor during the performance of the work, said she has seen poor treatment, but mostly due to personality conflicts. [#14]

**Several interviewees indicated that they have not experienced any unfavorable work environments.** [e.g. #8, #10] For example:

- A male owner of a DBE-certified company, when asked about treatment during performance of a job, said he has not experienced discrimination either personally or secondhand from his staff. He said, “We hire all kinds of minorities. I've got minorities working for me. A lot of them. I haven't had any problems. I haven't had anybody say not to send them back or anything disparaging about them. As long as they get the job done...all the primes want is to get the job done and do it right. That's the biggest thing, do it right. I haven't heard anything and I'm sure I would have.” [#1]
- A male owner of a DBE-certified firm when asked if he had experienced discrimination expressed that he had not witnessed discrimination. He said, “You just don't see that, and if it's passive, it's so passive you just don't see it.” [#13]
- A male representative of an uncertified woman-owned firm stated that working with diverse employees has not been a problem. He explained, “We don't really look at that; you know the gender or the race. We look at whether they can get the job done or not. We've worked with all sorts of race, and all sorts of gender, and we work with ones that work hard, and are honest, and they get the job done.” [#24]
- A male representative of construction trade association, when asked if there was any discrimination in the marketplace, stated that he does not see that. He explained that he has spent a lot of time in North Idaho, for example, where there is a white supremacist history. He said, “In our work, I haven't experienced any of that the times I've been up there. It's all been pretty fair. One of the things I really like about working for the contractors is that if you show up and do your job and do it well, they treat you well. The only time I've ever heard a contractor get mad at somebody is because they didn't do their job well, not because of who they were.” [#25]

**Approval of work by prime contractors.** Interviewees discussed their experiences with getting approval of work by prime contractors. For example:

- A male owner of a DBE-certified firm, when asked about approval of his work by the prime, said the contractor he works for has been happy with his work and added that contractors' employees become the eyes and ears for their companies. He said, “The guys for their own

company, they'll go back to the office and be like, 'Get rid of [this employee]. He's ...driving real slow. Not getting the loads. Wasting time.' You kind of have to be Johnny on the Spot because you've got eyes on you from that company that hired you out." [#7]

- The male owner of a DBE-certified firm worked on a job where the project was already behind schedule and there were issues with work quality. He ultimately suffered some financial setbacks as a result. He explained, "They went in there and they took out all the road... and then they started paving. They paved like half the road in two days or something, and then they had to tear it back out and then reset the plant because their mixer didn't meet specs, so we lost a lot of time there, too, but that was just some time that I just had to eat." [#27]
- The male owner of a DBE-certified firm, when asked about approval of work by prime contractor, stated that he does experience a lot of politics in his industry now. He explained, "Well, because of the ADAs and everything, there's certain percentages and everything, and there's a lot of paperwork for them [prime contractors]." [#27]

**Any double-standards for minority- or women-owned firms when performing work.** Interviewees discussed whether they believe there to be double-standards for minority or women-owned businesses.

**Several interviewees noted that they believe there are double-standards for minority- or women-owned firms.** [e.g. #20] For example:

- The female representative of a DBE-certified firm, when asked about double standards, said that she has seen what she believes to be double standards. She explained that on the outside, it looks like men and women are getting paid the same amount for work that is not at the same quality level. [#17]
- The male owner of an uncertified firm, when asked about double standards in performance, said that a lot of companies assume that a Hispanic company will get it done better and faster than a Caucasian company. He said, "They assume it will get done right with no complaints because the crew is Hispanic...I have both kinds of crews and I make them compete against each other." He added that he sees this type of assumption mostly in the private sector. [#19]
- A female interviewee, who provided public comment in a public hearing testimony, discussed the impact of gendered homogeneity in the marketplace. She said, "In this general vicinity, it's been a very homogenously white community for a long time, aside from the various tribes... So the impact of gaming on tribal reservation communities has – it's hard to convey to you how much positive impact it's provided for jobs. On construction projects, I don't think the construction industry is in as bad a condition as the rest of the country, in the other things that we are inundated with in the press, but it's a very competitive situation... In the past, I don't think that I would have worked at any of the tasks or occupations that I did if there hadn't been targeted hiring requirements. [Those] got me in the door. It was kind of like the Jackie Robinson syndrome: you could get in the door, but you had to work twice as hard to keep the job and that even wasn't always good enough." [CDA #1]

- A female owner of a DBE-certified firm, when asked about double standards, said she believes there are double standards for women. She repeated a quote attributed to Madeline Albright, saying “‘There's plenty of room for mediocre men but there's no room for mediocre women.’ I think that's true.” She indicated that a related male-dominated hunting culture can also be exclusionary, even within the business community. She explained, “If you work with large mammals and you work in aviation, absolutely. I don't hunt, so [I] could be easily dismissed.” [#2]

**One interviewee stated that he does not believe there are double standards for minority- or woman-owned businesses. [#4]**

## **H. Any Additional Information Regarding any Racial/Ethnic or Gender-based Discrimination**

Interviewees discussed additional potential areas of any racial/ethnic or gender-based discrimination, including:

- Stereotypical attitudes about minorities or women (*page 63*);
- “Good ol’ boy” network or other closed networks (*page 65*); and
- Factors that affect opportunities for minorities and women to enter and advance in industry (*page 67*).

**Stereotypical attitudes about minorities or women.** Many interviewees had comments about whether they had experienced stereotypical attitudes about minorities or women.

**Several interviewees noted that they have experienced stereotypical attitudes.** [e.g. #19] For example:

- Male managers of a business development organization said there is an issue with perception about what jobs are open to women, and an issue of what training or education has been offered to women. A manager explained, “It's a perception of what [is] dirty, greasy so the ladies don't want to go there. The guys don't think punching a bunch of buttons is real work, so they want to be outdoors doing something. If you could get a woman owner who knows the business and can run the tools and make the decisions, she could do a phenomenal amount of business, and she could encourage other young ladies to get into that field. I mean, I hate to say this because I'm going to sound sexist, but I'm not. Most girls are not even afforded that opportunity growing up to do that. I would say that female welders are better than guys. They're more delicate. They have much more control.” [#10]
- The female representative of a DBE-certified firm, when asked about stereotypical attitudes on the part of the customers or buyers, said, “Oh boy...we have a lot of women that work for us, and you'll have this little gal that can bust out 40 barrels in time, and they've got this look [of] 'I don't think she can do it.'” [#17]

- The female owner of an uncertified firm said that because the construction industry is so male-dominated, gender stereotypes still exist. She explained that awareness has increased, so it is not as prevalent as it was years ago. She said, “Before, you knew what you were dealing with. Now it is often hidden...If a 60-year-old man calls me ‘sweetie’ or ‘hon,’ I don’t think anything of it. But, if a 30-year-old calls me sweetie, I know it’s an insult.” [#22]
- A female interviewee, who provided public comment in a public hearing testimony, discussed the challenge of being a woman-owned business in a male dominated industry. She said, “I met with the head director of [large firm]. And I asked him if he had any kind of work, and he was shocked that I was the owner. And he told me three times that he couldn’t believe that I was the owner of a trucking company, nor did I look like any owner that he’d ever seen that had a trucking company.” [CDA #1]

**Some interviewees noted that they do not believe there are stereotypical attitudes within their industries, or that stereotypical attitudes are changing.** [e.g., #22] For example:

- The non-Hispanic white male owner of a small business, when asked about his experience with stereotypical attitudes, said, “You know, the surveying industry is pretty much male-dominated. I think there’s one surveyor in the valley that’s a woman. To say that there’s discrimination or anything like that, how can you say that when there’s only one of them?” He added, “I don’t know. Society is kind of funny that way. They’d say, ‘Well there’s only one surveyor because women are discriminated in the survey industry.’ Well, maybe women just don’t want to be surveyors.” [#4]
- A female representative of a non-Hispanic white male-owned business, when asked about discrimination against minorities and women, noted that some unfavorable situations for women and minorities can be a product of the industry. She said, “I don’t know of any of the big construction firms that are women-owned or minority-owned. It is a product of the environment in which you live.” She also stated that the common use of curse words should not be misinterpreted. She said, “It’s just some people are easily offended by that and it wouldn’t work out real well. It would never be tolerated if there were anything racial...We have zero tolerance for making anybody feel bad over things like that. But I’m sure it happens, without a doubt. Whether it happens or whether somebody just perceives it that way because they’re offended by just the general culture of construction is a different story.” [#5]
- The male owner of a DBE-certified firm, when asked if he had experienced any stereotypical attitudes, said, “Not so much anymore. Overall, it’s not too bad...In the 70’s and 80’s it was worse, but it is much easier today to get a company started from an ethnic or racial standpoint.” [#20]



**“Good ol’ boy” network or other closed networks.** Many interviewees had comments concerning the existence of a “good ol’ boy” network that affects business opportunities.

**Those who reported the existence of a “good ol’ boy” network included minority, female, and white male interviewees.** [e.g. #19, #23, WT #76, #21] For example:

- The non-Hispanic white male owner of a small business, when asked about his experiences with good ol’ boy networks, said he has the impression that those networks do exist. He said that a former employee went to work for another firm, and after that, the competing firm started doing a lot of work for a former client of theirs. He commented, “So, it makes you think that it’s about who you know not what you offer. I was never actually involved in it, but it seems pretty coincidental.” [#4]
- A male owner of a DBE-certified firm, when asked about good ol’ boy networks, responded that he has seen something similar, but acknowledged it might simply be business decisions based on relationships. He explained, “If [private company] and [private company] are on the same job together or whatever, you can kind of see these trucks that have been familiar with each other for a while, either conspiring or doing stuff to kick these other subcontractors off so that they can put their other trucks to work.” He added, “But I don’t know if that’s good ol’ boy kind of logic...Or just kind of smart business. But at the same time, it is kind of what these guys do. They kind of stick together... that’s why, it’s like, you got to be out for yourself... these guys will just leave you in the dust and not tell you about any job going on or they will tell their friends.” [#7]
- The female owner of a DBE-certified firm, when asked if she had experience with the good ol’ boy or other closed networks, said that the geothermal industry has aspects of closed networks, but she believes that she and other strong women in the industry are breaking down that barrier. [#15]
- The female owner and female representative of an uncertified firm, when asked about closed networks, expressed frustration about not get local municipal work despite securing substantial federal contracts. An interviewee said, “It’s discouraging...[the] City of Coeur d’Alene always seems to gravitate towards one firm, and it’s very hard to get your foot in the door. It’s just that same good ol’ boys club. We’re not part of the good ol’ boys club, there was a turnover in the park’s director. I went and sat down and he basically was just talking to us differently than he would talk to a couple of guys that walked in. Kind of like pat you on the head, like, ‘Oh, you’re so cute.’” [#6]
- The female representative of a DBE-certified firm when asked about the good ol’ boy network, said with a chuckle, “It’s still working real well.” She added that they have been around for so long, they have established themselves as part of that network. [#17]
- The male owner of a DBE-certified firm, when asked if he has experienced any predatory business practices, said that he has seen a lot. He explained that it has mostly involved competition among companies. He said, “The majority of it will happen with one ethnic company against another. And if they are an established group and don’t want you in, they will band together to price you out of a market.” [#20]

- A female interviewee, who provided public comment in a public hearing testimony, claimed that a good ol' boy network has a hidden impact. She stated, "I did used to provide to smaller entities, private entities, and it's difficult to compete with a well more established [firms]. I hate to use the phrase the good ol' boy thing, but there is... Everybody knows it's there, and it's a hidden impact to people. It's hidden but usually the person or the business is pretty sure that the impact, why they didn't get something or why something changed mid-stream." [CDA #1]
- A female interviewee, who provided written testimony, wrote, "I started my business about 4 months ago, so I may not be the best resource for potential discrimination, at least not yet, but I have spoken to a few DBE's that have been in business for quite some time. They indicated it is very difficult to break into existing developed relationships and do feel discriminated. It's human nature for people to work with a known commodity therefore I understand this challenge." [WT #1]
- A representative of an uncertified firm said, "[A large problem in the marketplace is] not giving enough work to minorities, without being part of a group." [WT #78]
- A representative of an uncertified firm said, "It's hard to break into the government work because they have preferred people they have worked with in the past." [WT #64]
- A representative of an uncertified firm said, "A lot of the agencies only have a list of preferred contractors that they do business with and they only supply three, making it hard for smaller businesses to get on the list." [WT #65]
- A representative of an uncertified firm said, "The recent trend has been to award the work to the larger firms. This has significantly degraded our ability to survive as a small firm. We would very much like to be doing more projects to ITD yet competing with the large firms is not possible." [WT #70]
- A representative of an uncertified firm said, "[It's] a double edge sword. The short answer is no, we don't pursue any kind of public work. For one, the bureaucracy, and we feel that work is good old boy work and we're not part of that country club." [WT #66]
- A representative of an uncertified female-owned firm said, "Other companies have relationships already built causing barriers." [WT #63]
- A representative of an uncertified firm said, "Architects say that if you have a contact in government you are favored over other architects. Qualifications [should always be] taken into account first and foremost. I would like to see a focus more on qualifications." [WT #16]

**A few interviewees who reported the existence of a "good ol' boy" network believe that they are not negative, or are starting to break down.** For example:

- A female representative of a non-Hispanic white male-owned business, when asked about good ol' boy networks, said she does not believe they exist. She responded, "No, not really. And I'm a woman in construction...It's municipal construction so it can't be good ol' boy

because we do municipal [work]. If it was back in the day when anybody could pick whoever they wanted, they kind of eliminated that good ol' boys stuff in large part by making it [public bidding process]." [#5]

- A male representative of construction trade association, when asked if the association members had experienced the good ol' boy network, stated that those barriers are more on the private side of the industry. He said, "These certain developers have contractors that they work with. On the publicly funded stuff it's not so much. There is enough competition in the valley that the good ol' boy thing doesn't really work, because somebody will do it cheaper. ITD has [also] done some experimenting with design/build, where it's not just a hard-number bid, right? You take into account their competency and what they've done in the past, and you rank them by ability as well as price. The only complaint we got from that process was that they picked out state people. [It was not the same people receiving the] same old jobs. It's like here are these people we've never heard of that came in and got these jobs." [#25]

**Factors that affect opportunities for minorities and women to enter and advance in your industry.** Many interviewees discussed factors that affect entrance and advancement opportunities for minorities and women. For example:

- The female owner of an uncertified firm said she has faced difficulty with financing, bonding, and insurance due to her gender. She said, "I think [gender has] hindered us but we've blasted through that and we're now in a really good spot with a great banker...If I was opening a flower shop, do I think the credit would be more available? Probably." For bonding, she said it had been challenging for the firm to obtain at rates comparable to male-owned firms. She stated, "It's been hard but we've made it. We've made it, but boy, we've had to battle with bonding agents and with banks and we've settled on two now that are giving us the same rate we see our male counterparts getting. We can't say for certain if it's been because of gender. The bonding [difficulties are] probably are [due to being] inexperienced but I think the line of credit for sure [is due to gender]." [#6]
- The male owner of a DBE-certified firm said, "Positively, financing is one of the biggest places where discrimination still exists across the board...I take the same set of financials into one bank and could get a loan based on credentials as an individual and professional. Because of structure of ownership, they specifically want to know ethnic background and there are individuals who will stop and not even look at the credentials on a financial level, and we will not even be considered. There are institutions who do not lend to certain ethnic-based people." [#20]
- The male owner of a DBE-certified firm, when asked if he had experienced any price discrimination, stated that he had. He said, "Price discrimination comes in based on overall perception of who you are and can be manipulated against you." [#20]
- A representative of an uncertified firm said, "I am a minority, and I am from Belize. It's harder for me to get jobs." [WT #79]

## I. Insights Regarding Business Assistance Programs, Changes in Contracting Processes, 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 all small businesses, or all businesses, obtain work in the transportation 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:

- Business assistance programs (*page 68*);
- Contracting processes (*page 74*);
- Pre-bid conferences (*page 76*);
- Unbundling (*page 77*);
- Small business set-asides (*page 78*);
- Subcontracting minimums and goals (*page 79*);
- Formal complaint or grievance procedures (*page 79*); and
- Other (*page 80*).

**Business assistance programs.** Interviewees gave insights regarding business assistance programs.

**Many interviewees stated that technical assistance and support service programs were advantageous or that they would be interested in attending to learn more.** [e.g. #7, #10, #15, #20, #27] For example:

- The female owner and female representative of an uncertified firm, when asked about assistance programs, stated that they do participant in programs. An interviewee said, “We take advantage of all the classes as much as we can. If there's something there to learn, we definitely do... [We have utilized] webinars [on] how to write. I mean we write SOQs, proposals for local work, but I've sat through several webinars about how to write a successful proposal to the federal government.” [#6]
- A male representative of construction trade association stated that his association helps members ranging in industry from service and supply, general contractors, and specialty contractors or subcontractors. The agency's services provide four benefits to businesses and that those services offer assistance for challenging business needs. First, the agency provides advocacy and speaks directly with ITD about budgets and projects or the Department of Labor and the Department of Insurance about legislature, worker's compensation, or issues. Second, the agency provides direct business services, such as collecting all bidding jobs and sending them to members. Third, the agency provides a health plan for companies who need employee health insurance to gain the bulk discount. Fourth,

training and education classes, such as reading blueprints, Construction 101, retirement planning, and so on. [#25]

- A male owner of a DBE-certified firm, when asked small business start-up assistance, said the SBA 8a program helped his company in early business planning and marketing. He states, “[Small business office employee] was really good at helping small business 8a contractors get known and your name out there in front of more primes and stuff like that, how to do it, and helped us write the business plan. Some of it did [help].” [#1]
- Male managers of a business development organization, when asked about programs that are particularly helpful, said that contracting classes are especially valuable and they want to expand course offerings. A manager stated, “This year, so far, we teach what we call our government Contracting 101. That is where we bring in the SBA, ITD, and usually a federal mystery contracting officer from one of the agencies, and SBA sets the terms of who that's going to be and invites them along. That gives them a 35,000-foot overview of federal contracting and state programs and set-aside programs that the SBA offers and a quick overview of what that particular agency does and what they look for. In addition to that, so far this year already, we've done marketing to the federal government and capability statements, which you have to have it. What I would like to do also, but I can't find anything on it that's not going to cost me a lot of money, is contract management...After you win an award, now what?...We also, and I'm going to try to do it next year, we bring in a subject matter expert, an outside presenter, to teach how to write a winning proposal.” [#10]
- A male owner of a DBE-certified firm, when asked about helpful or unhelpful programs, said the continuing education that ITD helps pay for is helpful and allows their staff to attend out-of-state conferences. The staff has also attended Davis Bacon, minority-related trainings, and pavement maintenance expos. [#1]
- A female owner of a DBE-certified firm, when asked about small business start-up assistance, indicated the SBA Kickstarter program and Watercooler Business Incubator were valuable resources for networking and moral support. She said, “I would go and I would learn. I always learned something that was useful. I never ended up working with anybody there, but it's amazing how just getting together with a bunch of people like that can end up being helpful.” [#2]
- A female owner of a DBE-certified firm, when asked about helpful or unhelpful programs, said that marketing and training funds are helpful in keeping the business going. She explained, “The trade shows I go to, those are very valuable because that's where I get most of my business marketing done. That's the kind of thing where it really does help...[The funds] allowed me to go to rebuild my website, which was great. I needed that.” [#2]

**Some business owners indicated that they have had negative experiences with business assistance programs, or that the programs have become less helpful as changes have occurred.** For example:

- The male owner of an uncertified firm, when asked about on-the-job training programs, said he found out about a program through the Small Business Administration at Boise State University. He mentioned that he has only used the service twice within the last two years, and the last time he used the program for a crew member, none of the trainers could speak Spanish. [#19]
- A female owner of a DBE-certified firm, when asked about working with business development groups, stated that she had attended some marketing classes to learn how to boost her confidence and successfully market over the phone. The development officer lead her to an associate, who she had a negative experience with. She said, “[The associate] was just a nightmare. I mean, he basically said he would spoon feed me the information. He did not think I could handle it all at once. It was just ridiculous.” [#21]
- A male owner of a DBE-certified firm said, “There used to be [incentives]...They would pay a certain amount for things like website development, with budget cuts they really do not offer that now. There are some programs through the SBA at BSU and other professional development opportunities, but they seem to be geared towards new businesses.” [#13]
- The female representative of a DBE-certified firm said she thought the education programs were very good, but she has not seen as many offerings as before. [#17]
- The male owner of a DBE-certified firm, when asked about his experience with DBE program trainings or webinars, said that he receives notification about them, but he has only attended once. He continued by saying that he wished the programs were more marketing-focused. For example, by having the DBE agency market the DBE because most firms do not have resources to market themselves. [#26]

**A few business owners indicated that they were not aware of business assistance programs.** [e.g. #14, #23]. For example, the male representative of a non-Hispanic white male-owned firm, when asked whether he was aware of measures or programs that seem particularly helpful to small businesses, said he is aware that programs do exist, but he is not familiar with the specifics. [#16]

**A few interviewees indicated that mentor-protégé or joint venture relationships would be helpful for small businesses.** For example:

- A female owner of a DBE-certified firm stated that mentor-type relationships would be helpful. She said, “[It would be helpful to provide] some sort of networking or training opportunities so that small businesses could effectively train with larger companies on what they do and how it could be done easier, and then larger businesses helping small businesses get into that game...I guess if the transportation department could do anything, it would help to network the primes with the small businesses so they could get to know [each other]. It's just easy to dismiss people, and if you're a small business it could be easy to

decide you just don't know them, you don't know what they look like, act like, what they know how to do. Providing networking opportunities between primes and small businesses would be a great idea.... Who you know matters." [#2]

- The female owner and female representative of an uncertified firm, when asked about joint venture relationships, stated they have two joint venture companies, one for construction and one for civil engineering. She said, "We can bond up to \$1 million, so that's our limit. If we're going after anything bigger, [company name] is a company that we're working with general construction. They're everywhere, they're huge. We can use their bonding as the joint venture. Then [company name], I think they're like something like \$10 million, so those guys have that experience going on, bigger projects." [#6]

**Some interviewees felt that although they would like to be part of a mentor-protégé or joint venture relationship, the process has been difficult or problematic.** For example:

- The male owner of a DBE-certified firm, when asked about the benefits of joint venture relationships, said, "'Caution' is the word that comes to mind...Primarily because they are complex and can get you where you need to be. They are good relationships to have, but only for the experienced contractor because of the complexity." [#20]
- The female owner of a DBE-certified firm, when asked if having assistance with joint venture relationships would benefit small businesses, stated that having assistance in developing different kinds of agreements would be helpful. She mentioned that she had contacted ITD about joint ventures but was just referred to the website for information. She explained that because she wants one-on-one feedback about a joint venture relationship, she might end up hiring a lawyer to help her. She went on to say that she had heard about a past program that gives small businesses up to eight hours of free legal counsel for contract verbiage, and expressed that they should bring back the program. [#15]
- A male representative of a DBE-certified, woman-owned firm, when asked about mentor/protégé relationships, stated that the company is participating as a protégé with two mentor companies with mixed results. He explained that while the overall experience has been beneficial, one of the relationships has been problematic. He said, "We've had some issues and it's actually cost us... Not all mentor/protégés are really good. In fact, I talked to a lot of people and the majority of them are set up so that the mentor gets something out of it and the protégé doesn't really gain that much." He added, "We're not real happy with this mentor/protégé, although they've been good in some areas....[For example,] when we go out marketing, they try to keep us off to the side because they're the mentor, to work with other companies. They say they're setting all this stuff up, but really all they're doing is opening the door for them with our 8A, is what I've found out." However, he added that another mentor company provided significant help on a new contracting process. He stated, "If we didn't have a mentor/protégé, we would never have been able to figure that [process] out. The mentor protégé played a big part in helping us, and they actually were able to give us the person that you need for a contracting license." [#3]

**Some interviewees stated that mentor-protégé relationships would be beneficial, but that they are unsure how to find information about these programs.** [e.g. #17, #20] For example:

- The female owner and female representative of an uncertified firm, when asked about mentor/protégé relationships, stated they are developing one with another 8a firm in Anchorage. They also stated that mentor/protégé might be promoted by SBA, but when it comes to connecting with large national firms, it often does not work as intended. An interviewee said, “On paper we know it works...but in reality it doesn't work... [For example, a large national engineering firm] sent a woman from Kansas City [to a conference] and she does nothing but look for mentor/protégé candidates. She was so excited when I stopped at their table and I said, ‘Look at us, we're a little lady firm.’ They can't get a small business, they can't get woman-owned, and they can't get 8a so we were on all three of those levels. We were golden. ‘Call me,’ and she gave me her card and it was the same day. Called her, called her, called her. Got one courtesy email back and nothing. She's being paid to do that. She's doing what she's being paid to do but she's not – because there's nothing that would make us unattractive to that, they don't care.” [#6]
- The female owner of a DBE-certified firm, when asked about mentor/protégé relationships, said she has been looking into it and has contacted ITD about becoming involved with the program. She added that she would like ITD to treat DBEs the same as 8As for the available programs. [#15]
- A male representative of construction trade association, when asked whether his organization is working on a mentor/protégé plan, stated that was a topic that came up in a recent staff retreat. He stated, “Part of our effort to get people to come to work in construction is launching new businesses. And so we're going to explore the opportunity of teaming up a small business with a more established, successful one that's not a direct competitor, and trying to do some of that. We haven't done that in the past.” [#25]

**Interviewees discussed their experiences with on-the-job training programs.** For example:

- The male owner of a DBE-certified firm, when asked about the benefits of on-the-job training programs, said that he thinks they are very helpful and a great program. [#20]
- A female representative of a non-Hispanic white male-owned business, when asked about on-the-job training, said “It might be something that [we would use]. It's one of those things where you don't actively go out and seek it but if it was brought to you, you might participate in it.” [#5]
- The female owner of a DBE-certified firm, when asked about on-the-job training programs, said they would be useful. She explained that she met with SBDC for business coaching and has gotten coaching for QuickBooks, but it was not very clear. As a result, she ended up finding an accountant to do her books. [#15]
- The female representative of a DBE-certified firm, when asked about job training programs, said they were good and wished ITD would offer more of them. [#17]



**Business owners gave insights into their experiences with financing and bonding assistance.**

For example:

- The female owner of a DBE-certified firm, when asked if financing assistance would be beneficial, said, “Yes, it would...I would like to know what other options are.” [#15]
- The male owner of a DBE-certified firm, when asked if financing assistance would be beneficial, said that it would and added that anyone who can come in and help with or advise on finances would be great. [#20]
- The male owner of a DBE-certified firm, when asked about the benefits of assistance in obtaining business insurance, said that there are brokers available to help and added that he uses it wherever he can. [#20]
- A male representative of an uncertified female owned firm, when asked about his experience with neutral measure programs, stated that he is only familiar with the SBA. He explained, “[The SBA] helped us for other jobs. Other than that, I’m not aware of any other groups or agencies, or anything. I’m not aware of any others. We probably haven’t thought about it.” When asked to clarify how the SBA provided assistance, he stated, “We did a job years ago where we built a shop, and we used the SBA [for financing]. The people there helped us out there a lot to get through all the miles of paperwork, and stuff that needed to be done.” [#24]
- A female owner of a DBE-certified firm, when asked about programs offering financing assistance, expressed frustration at the way banks and small business support programs share information about loan options. She said, “A lot of the banks, it’s sort of disappointing. [Bank Name] was one of the resource banks who went and talked to small businesses about various kinds of loans you could do. I sat in on one of those just to see what else I could learn. What I did learn was that bank, since they didn’t offer that program, weren’t telling people about the program...,The banks don’t make any money off of it, but what they fail to recognize is it builds this relationship with it.” Recounting another experience, she stated, “When I talked to another bank recently about [the Idaho Prime program for loans on physical assets], they didn’t offer it, and they went to the state and said that it didn’t exist. I don’t know what dance was actually being done but that is a huge program. For businesses that would be getting into transportation department projects, actual physical assets are really important.” [#2]
- The male owner of a DBE-certified firm, when asked about financial assistance, stated that he had approached the Small Business Administration once. He recalled, “I was supposed to get my packet together and go back to [the administrator], and he just was never there. My wife works at the college, so they know each other...and she [said] he’s like that... I tried to get a small business loan, and then the door was shut in my face basically.” [#27]

**Contracting processes.** Interviewees discussed their experiences and recommendations for the contracting processes of public agencies. For example:

- The male representative of a DBE-certified firm, when asked about information on public agency bidding opportunities, said he would like to know where to begin. He also added that he would like to learn how to find out about upcoming projects and access bid lists. [#18]
- The female owner of a DBE-certified firm, when asked if having a hard copy or electronic directory of potential subcontractors would be beneficial, said it would be helpful. She explained that she has a directory for geothermal companies from the Geothermal Resource Council, but having those additional resources would be very helpful. [#15]
- The non-Hispanic white male owner of a small business, when asked about programs that provide information on public agency bidding opportunities, said he receives email notifications from PTAC as the result of free classes he attended. He said, “That’s where I found a lot of the ITD and ACHD [bid opportunities] and those kinds of things.” [#4]
- A male representative of a non-Hispanic white male owned company, when asked about assistance with emerging technologies, said he receives bid information by email. He said, “We’ll get e-mails to bid or something, but [we are] not logging on to any particular site.” He added that the emails typically come directly from individual customers to ask about materials or services. [#8]
- The male owner of a DBE-certified firm, when asked about plan holder or possible prime bidders lists, said that it would be helpful, so his firm can learn about bidding group demographics. [#20]
- A male owner of a DBE-certified company, when asked for any bid process recommendations, said it would be helpful if ITD had a faster turnaround time for posting bid abstracts. He explained that the information in the abstracts helps his company gain insights about pricing strategy. He said, “[ITD] used to put them out weekly. Now, it could be three weeks, a month, before the abstracts come out. You could look at the abstracts and see where people are at and where you’ve got to be. Where they’re beating you on this job... The last six months, a year, it’s like, eh, maybe once a month maybe couple of months before they get the abstracts out.” He added that the information in the abstracts can fill in for missing communication with prime contractors and help the company figure out how to plan for upcoming work. [#1]
- A female owner of a DBE-certified firm, when asked about unbundling contracts, said that she has actually wishes it were more likely that the 20 small projects she could work on should be bundled together so that her firm can be the one company to do them. [#21]

**Some interviewees stated that they have had positive experiences with outreach efforts and they can be helpful.** For example:

- A female representative of a non-Hispanic white male-owned business, when asked about agency outreach, said her firm does participate in some of the outreach activities. She stated, “We’ll send the guys to Safety Fest things and there’s some of [the events] that I’ll go to depending on what they’ve got going on. We have certifications in certain things that [our staff] has to maintain...We may get to a point where we are going to conferences to promote our [specialty product].” [#5]
- The female owner of a DBE-certified firm, when asked if other agency outreach programs would be beneficial, said these are already in place with the Geothermal Resource council and they are a great resource. [#15]
- A female owner of a DBE-certified firm, when asked if anything else can be done to enhance the availability and participation of small businesses, stated that having better working relationships and outreach events with ITD could help. She explained, “They could learn from some of the federal agencies. Like Army Corp of Engineers - they have outreach events. Then they invite small business in, [and ask them to] come in and tell us what you do. So at least we may not have anything but at least we know you’re there if we do have something. ITD has the exact opposite. ‘Don’t come in and talk to us. We get on our term agreement. We’ll call you if we need you but we’re not going to call you.’ And it would be nice if there was a goal... and it was some sort of penalty [for not utilizing DBEs].” [#21]
- A male representative of a DBE-certified, woman-owned firm, when asked about small business assistance, said the SBA Emerging Leaders program was helpful because it provided access to experts. He added, “The biggest thing is, you get to meet other CEOs and owners of other small businesses. You help each other out. I’m still helping a lot of the small contracting companies around here, which is interesting. They’re all woman-owned small contracting companies.... Our groups, even though it’s been over for almost a year now, we still meet once a month, and get together and talk ...it was a very good program.” [#3]

**Several interviewees offered suggestions for how to improve outreach efforts.** For example:

- The female owner of a DBE-certified firm, when asked if anything should be done to enhance the availability and participation of small businesses, said right now she is receiving push notifications, but would like them to have more detail. She also wants to know how the criteria are set for the distributed information. She added that revisiting mechanisms and using emails from different engineering companies, refining, revisiting, and updating the list will help with this clarity. [#15]
- Male managers of a business development organization, when asked what recommendations they have for ITD or other state agencies in Idaho, said that the State needs to conduct a campaign directed towards small businesses, letting those businesses know about the services of their organization. They said that marketing the availability of the DBE and other programs to the people who would use them would be particularly useful. [#10]

- A male owner of a DBE-certified firm said he would like to participate in more outreach and contract improvement workshops, but indicated the opportunities tend to be based in Southern Idaho. He stated, “If they had these classes up here [in North Idaho], I would go to every single one of them that you've said so far, these programs. These seem like it would only be super beneficial to me....I think I only seen one invitation up here in the North Idaho for a program or seminar, speech where [DBE staff member] was coming up.” [#7]
- The male owner of a DBE-certified firm, when asked about other small business start-up assistance benefits, said anything that helps small business should be fostered. He added, “You can’t get enough information on what’s current and what’s happening. I’m always looking to change and be better.” [#20]
- A male owner of a DBE-certified firm, when asked what recommendations he had, said that scheduling programs and training opportunities after regular business hours would make it feasible for contractors to attend, such as weekends or after 5:00pm. [#7]

**Pre-bid conferences.** Interviewees discussed their experiences with pre-bid conferences.

**A few interviewees noted that pre-bid conferences were helpful.** For example:

- A female representative of a non-Hispanic white male-owned business, when asked about pre-bid conferences, said they attend them often. She said, “[The conferences are sometimes useful, but it] depends on the engineer.” [#5]
- The male owner of a DBE-certified firm, when asked about attending pre-bid conferences, stated that they are helpful. He said, “You get to see who’s there, and who they are, and they get to see who you are.” [#27]

**A few interviewees were not able to attend pre-bid conferences due to time constraints.** For example:

- The non-Hispanic white male owner of a small business, when asked about pre-bid conferences, said he has not participated in those due to time constraints. He said, “I’ve seen some of them, but when you’re busy you’ve gotta take a time out to go do those.” [#4]
- A male representative of a non-Hispanic white male owned company, when asked about pre-bid conferences, said he has never been to one but would be willing to attend. [#8]

**A few interviewees would like pre-bid conferences to become more targeted for their needs.** For example:

- The male owner of a DBE-certified firm, when asked if he attends pre-bid conferences, said he had attended, but has not found them helpful unless he has a specific question. He would like the pre-bid conference to be more targeted so that the agency can get to know the bidders. [#26]

- A male representative of construction trade association, when asked about pre-bid conferences, stated that they have not conducted any. He said, “Most of the bidding in Idaho is done electronically, so they’re submitted from all over. But [having pre-bid conferences is] probably a good idea to do, and you’d focus on DBE or something... I don’t know if [the members] would find it useful or not because we haven’t experimented with it.” [#25]

**Unbundling.** Interviewees discussed their thoughts on unbundling contracts.

**Many interviewees believe that unbundling would be good for small businesses.** [e.g. #15, #17, #22] For example:

- A male representative of a DBE-certified, woman-owned firm, when asked about breaking up large contracts into smaller pieces, indicated it is a barrier to be required to work as a subcontractor for large companies in order to perform environmental work. He also added that separating the environmental projects out into individual contracts would benefit DBEs. He said, “Specifically to ITD, since we’re an environmental consulting firm, the works that comes out of [ITD] are typically cultural resource type stuff, or environmental assessments. Those are typically tagged to a larger construction company, so you get the big construction [and engineering] firms...That hurts us as a DBE because we don’t have [direct] access to those [contracts].” [#3]
- The female owner and female representative of an uncertified firm said that smaller contracts for civil engineering are hard to come by. An interviewee stated, “I think it’s been a little bit frustrating to [our staff engineer] that we haven’t had that success of finding smaller engineering contracts that we can go after and engineer eight miles of forest service road. We don’t want to engineer the highway from New York to Seattle but we’re perfectly capable of designing a downtown street corridor or three miles of new highway and there’s just not that availability.” She continued, stating that if only a small percentage of the contracts awarded to large engineering firms were broken into pieces for small firms it would be beneficial. She said, “It would be a lot of work for us...They can throw us just a tiny crumb of what they do and it’d be a lot for us...You go to these big conferences and you network with these big guys that are from these large businesses that say, ‘Oh we need a small business to fill a portion of the quota’ but it’s just never run true, we’ve never had success.” [#6]
- The non-Hispanic white male owner of a small business said that it would be preferable for agencies to break contracts into smaller pieces rather than repeatedly issuing large contracts to a small list of prime contractors. He explained, “Maybe just issue all those different jobs rather than just one big contract. Issue it to multiple primes.” [#4]
- A male representative of a non-Hispanic white male owned company, when asked about breaking up large contracts into smaller pieces, said he does not know what the contractor experience would be, but he sees two perspectives. He said, “It seems like it would probably make it pretty tough for a contractor to have to break [it up]....I’m sure when you’re a smaller firm it’s probably tough to compete with the big ones.” He added, “I would assume all-inclusive is probably easier for the general [contractor] ... At the same time, I can understand wanting to split it as the bidders.” [#8]

- A female representative of a non-Hispanic white male-owned business, when asked about breaking up large contracts into smaller pieces, said it could open the pool of contractors but ultimately must be in the best interest of the client. She stated, “I think that this misconception that they take a large contract and break it into smaller pieces is a bad thing. That’s the stigma, this bid-splitting. It’s not bid-splitting...It’s actually making it better if they were to break it into smaller chunks because it gives...other contractors an opportunity to bid the work.” She added, “It’s what’s in the best interest of that municipality. If it’s in the best interest of them and it’s easier to manage.” [#5]

**A few interviewees believe that unbundling is not good for the industry.** For example:

- The male owner of a DBE-certified firm, when asked about breaking up contracts into smaller pieces, stated that he did not think it was a good idea. He explained, “I think they should have as little as possible subcontractors because then the prime will lose control and the project will suffer.” [#26]
- A female owner of a DBE-certified firm relayed a concern about having too small of contracts. She recalls that ITD’s agreement system for smaller jobs makes the process difficult because the RFP threshold is something between \$500,000 and \$1 million. Anything under that, the agency can just call someone to do the work. She believes that because their work is so small, they might not see postings for it because it is not a competitive bid project. [#21]

**Small business set-asides.** Interviewees discussed whether they believe small business set-asides are beneficial.

- The male owner of a DBE-certified firm, when asked if there are benefits of mandatory subcontracting minimums, said, “Yes to a point. You must provide a functional service and if you don’t have that, you can’t find someone to do the job.” [#20]
- A female owner of a DBE-certified firm, when asked about mandatory subcontracting minimums, said that people are unlikely to put in the extra effort to participate unless it is required. She stated, “Unless you’re going to specifically require it, people aren’t going to do it because... it’s simply another thing to do. It’s simply work.” [#2]
- The female owner and female representative of an uncertified firm, when asked about small business set-asides, said that set-asides would be useful. An interviewee said, “It’s just frustrating that not even just women, set-asides for woman-owned businesses, just set-asides for design work, or small business are just non-existent.” She added, “To be on the list you have to be big. There’s no little firms and when we’ve asked, ‘How come we didn’t get on the list?’ ‘Oh, go find a big firm to partner with.’ ‘We’ve tried that,’ and they’re like, ‘Keep trying.’ They have mandates, the big firms like the [private company]. They have to have a certain amount on their subcontracting work go to small business. I don’t think they need woman-owned, but it does have to be small. There’s flaws in the system.” [#6]

**Subcontracting minimums and goals.** Interviewees discussed whether they believe subcontracting minimums and goals to be beneficial.

**Some interviewees indicated that subcontracting minimums and goals are beneficial.** For example:

- A male owner of a DBE-certified firm, when asked about mandatory subcontracting minimums, said that he anticipated this would be the standard practice when he earned his DBE certification, but his experience tells him this is a low priority for prime contractors. He said, “I thought it was benefiting them to hire me out but...there's no benefit really, they don't care...they have no incentive.” He added, “[The DBE recommendation is a] fairy tale goal that [prime contractors] don't care about. It has nothing to do with their business or affects them getting contracts but, obviously, if it affects them winning the contracts, then they will be probably all over it and the goal will be met every time...[In order to help DBE businesses,] you would have to make it mandatory for the primes to use a certain percentage. That's the only way it would work for somebody just starting up. [#7]
- The male owner of a DBE-certified firm stated that he would like percentages of federally funded money to go back to small contractors. He explained, “There's a lot of airport work going, there's a lot of work there and there's a lot of money there.... It doesn't have to be that high either, four percent or seven percent, it could be three, or one percent is a lot at times... For one percentage of the job being concrete, you know, or something like that.” [#27]
- Male managers of a business development organization, when asked about mandatory subcontracting minimums, stated that DBEs could benefit from subcontracting goals. An interviewee said, “[There is an assumption that DBEs will] benefit with actual hard goals set for each contract...because goals are now being set, and it's not overall spending. It's each contract, which is a huge change in the way they've been doing business.” He added, “Yeah, so, if a goal is 8% of every contract, you've got to have a small business DBE doing 8% of the contract or you have to justify why they're not, why you couldn't find a DBE, and that's going to be hard to justify because most of the DBEs are very much broad, and there's enough of them throughout the state that a general contractor or a prime doesn't have the excuse, ‘I couldn't find a DBE.’” [#10]

**One interviewee indicated that subcontracting minimums and goals can create challenges.**

Specifically, the female owner of a DBE-certified firm, when asked about mandatory subcontracting minimums, said it could be useful, but it could also be difficult as the prime contractor, especially if the service providers are large and small businesses. [#15]

**Formal complaint or grievance procedures.** Only one interviewee discussed an experience with formal complaint or grievance procedures. The male owner of an uncertified firm said he is aware of the procedures, however, admitted that some firms are very hesitant to proceed. He stated, “A lot of times, minority companies are intimidated by it because their name can become tarnished by the company they are filing against.” [#19]

**Other.** Interviewees discussed other issues and suggestions for contract processes. For example:

- The male owner of an uncertified firm, when asked if there was anything should be done to enhance the availability and participation of small businesses, said “Chance and opportunity. [So] people can see what minorities are doing for the community... We’re not asking for, you know, for a \$20 million project. Just let us enjoy the same piece of apple pie you are eating out of.” He also said that the SBA, DBE and ITD need a minority representative to speak on behalf minority companies. He said, “We need to have a person to help the minority companies. The person doesn’t necessarily have to work for SBA, DBE and ITD, but they need to be able to attend the meetings and speak on behalf of minorities.” [#19]
- The male owner of a DBE-certified firm, when asked about assistance in using emerging technology, said that it needs more priority because of all the new and better thing technology that is available. He said that it is hard to keep up with new technology while running a company, so he would like some way of seeing what is new, but in a way that optimizes his time. He also added that he sees how technology is changing the outcome of bids. He explained, “New companies come in and walk away with a bid because of their new means to the method.” [#20]
- The female owner and female representative of an uncertified firm, when asked what should be done to enhance the availability and participation of small businesses, responded that addressing issues with NAICS codes for non-traditional female professions would be helpful. She said, “It’s just frustrating that not even just women, set-asides for woman-owned businesses, just set-asides for design work or small business are just non-existent...You can get on FBO and look at, you can screen it for just woman-owned past 30 days and you look all across the country and 95% of them are paper shredder, interior designer, housekeeping, t-shirt cleaner, latrine cleaner. There’s no engineer, there’s no architect and granted, those are low anyway because those are pulled off the IDIQ list, but very few construction, very few...Then the government decided, ‘You know what, we’re going to reduce the NAICS codes so that it makes it more likely that a woman would get a job as a roofer. Here’s the NAICS code that’s just specific to a woman who does roofing,’ and that is a positive step. We’ve expanded our services so that we can compete in that realm. It goes back to a mindset, it’s the contracting officer that’s sitting there, what are they thinking? You can mandate the heck out of something but if the thought process isn’t [in place, the mandate won’t work].” [#6]

**Other interviewees expressed that complete equality, regardless of racial or gender status, should be encouraged.** For example:

- The non-Hispanic white male owner of a small business, when asked about forms of discrimination against minorities or women, said, “[It is unfair when a] minority group gets preferable treatment to an everyday person because of their situation...It’d be nice if everyone could just have blinders and look at everything equal.” [#4]
- The male representative of a non-Hispanic white male-owned firm said he does not think programs that help woman- or minority-owned small businesses are fair. He does not believe a women-owned or minority-owned firm that has the same number of employees as



he does and works at the same caliber should be guaranteed 30 percent of the work. He explained, “I do not agree with the philosophy that if it is a government owned project a certain percentage needs to go to women or minorities.” [#16]

- The female owner and female representative of an uncertified firm, when asked what recommendations they had for ITD or state agencies, said “Just let people get their foot in the door. I mean, you wouldn't be a successful company open for 10 years if you didn't know what you were doing...I just think that there's just not that willingness to just try out new firms, everybody's just so comfortable and it's so easy for them to just say, 'I've worked with them before, let's just give it to them again' even if they're sort of happy with them. They might not even be doing a stellar job.” [#6]
- The male owner of an uncertified firm, when asked about race/ethnicity/gender-based programs, said that he does not like them. He explained, “When I was growing up in Southern California, I was a manager of a Radio Shack. We had to hire a certain number of blacks. I don't have anything against them, I really don't. But, let's say you both apply for a job. You're qualified and she's not. I have to hire her just because she's black.” [#23]

## **J. Insights Regarding the Federal DBE Program or any other Race/Gender-Conscious Program**

Business owners and managers discuss their experiences with state and federal certification programs, including comments related to:

- Federal DBE programs (*page 81*); and
- Issues regarding Idaho or local state agencies monitoring and enforcement of its programs (*page 83*).

**Federal DBE programs.** Interviewees discussed their experiences with Federal DBE programs.

**Many respondents felt that DBE utilization could be increased if Idaho's implementation of the DBE program had more incentives.** [e.g., #1, #2] For example:

- A male owner of a DBE-certified firm, when asked for recommendations regarding the DBE program, indicated that reinstatement of DBE goals would be helpful because it would encourage prime contractors to hire businesses like his. He stated, “When it was a set goal, [prime contractors] would more likely use us, even if [our bids] were a little higher.” [#1]
- A male owner of a DBE-certified firm explained that once percentage goals were dropped, the incentive to use DBE-certified firms also decreased. [#13]
- A male owner of a DBE-certified firm indicated that a prime contractor will hire subcontractors based largely on pricing and that DBE certification does not factor into the hiring decision. He said, “A prime contractor, he's going to take the lowest price, but if there was some incentive to take that lower price it might help him....If there was some incentive for him to take disadvantaged business, it might help. I don't know, a tax break or write-off

or something just to help him to take them....Nobody's ever come up to us and said, 'Yeah, we hired you because you're DBE.'" [#1]

- Male managers of a business development organization stated that some DBEs signed up with an expectation to be awarded work. A manager said, "Some of them think it's a gateway or a lock into being a subcontractor on a highway job. It's not, because there are goals for DBEs, but there's been no teeth in the program for the primes to meet those goals, meet those DBE goals, until just very much recently. I haven't seen how that's worked yet. There hasn't been enough history for that to work yet...They can get up to a \$1,000 reimbursement, so that's an incentive to be a DBE. It was more an incentive in the past when [DBE staff] had a larger pool of money. Our pool of money has really shrunk, so we've had DBEs drop out because it's not worth their effort anymore, and some of them are already successful in contracting, and they don't need to worry about DBE... [ITD] has reciprocity in almost all of the western states with DBEs. What that means is to be counted as DBE for highway work in Washington, you have to be registered in the state of Washington as a DBE, but if you're an Idaho company, you would have to submit all your paperwork again. Well, the reciprocity [DBE staff member] has established with most of the states is if they're a DBE in Idaho, I will send you the package so that you can DBE them in that state, and we will offer the same here." [#10]
- The female representative of a DBE-certified firm said that their firm was one of the first Idaho firms to receive financial assistance from the DBE federal program. She added that it was helpful, but required a great deal of paperwork. [#17]
- A female owner of a DBE-certified firm, when asked about whether the firm marketed to primes, explained that they were largely unsuccessful because the primes were not required to meet any goals. She explained, "We did spend a lot of time in the first couple years trying to market ourselves to some of the larger primes in the Valley. Nobody cared that we were DBE or knew what it was. They only wanted to know if we had our 8A certification. So I spent a lot of time trying to go to the [large firms] and it was worthless. They have no reason to use us because they're not required to meet any goals." [#21]

**Some interviewees noted that outreach for the DBE program should be improved.** For example:

- A female owner of a DBE-certified firm, when asked if she had recommendations for the DBE program, indicated that communication with small businesses could be improved. She said, "Given that I'm being asked by... two people how to get involved [with the DBE program]... through personal contact... There's probably other people that don't know that there's anything out there. I don't know how, the program needs to let people know they're out there and what you could do for them. I'm being asked, 'How do you put contracts together?'" She added, "I am at a loss a little bit because [Idaho's DBE program] used to be [a member of Idaho's DBE staff]. She had some training calendars going on there and now it's from the Boise State. [The Idaho DBE staff member] was a great contact. Now it's the Boise State. I don't know what [DBE staff member] is doing versus what Boise state is doing. I don't know." [#2]

- Male managers of a business development organization, when asked for recommendations regarding the DBE program, indicated that additional training or marketing grant funds for the Idaho DBE program would draw more participants. An interviewee said, “It used to be the DBEs joined because there was a lot more money to be had. Since the money is less, there are a lot less DBEs. I don't know why. That would be recruiting in [DBE employee's] end of it, is why she can't get more in. The ones she's got in, for the most part, are pretty good, at least the ones we've awarded money to work the SBDCs and that sort of stuff and are learning more about business planning and financials and stuff, so they're actually learning better, but the recruitment end of it, I'm not [involved on that end], so I don't know at all.” [#10]
- The female representative of a DBE-certified firm said that the new DBE director is not as helpful to the program as the previous director. She stated, “The former director would have not put up with what he is doing...He supports whoever has the most money, or who he thinks he will get in the most trouble with. When the former director was in place, if a DBE contacted her with an issue, she would go to bat for the DBE.” She added that the former DBE director would do her research, and if the DBE was wrong she would tell them, but if the contractor was wrong she would work to resolve it. She went on to say, “I really appreciated the former director's insight and knowledge.” She also stated that some long-time employees that were very helpful in the past now seem to have their hands tied, explaining, “We recently had an issue where we really needed some help, and got none whatsoever...When the former director was in charge, we knew the 'buck stopped there.’ Now issues are sent to multiple departments and no one seems to have an answer.” [#17]

**Issues regarding ITD or local state agencies monitoring and enforcement of its programs.** Interviewees discussed whether they believe there are any issues with the monitoring or enforcements of state or local agency programs.

**Some interviewees noted that monitoring and reinforcement could be improved.** For example:

- Male managers of a business development organization, when asked about ethnicity or gender-based programs, stated that federal contracting officers are likely to select companies with HubZone or 8a certification rather than DBE or some other programs. A manager explained, “There are only, right now, agency-wide, the entire federal government, there are only two programs that are managed so that generally speaking, when a contracting officer sees a company that claims to be Hub Zone certified, the paperwork has been done. They've been investigated, so there's a level of confidence from the contracting officer that that company is, in fact, a Hub Zone company. Same thing with an 8a company...When it comes to women-owned and service disabled veteran-owned, for every agency for both of them except the VA for the service disabled, it's just self-certification. You just put a check that says I'm woman or I'm a service disabled veteran. There's no checks unless you're working with the VA, and then the VA has a similar process to 8a and Hub Zone where you have to submit documents up to them. They're going to do an evaluation. They have been, in the past, coming out and talking to the business owner to make sure they're a veteran and that they own 51% and they're controlling interest in the company and everything, that they meet the criteria. Then for the VA, now they know that when he

they award service disabled or a veteran on set-aside contract, they know for certain they have a veteran business.” [#10]

- A male representative of a DBE-certified, woman-owned firm, when asked about DBE fronts or fraud, expressed frustration about minority-owned businesses that are allowed special certification indefinitely. He said, “It’s really kind of a petty thing, but I do think it’s not fair that native Hawaiians and native Alaskans can continue their 8A programs in perpetuity... It could be because they just need to change their NAICS code for their primary business, and they can continue on a new company, [private company] has 6 different companies, they’re all 8As. ...I think 4 or 5 years ago, and they got bought up by an Alaskan native company, so they’re all back 8As again. We have to compete against that ... they don’t really have to deal with the revenue problems because they can split themselves up into all these different companies, they can all be 8A. You continually see them divide into more and more companies, and [private company is] a great example. I complain about them all the time, although I work with them a lot. We get advantages...too. It’s hard for me to complain.” [#3]

## K. MBE and DBE Certification

Business owners and managers discussed the process for MBE certification and DBE certification, including comments related to:

- Knowledge of certification opportunities (*page 84*);
- Ease or difficulty of becoming certified (*page 86*);
- Advantages of certification (*page 87*);
- Disadvantages of certification (*page 88*);
- Recommendations for improvement (*page 90*); and
- Abuse of certification by firms (*page 91*).

**Knowledge of certification opportunities.** Interviewees discussed their knowledge, or lack thereof, of certification opportunities. For example:

- A female interviewee, who provided public comment in a public hearing testimony, stated that the amount of help she had received from business assistance staff was instrumental in her learning about the DBE program. She explained, “[They] always answered all my questions. It was fabulous. And then if I’d have a concern about something, I would call her... So to be honest, that has been the best experience... And not only that, so I was so excited about it that I got a DBE in North Dakota and in Utah, and she totally facilitated that and helped me get that done in a really quick fashion.” [CDA #1]
- A female owner of a DBE-certified firm said she learned about certification through informal personal networks. She said, “[My firm obtained its DBE certification] within three or four years of starting [the] business [16 years ago]. I think you had to have three years of showing you’re in business before I heard about this program.” Since then, she has been

approached by other small business owners seeking information about the process. She said, “Actually, a number of people just this year asked me to help them think about going through this process. I had two business owners who wanted my help or advice on how to do this.” [#2]

- The female owner and female representative of an uncertified firm stated they are in the process of completing the application process. She explained, “[We are pursuing DBE status] because we have more engineers now on staff and are capable of doing more engineering work. We didn't even have one on staff before but we could have subbed it and then had our percent. Now we can probably self-perform all of it.” [#6]
- The female representative of a DBE-certified firm, when asked about certification with state or local agency DBEs, stated the firm is a certified DBE in the State of Idaho, and was one of the first certified DBE firms. They are not currently certified in other states, but have been considering it recently due to the slump in local road work. [#17]
- The male owner of a DBE-certified firm, when asked about certification with the state or local agency DBEs, stated that his firm became DBE-certified in the State of Idaho through ITD when the firm began. He added that the firm also maintains DBE certifications in several other states. [#20]
- The female owner of an uncertified firm, when asked about certification with the state or local agency DBEs, stated that her firm is not DBE certified. She explained, “[I prefer to gain work] by merit as opposed to checking a box.” She has not gone through the process in Idaho, though she did participate in a California small local business program, but has not maintained that certification. [#22]
- A representative of an uncertified firm said, “I think it was a rough go. My wife and I are half owners. I feel like if she was 51%, I might have gotten a little more [work].” [WT #45]
- A female owner of a DBE-certified firm, when asked about her experience with DBE certification, stated, “In theory, it seems like when I first heard about it I thought it sounded really great because there are some, I guess well established engineering firms in the valley, and I thought that being a certified DBE [would be beneficial]. Initially I thought that there was in fact a goal that they had to meet. We [thought] would have a better shake at getting some projects with ITD. Unfortunately, that hasn't worked out that way for us. It's been difficult from the get-go. I mean we got on the ITD Term Agreement, but in terms of marketing, trying to contact people, even ITD's employee's knowledge of the DBE program is very minimal.” [#21]
- The male owner of a DBE-certified firm, when asked why he decided to become certified, stated that he believed the certification would help because, at the time, certain percentages of projects had to be given to a DBE certified firm. [#27]
- The male owner of an uncertified firm, when asked about certification with the state or local agency DBEs, indicated that he did not know what a DBE was. [#23]

**Ease or difficulty of becoming certified.** Interviewees discussed how easy or difficult they believe it is to become certified.

**Some interviewees noted that becoming certified was a difficult process.** [e.g. #16, CDA #1] For example:

- The male owner of an uncertified firm said he is not certified due to the process of obtaining the certification. He explained, “It was difficult to work with because there was little explanation of what certain items were.” [#19]
- A female representative of a non-Hispanic white male-owned business said the process for SBA and DBE certification is a difficult one. She explained that during her career, she has tried to understand the application process in order to pass along information to contractors who might qualify. She said, “Trying to look up how you would go about [becoming certified] is not a real simple process.” She added, “Some of these smaller companies aren't electronically-savvy, either. So you want this small company, who's not electronically savvy, who's trying to do it themselves, to find a process that's not that easy to find, even on a Google search. So while there's probably plenty who would qualify, and could be an MBE or a WBE, they don't know how to go about making that happen. They might do a quick Google search and then the frustration sets in...And then it becomes not worth it and so then they don't do it.” [#5]
- Male managers of a business development organization said the DBE certification process requires a lot of paperwork, which some small businesses do not want to take the time to complete. A manager said, “When you come to DBE, when you come to Hub Zone, 8a, service-disabled veteran-owned certifications, the women-owned certifications, there's a lot of paperwork involved, and most are small businesses [that] just don't want to do it.” [#10]
- The male representative of a DBE-certified firm said that it took he and his wife about a week to battle through all of the paperwork. He said, “In all my life, I have never been through a process that was so detailed. I mean, they wanted everything. I could imagine getting a top-secret government clearance would be just as detailed...The ITD staffer that helped us get started was great, but once it was submitted, crickets...We did get a couple of questions that came within a week, then it took four to five weeks and ITD requested an interview, which was held locally...Then we did not hear from ITD for another five or six weeks. I think a Board had to meet.” He added that they finally received notification through the website that their DBE-Certification had been approved. [#18]
- The female owner of an uncertified firm, when asked about DBE certification process, said the firm applied several years ago but were denied due to a technicality. She noted that they are currently loading required documents online, but they are coming across some unclear requirements. She explained, “Some of the things I don't understand what they're asking for...[for example], show us copies of all your trusts. We don't have any trusts. I mean, I have a will that's a trust, but I don't think that that's what they want. I didn't know if I should call [ITD DBE staff member] and ask her if I can be denied because I didn't submit information that I needed to.” [#6]

**Some interviewees did not find the certification process to be difficult.** [e.g. #13, #20, #27] For example:

- A female owner of a DBE-certified firm, when asked about the ease or difficulty of the DBE certification process, stated that the process was simple. She said, “Actually, filling the paperwork was really easy. I didn't find it to be a big deal because I keep all that stuff anyway. You have to show contracts. No big deal, I had contracts. You have to show that you had cash flow in whatever direction... I don't think it took me more than an hour to pull, copy, and mail all of that stuff. Now it can be electronically. Yippee.” [#2]
- The female owner of a DBE-certified firm, when asked to describe her experience with DBE certification, said the process was fairly straightforward. She said, “The certification process was fairly simple and straightforward, and making sure the paperwork was in order and documenting [the paperwork] was a fairly simple process.” [#15]
- The female representative of a DBE-certified firm, when asked about the DBE certification process, said the process has become more streamlined in the last few years. She mentioned that she appreciates that the yearly online renewals are straightforward. [#17]
- A female owner of a DBE-certified firm felt that the certification process was easy. She explained, “It's just a lot of steps but it was pretty easy.” Since the firm is DBE certified in other states as well, she focuses a lot on her paperwork. As the firm completes other certification processes, they know what each is looking for. [#21]

**Advantages of certification.** Interviewees discussed whether they believe there are advantages to certification.

**Business owners indicated that certification has been advantageous.** [e.g. #10, #20, POC #1] For example:

- A male representative of a DBE-certified, woman-owned firm said that the DBE designation has helped the firm. He said, “Because we are a DBE, and believe me, that's huge, especially with the Army Corps...[it is] very helpful...I think DBEs have a pretty good deal though, really, personally. We've definitely benefited from it.” He explained that it is advantageous because his small company is positioned to pursue projects large companies might pass over. He stated, “Because [Department of Defense or Department of Energy] can sole source projects to a qualified bidder up to \$4 million. A lot of companies, big companies, they don't even look at that kind of stuff. As a DBE, we can go in, and we meet with [either Department], provide them our qualifications, talk to them, give them references ... They'll come to us, say, ‘Can you guys do this’ [and] I'll have to provide a proposal, and show how we can do that. We've gotten several contracts like that.” [#3]
- A male owner of a DBE-certified firm stated that being DBE-certified was advantageous when he first started out. He explained, “You have someone like [ITD staff member]. She's great. She's very supportive, and they help you out.” He added that his firm even gained certification in surrounding states and got some work; however, the firm is now only DBE-certified in Idaho. [#13]

- The female owner of a DBE-certified firm stated that some of the technical benefits of being DBE-certified, like assistance with QuickBooks and other programs, were helpful while the business was just getting started. She mentioned that they have not received work through ITD as part of the DBE, but received other benefits through the program. [#15]
- The female representative of a DBE-certified firm said, “When percentages are in place it does help DBE’s because the primes will use you.” She also explained that DBE percentage requirements have been in and out of contract requirements so many times that she believes contractors continue to use DBE-certified firms because they know percentages will eventually be required again. [#17]
- A female owner of a DBE-certified firm mentioned that a DBE representative was helpful during the process. She stated, “I can only say wonderful things about [DBE representative]. She’s awesome. She’s been incredibly helpful in terms of and application assistance and stuff like that.” [#21]
- A male representative of construction trade association, when asked whether the members feel that DBE certification is a benefit to them, stated that many of them think it is a benefit because they advertise about being DBE certified. He stated, “We have a couple large ones in north Idaho that travel quite a bit all over the region and [their DBE status is] like the first thing you see when you get on their web page.” [#25]

**Disadvantages of certification.** Interviewees indicated that there were some problems that could come from being certified. Many believe that certification has been less helpful than expected since no formal DBE goals exist. [e.g. #18, #26] For example:

- A male owner of a DBE-certified firm said he expected DBE certification would help him be successful in business, though it has not helped him in that way. He said, “The motivation [was] just to help me get started in business with the trucking industry...The reason why I’m going to stay enrolled in it is so that I can get help getting certified in Montana or nearby states where [contracting goals are] mandatory... I totally thought that that DBE program was going to just secure it for me, and then I feel like it made matters worse...The one complaint that I’d have with the whole [DBE] system, the idea about it, is that it took a lot of effort to get on without knowing what the return was going to be. So I put a lot of time and energy to get put on the system, not quite expecting the outcome that I got from it. Because the outcome was rather disappointing...the fact that when you get on there and then they tell you that none of these goals that [ITD] set are mandatory...it actually affected me more negatively... Because I just don’t see the incentive [for primes to hire DBEs for] roadwork.” [#7]
- The female representative of a DBE-certified firm, when asked about disadvantages of certification, said that the restrictions and regulations in the field are cumbersome. As an example, she described how they cannot exchange equipment with other contractors or move each other’s equipment due to the specification that DBEs cannot receive any assistance from primes or other contractors while performing the work. She said, “You aren’t like other contractors where you can say, ‘OK, I’m going to borrow this piece of



equipment from you and then I'll do this for you'... that kind of partnering is prohibited. Everything has to be in a written contract." [#17]

- A female owner of a DBE-certified firm stated that there is no benefit to DBE certification. She explained, "It's hard to market yourself and say, 'Yeah I'm a DBE.' And have someone say, 'Well I don't know what that is. That means nothing to me.' I understand that education is part of it but there's absolutely no importance placed on the DBE program.... In other states, there are actually hard and fast requirements [where] certain percentages have to go to DBE's. Idaho isn't one of those states." [#21]
- The male owner of a DBE-certified firm, when asked about the disadvantages of certification, explained that it was originally good for his business 19 years ago. He said, "[However] it disappeared, the seven percent or whatever it was of the projects, it went away, and then I really, deep down inside, still think that it's useful." He felt that primes do not make as much effort to utilize DBE certified firms. He explained, "Why would they even mess with somebody else like me? Because there [are] tractor truck drivers that are women, there are a lot of truck drivers that are black. They're at their site checking grades and stuff, so there's a lot of women and minorities in their corporation that doesn't allow [primes] to go seek anybody else because they've already fulfilled that goal." He believes if DBE percentages were again implemented, there would be no disadvantages to certification. [#27]
- A male representative of construction trade association, when asked if the association's members had negative opinions about the DBE program, stated that there is a concern about forced goals and a lack of communication about the program. As a solution, they have increased communication about DBEs and tried to make the program more familiar. [#25]
- A male owner of a DBE-certified firm said there is little advantage to being DBE-certified. He said, "I don't know that the DBE certification helps that much anymore because [there aren't] set goals. When there [were] set goals, yeah we had some bigger contracts that way. It works." He claims that there is a decline in the use of DBE firms since those goals were discontinued. He stated, "When [they] had to use minority, then it was a little easier for us to compete... [Prime contractors] would more likely use us, even if we were a little higher." [#1]
- A female owner of a DBE-certified firm, when asked if she found there to be any disadvantage to certification, responded, "I don't even tell [customers]. If they don't have any work, [DBE certification] doesn't matter. Or if they don't know how to use you, it doesn't matter what your certification is." She added, "The DBE designation has not helped me a lot. I'd say for 80 percent of my work, the DBE designation means nothing." [#2]
- A male owner of a DBE-certified firm, when asked about disadvantages of DBE certification, said, "It is actually affecting me negatively because I got the feeling that [contractors] thought that I was just looking for a handout...I stopped even saying that I was certified to any of them, because that's how I could tell that they're interpreting it." [#7]

- A female interviewee, who provided public comment in a public hearing testimony, stated that when she first received her DBE, she thought that she would receive more work. She recalled, “I was under the impression that [the primes] get points, right, or that they get certain benefits [for hiring DBEs]?... I called a big company [and] they said, ‘No, we don’t get any benefits. There’s no points. I don’t know what you’re talking about.’ So they have no idea what I’m talking about.” [POC #1]

**Recommendations for improvement.** Interviewees offered recommendations for improvement of certification programs.

- A male owner of a DBE-certified firm, when asked about his experience with the DBE program, said that the DBE program itself has been a barrier to establishing his business, in part because of unclear expectations about what the program could do for his business. He stated, “The DBE program, and not letting you know right off the bat that it’s not mandatory...I wish, if they would have told you that right from the beginning, because, in theory, [certification] sounds like a good idea. Then you start calling [prime contractors] and then they [think], ‘He’s just looking for the handout.’” [#7]
- A female interviewee, who provided public comment in a public hearing testimony, believes that having a DBE is like having a stigma against the ability to find work. She wants to work as a DBE and has tried to chase work in Idaho, but has found that firms actively avoid her, or if they can, terminate her for “lack of work” though several other trucks are still used on the site for the exact job she was doing. She claimed, “When I could have work here, closer to home. But nobody will give me a chance. And either because they say, ‘Oh my gosh, you got the DBE’ or ‘Oh, I don’t want anything to do with that’ or ‘You’re a woman-owned business.’ I mean, it’s so so bizarre. It’s so ridiculous.” She strongly recommends having agency goals to incentivize firms to use DBEs.
- A female interviewee, who provided written testimony, talked about the need to include more specific goals for DBE utilization that are not exclusively construction. She wrote, “I think the DBE program creates a great opportunity for entrepreneurs who are minority- and woman-owned businesses. One item that would help grow the program would be hard targets on the design side. Design engineers sell intellectual property, (i.e. knowledge and experience) large capital investments are not necessary to start a design firm unlike a construction subcontractor or vendor who may need to buy product and equipment in order to perform their job.” [WT #1]
- A male representative of construction trade association, when asked if the agency did anything else to counter the construction stigma and recruit more construction workers, mentioned that the DBE program goes hand in hand with their ability to recruit potential workers. He explained, “Part of that comes to [us] producing more and more of our material in Spanish. We’re reaching out to women and other groups and explaining that there [are] opportunities here for them as well. We have several members that are women-owned companies, and so we try to highlight them and get them more involved [to make] an example [and hope] it will inspire somebody else.” [#25]

- The male owner of a DBE-certified firm, when asked about recommendations for the DBE program, stated that he wishes they would improve the benefits by offering marketing services. [#26]
- The male representative of a DBE-certified firm, when discussing helpful programs offered to small businesses, said he would like to know what programs exist since they are a new DBE and do not have much experience with the program. He explained, “I don’t feel like we have had any training regarding the program.” [#18]
- A male representative of construction trade association, when asked how members interact with the DBE program, stated that his organization and their relationship with ITD have set DBE information as a priority. It is an agenda item every month. They also recently created new software that tracks DBEs. Their members received training on how to use that. He stated, “[The members] were all very pleased to see that ITD was going to do a better job of tracking the data because, in the past, I don’t know how faithfully that was done.” [#25]
- The male owner of a DBE-certified firm, when asked about any other items that could enhance DBE or small business participation, noted that he is concerned that having a percentage goal, without examination of which firms are awarded the goals, could lead to a situation where only one large firm wins and completes all the work. He said, “So the percentage might have already been eaten up before it even gets down to me because they’ve already consulted with the [larger prime].” [#27]

**Abuse of certification by firms.** Interviewees discussed whether they have seen or experienced any abuse of certification.

**Many interviewees believe that there is a problem of abuse of certification, and that fronts are an issue.** [e.g. #6, #17, #22] For example:

- The non-Hispanic white male owner of a small business, when asked about DBE fronts or frauds, responded, “The whole minority, women-owned business thing is kind of silly because I know a couple survey firms where they put their wives as the majority owner just for that reason.” He added, “If I wanted to, I could make my wife the majority owner, and then we could be a minority woman-owned business. But, even though we’re married, really it makes no difference who has more shares...what’s hers is mine, and what’s mine is hers. What difference does it make?” [#4]
- Male managers of a business development organization, when asked about DBE fronts or fraud, said that they are aware of some businesses listing the wife as owner to earn woman-owned business status. A manager said, “Part of the problem is, a lot of small businesses try to capture that woman-owned set-aside program that the federal government has, and they make the [wife] the owner the business, who has no idea what the business does. When you apply for that status...it doesn’t happen all the time, but all of a sudden you can get a knock on the door, and they’ll pull the spouse and lose construction because it’s the easiest one to give example of. They’ll pull that [wife] into a room, keep the husband out, and say, ‘Bid this job.’ If the person can’t bid the job, they don’t have control of the company.” [#10]

- The male owner of a DBE-certified firm, when asked if he was aware of or experienced issues with DBE fronts or fraud, said that he has seen some over the years. He said, “A big company comes in, hires someone as a DBE front, assembles an entire company, and will then go out and decimate the market and take control, and the DBE company becomes no more than a figurehead.” [#20]
- A female owner of a DBE-certified firm, when asked about DBE fronts, stated that she has heard about them, but doesn’t understand why someone would go to such lengths. She explained, “Since there is no impetus to use DBEs, why would anybody risk that?” She also mentioned that the firm had been working with a WBE, but they did not know it was a WBE firm because the female owner had a completely different job and her firm had only ever worked with the male. [#21]
- A male representative of construction trade association, when asked about any DBE fraud in the community, said that was a very famous case of that in Idaho in the early 2000s, where the DBE was hiding assets to remain in the small business category. He said, “The thing was that she didn't need to because they did great work, and people would've hired them anyway and done that. There was a sense right after that whole thing happened that [there was a] negative perception. There may have been a small perception, when all that was in the paper. But that quickly went away, and I haven't heard any negative since.” [#25]

**Some interviewees indicated that they have not seen any abuse of certification in Idaho.** [e.g. #7, #22, #24] For example, a male owner of a DBE-certified firm, when asked about DBE fronts or fraud, said he is not aware of it in Idaho but has heard of companies in other states listing the wife as the owner to benefit the company. He said, “I don't hear about it. No, not in Idaho.” He noted that he has heard of it in other states, presumably, because those states enforce DBE goals. [#7]

## **L. Any Other Insights and Recommendations Concerning Idaho Contracting or MBE/DBE Program**

Interviewees, participants in public hearings, and other individuals made a number of comments and suggestions regarding Contracting Programs and MBE/DBE programs. Comments regarded:

- Access to information (*page 92*); and
- Streamlining contract specifications (*page 93*).

**Some business owners recommended that access to information be improved through the website, outreach events, and equalizing information channels.** For example:

- A male representative of a DBE-certified, woman-owned firm, when asked about recommendations, responded that it would be helpful if small businesses had access to the same information large companies do. He said, “As a small business, we can't pay \$10,000 a year for [data mining] service, but if there's something that would help us be able to get in early enough, to know about some of the ones coming up without us having to go travel to all of the different Corps districts, or the Department of Energy... There's so many things out

there, but that data mining is only available to those that can afford it, and that would be helpful. I would love that, I've tried some of the less expensive ones, and they're okay but... You don't get the intel that all the other big companies get." [#3]

- A female representative of a non-Hispanic white male-owned business, when asked for recommendations to enhance the availability and participation of small businesses, said that simplifying the registration process for both public works licensing and DBE registration, coupled with outreach to help small businesses with those processes, is needed. She said, "They need to have some kind of outreach to the small businesses to explain to them how to get on the lists, and they need to work on the public works licensing process to make it easier for the smaller businesses. And I think that whole process needs to be completely revamped. But they need to have an outreach to them...Reassign somebody that when they de-funk the whole Idaho public works licensing division, they can assign them to go and start outreaching to these MBE and WBE and getting them through that process." [#5]
- A male owner of a DBE-certified firm, when asked what recommendations he had for ITD, said the ITD website could be improved to be more user friendly. He said, "[The site presents challenges] just to even find the contracts that are there. It's kind of difficult to go through and figure out...it's like you have to be an elite, know what the lingo is...I feel like you would need to have somebody have a course if you really wanted to know what to do on that website...it shouldn't be that way. If somebody wanted to go in, open up that government website, I think it should be self-explanatory where you would want to figure it out yourself." [#7]

**Other business owners recommended a simplification, or streamlining, of contract and bidding processes.** For example:

- A female representative of a non-Hispanic white male-owned business, when asked for recommendations for ITD, suggested that ITD could look to the state of Washington for ways to streamline and consolidate specifications. She said, "[Washington State's] spec book's better. It's edited far more often. It includes water and sewer items, because they have made it about not just road construction, it's municipal construction in general. In Idaho we have two separate entities. We have the ISPWC and then we have ITD. And instead of trying to combine the two, they're constantly at odds...If you have water and sewer involved on an ITD project... I can't tell you how many times they'd say, 'Well, you can't put that in there for the water because we don't have those standards to look at.' So then you'd have to go copy tons of stuff out of the ISPWC and put it into this. Instead,... why not make it all one, put it all under one umbrella?" [#5]
- A male owner of a DBE-certified firm, when asked what recommendations he had for ITD, suggested the agency provide a simple user guide for navigating the bidding process. He said, "If they could do that or explain the process...maybe if they even just had a pdf that you could download...with simple explanations on how to bid." [#7]

# **APPENDIX F.**

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## **Disparity Tables**

Figure F-1

Figure F- :	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
<b>Funding and program</b>																				
All Funding Sources	X	X	X	X			X	X	X	X	X	X	X	X	X	X				
Federal						X											X	X	X	X
Local					X															
<b>Time Period</b>																				
FFY 2010-2014	X	X	X	X	X	X			X	X	X	X	X	X	X	X	X	X	X	X
FFY 2010-2012							X													
FFY 2013-2014								X												
<b>Type</b>																				
Construction, Professional Services, Goods and Other Services	X				X	X	X	X	X	X					X	X	X			
Construction		X									X		X					X		
Professional Services			X									X		X					X	
Goods and Other Services				X																X
<b>Contract role</b>																				
Prime Contractors, Subcontractors and Suppliers	X	X	X	X	X	X	X	X									X	X	X	X
Prime Contractors									X		X	X			X	X				
Subcontractors and Suppliers										X			X	X						
<b>Contract size</b>																				
All	X	X	X	X	X	X	X	X	X	X	X	X	X	X			X	X	X	X
Under \$2M for Construction, Under \$500k for Prof. Svcs., Under \$50k for Goods															X					
Over \$2M for Construction, Over \$500k for Prof. Svcs., Over \$50k for Goods																X				
<b>Components of DBE goal</b>																				
Analysis of Potential DBEs																	X	X	X	X

Figure F-2.

Funding source: Federally and state-funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	3,795	\$1,092,683	\$1,092,683				
(2) MBE/WBE	750	\$76,267	\$76,267	7.0	17.9	-10.9	39.0
(3) WBE	495	\$40,403	\$40,403	3.7	5.0	-1.3	73.5
(4) MBE	255	\$35,864	\$35,864	3.3	12.9	-9.6	25.5
(5) Black American-owned	1	\$40	\$40	0.0	0.2	-0.2	1.6
(6) Asian Pacific American-owned	25	\$713	\$713	0.1	0.3	-0.2	23.5
(7) Subcontinent Asian American-owned	3	\$9	\$9	0.0	0.0	0.0	8.9
(8) Hispanic American-owned	163	\$9,801	\$9,801	0.9	0.7	0.2	124.0
(9) Native American-owned	63	\$25,302	\$25,302	2.3	11.6	-9.3	19.9
(10) Unknown MBE	0	\$0					
(11) DBE-certified	428	\$28,174	\$28,174	2.6			
(12) Woman-owned DBE	247	\$19,240	\$19,240	1.8			
(13) Minority-owned DBE	181	\$8,934	\$8,934	0.8			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	16	\$494	\$494	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	140	\$6,095	\$6,095	0.6			
(18) Native American-owned DBE	25	\$2,345	\$2,345	0.2			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: Federally and state-funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction

Contract role: Prime contractors and subcontractors

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	2,232	\$950,069	\$950,069				
(2) MBE/WBE	477	\$65,425	\$65,425	6.9	18.8	-11.9	36.7
(3) WBE	364	\$35,354	\$35,354	3.7	4.7	-1.0	79.0
(4) MBE	113	\$30,071	\$30,071	3.2	14.1	-10.9	22.5
(5) Black American-owned	1	\$40	\$40	0.0	0.3	-0.3	1.6
(6) Asian Pacific American-owned	8	\$201	\$201	0.0	0.0	0.0	121.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	81	\$7,188	\$7,188	0.8	0.7	0.0	105.4
(9) Native American-owned	23	\$22,642	\$22,642	2.4	13.1	-10.7	18.2
(10) Unknown MBE	0	\$0					
(11) DBE-certified	290	\$24,978	\$24,978	2.6			
(12) Woman-owned DBE	202	\$18,499	\$18,499	1.9			
(13) Minority-owned DBE	88	\$6,479	\$6,479	0.7			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	1	\$51	\$51	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	72	\$4,193	\$4,193	0.4			
(18) Native American-owned DBE	15	\$2,235	\$2,235	0.2			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: Federally and state-funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Consulting

Contract role: Prime contractors and subcontractors

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	1,563	\$142,614	\$142,614				
(2) MBE/WBE	273	\$10,842	\$10,842	7.6	12.1	-4.5	62.7
(3) WBE	131	\$5,049	\$5,049	3.5	7.1	-3.6	49.5
(4) MBE	142	\$5,793	\$5,793	4.1	5.0	-0.9	81.7
(5) Black American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(6) Asian Pacific American-owned	17	\$512	\$512	0.4	2.0	-1.6	17.9
(7) Subcontinent Asian American-owned	3	\$9	\$9	0.0	0.1	-0.1	9.1
(8) Hispanic American-owned	82	\$2,613	\$2,613	1.8	0.8	1.1	200+
(9) Native American-owned	40	\$2,659	\$2,659	1.9	2.1	-0.3	88.1
(10) Unknown MBE	0	\$0					
(11) DBE-certified	138	\$3,196	\$3,196	2.2			
(12) Woman-owned DBE	45	\$742	\$742	0.5			
(13) Minority-owned DBE	93	\$2,454	\$2,454	1.7			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	15	\$443	\$443	0.3			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	68	\$1,902	\$1,902	1.3			
(18) Native American-owned DBE	10	\$110	\$110	0.1			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: Federally and state-funded

Time period: October 1, 2011 to September 30, 2013

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	2,086	\$519,117	\$519,117				
(2) MBE/WBE	478	\$47,459	\$47,459	9.1	18.4	-9.3	49.6
(3) WBE	326	\$26,191	\$26,191	5.0	5.5	-0.5	91.4
(4) MBE	152	\$21,269	\$21,269	4.1	12.9	-8.8	31.8
(5) Black American-owned	0	\$0	\$0	0.0	0.3	-0.3	0.0
(6) Asian Pacific American-owned	17	\$418	\$418	0.1	0.3	-0.2	27.7
(7) Subcontinent Asian American-owned	1	\$3	\$3	0.0	0.0	0.0	200+
(8) Hispanic American-owned	88	\$4,440	\$4,440	0.9	0.8	0.0	103.7
(9) Native American-owned	46	\$16,408	\$16,408	3.2	11.5	-8.4	27.5
(10) Unknown MBE	0	\$0					
(11) DBE-certified	270	\$19,271	\$19,271	3.7			
(12) Woman-owned DBE	170	\$13,416	\$13,416	2.6			
(13) Minority-owned DBE	100	\$5,855	\$5,855	1.1			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	10	\$268	\$268	0.1			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	70	\$3,537	\$3,537	0.7			
(18) Native American-owned DBE	20	\$2,050	\$2,050	0.4			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: Federally and state-funded

Time period: October 1, 2014 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	1,709	\$573,566	\$573,566				
(2) MBE/WBE	272	\$28,808	\$28,808	5.0	17.4	-12.4	28.8
(3) WBE	169	\$14,213	\$14,213	2.5	4.6	-2.1	54.1
(4) MBE	103	\$14,595	\$14,595	2.5	12.9	-10.3	19.8
(5) Black American-owned	1	\$40	\$40	0.0	0.2	-0.2	3.5
(6) Asian Pacific American-owned	8	\$295	\$295	0.1	0.3	-0.2	19.4
(7) Subcontinent Asian American-owned	2	\$6	\$6	0.0	0.0	0.0	5.8
(8) Hispanic American-owned	75	\$5,361	\$5,361	0.9	0.6	0.3	147.9
(9) Native American-owned	17	\$8,894	\$8,894	1.6	11.7	-10.2	13.2
(10) Unknown MBE	0	\$0					
(11) DBE-certified	158	\$8,903	\$8,903	1.6			
(12) Woman-owned DBE	77	\$5,825	\$5,825	1.0			
(13) Minority-owned DBE	81	\$3,079	\$3,079	0.5			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	6	\$226	\$226	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	70	\$2,558	\$2,558	0.4			
(18) Native American-owned DBE	5	\$295	\$295	0.1			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: Federally and state-funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors

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	1,495	\$801,257	\$801,257				
(2) MBE/WBE	152	\$32,357	\$32,357	4.0	16.8	-12.8	24.0
(3) WBE	66	\$4,804	\$4,804	0.6	3.6	-3.0	16.5
(4) MBE	86	\$27,553	\$27,553	3.4	13.2	-9.8	26.0
(5) Black American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(6) Asian Pacific American-owned	11	\$350	\$350	0.0	0.3	-0.2	15.3
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	39	\$4,475	\$4,475	0.6	0.4	0.1	129.2
(9) Native American-owned	36	\$22,727	\$22,727	2.8	12.4	-9.5	22.9
(10) Unknown MBE	0	\$0					
(11) DBE-certified	74	\$3,260	\$3,260	0.4			
(12) Woman-owned DBE	23	\$940	\$940	0.1			
(13) Minority-owned DBE	51	\$2,320	\$2,320	0.3			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	11	\$350	\$350	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	33	\$1,647	\$1,647	0.2			
(18) Native American-owned DBE	7	\$322	\$322	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.**

**Funding source: Federally and state-funded**

**Time period: October 1, 2011 to September 30, 2015**

**Contract area: Construction and Consulting**

**Contract role: Subcontractor and suppliers**

**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	2,300	\$291,426	\$291,426				
(2) MBE/WBE	598	\$43,911	\$43,911	15.1	20.8	-5.8	72.3
(3) WBE	429	\$35,600	\$35,600	12.2	8.9	3.3	137.7
(4) MBE	169	\$8,311	\$8,311	2.9	12.0	-9.1	23.8
(5) Black American-owned	1	\$40	\$40	0.0	0.6	-0.6	2.3
(6) Asian Pacific American-owned	14	\$362	\$362	0.1	0.3	-0.1	49.1
(7) Subcontinent Asian American-owned	3	\$9	\$9	0.0	0.0	0.0	16.2
(8) Hispanic American-owned	124	\$5,326	\$5,326	1.8	1.5	0.3	119.9
(9) Native American-owned	27	\$2,574	\$2,574	0.9	9.6	-8.7	9.2
(10) Unknown MBE	0	\$0					
(11) DBE-certified	354	\$24,914	\$24,914	8.5			
(12) Woman-owned DBE	224	\$18,300	\$18,300	6.3			
(13) Minority-owned DBE	130	\$6,614	\$6,614	2.3			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	5	\$144	\$144	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	107	\$4,447	\$4,447	1.5			
(18) Native American-owned DBE	18	\$2,023	\$2,023	0.7			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: Federally and state-funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors

Region: Statewide

Small prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,325	\$262,066	\$262,066				
(2) MBE/WBE	147	\$10,342	\$10,342	3.9	18.1	-14.2	21.8
(3) WBE	66	\$4,804	\$4,804	1.8	5.9	-4.1	31.2
(4) MBE	81	\$5,538	\$5,538	2.1	12.2	-10.1	17.3
(5) Black American-owned	0	\$0	\$0	0.0	0.3	-0.3	0.0
(6) Asian Pacific American-owned	11	\$350	\$350	0.1	0.7	-0.6	19.2
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	38	\$1,963	\$1,963	0.7	1.3	-0.6	56.7
(9) Native American-owned	32	\$3,224	\$3,224	1.2	9.9	-8.7	12.4
(10) Unknown MBE	0	\$0					
(11) DBE-certified	74	\$3,260	\$3,260	1.2			
(12) Woman-owned DBE	23	\$940	\$940	0.4			
(13) Minority-owned DBE	51	\$2,320	\$2,320	0.9			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	11	\$350	\$350	0.1			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	33	\$1,647	\$1,647	0.6			
(18) Native American-owned DBE	7	\$322	\$322	0.1			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: Federally and state-funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors

Region: Statewide

Large prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	170	\$539,192	\$539,192				
(2) MBE/WBE	5	\$22,015	\$22,015	4.1	16.2	-12.1	25.2
(3) WBE	0	\$0	\$0	0.0	2.5	-2.5	0.0
(4) MBE	5	\$22,015	\$22,015	4.1	13.7	-9.6	29.8
(5) Black American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	1	\$2,512	\$2,512	0.5	0.0	0.5	200+
(9) Native American-owned	4	\$19,503	\$19,503	3.6	13.6	-10.0	26.6
(10) Unknown MBE	0	\$0					
(11) DBE-certified	0	\$0	\$0	0.0			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	0	\$0	\$0	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.**

**Funding source:** Federally and state-funded

**Time period:** October 1, 2011 to September 30, 2015

**Contract area:** Construction and Consulting

**Contract role:** Prime contractors and subcontractors

**Region:** Districts 1 and 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	964	\$254,705	\$254,705				
(2) MBE/WBE	160	\$31,072	\$31,072	12.2	16.4	-4.2	74.6
(3) WBE	107	\$8,217	\$8,217	3.2	4.1	-0.9	77.8
(4) MBE	53	\$22,854	\$22,854	9.0	12.2	-3.2	73.5
(5) Black American-owned	1	\$40	\$40	0.0	0.5	-0.4	3.4
(6) Asian Pacific American-owned	17	\$455	\$455	0.2	0.3	-0.2	53.9
(7) Subcontinent Asian American-owned	3	\$9	\$9	0.0	0.0	0.0	38.9
(8) Hispanic American-owned	24	\$1,241	\$1,241	0.5	1.0	-0.5	47.6
(9) Native American-owned	8	\$21,109	\$21,109	8.3	10.4	-2.1	79.7
(10) Unknown MBE	0	\$0					
(11) DBE-certified	83	\$5,102	\$5,102	2.0			
(12) Woman-owned DBE	49	\$3,719	\$3,719	1.5			
(13) Minority-owned DBE	34	\$1,383	\$1,383	0.5			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	13	\$425	\$425	0.2			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	21	\$958	\$958	0.4			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.**

**Funding source:** Federally and state-funded

**Time period:** October 1, 2011 to September 30, 2015

**Contract area:** Construction and Consulting

**Contract role:** Prime contractors and subcontractors

**Region:** District 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	1,465	\$412,510	\$412,510				
(2) MBE/WBE	301	\$19,517	\$19,517	4.7	16.1	-11.4	29.3
(3) WBE	202	\$12,506	\$12,506	3.0	4.2	-1.1	72.7
(4) MBE	99	\$7,011	\$7,011	1.7	12.0	-10.3	14.2
(5) Black American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	0.3	-0.3	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	88	\$6,215	\$6,215	1.5	0.5	1.0	200+
(9) Native American-owned	11	\$795	\$795	0.2	10.8	-10.6	1.8
(10) Unknown MBE	0	\$0					
(11) DBE-certified	178	\$10,111	\$10,111	2.5			
(12) Woman-owned DBE	98	\$6,740	\$6,740	1.6			
(13) Minority-owned DBE	80	\$3,371	\$3,371	0.8			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	80	\$3,371	\$3,371	0.8			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.**

**Funding source:** Federally and state-funded

**Time period:** October 1, 2011 to September 30, 2015

**Contract area:** Construction and Consulting

**Contract role:** Prime contractors and subcontractors

**Region:** Districts 4, 5, and 6

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	1,379	\$426,332	\$426,332				
(2) MBE/WBE	291	\$25,681	\$25,681	6.0	20.6	-14.5	29.3
(3) WBE	188	\$19,682	\$19,682	4.6	6.4	-1.8	72.2
(4) MBE	103	\$5,999	\$5,999	1.4	14.2	-12.8	9.9
(5) Black American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(6) Asian Pacific American-owned	8	\$258	\$258	0.1	0.2	-0.1	29.8
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	51	\$2,345	\$2,345	0.5	0.7	-0.2	75.1
(9) Native American-owned	44	\$3,397	\$3,397	0.8	13.1	-12.3	6.1
(10) Unknown MBE	0	\$0					
(11) DBE-certified	169	\$12,964	\$12,964	3.0			
(12) Woman-owned DBE	102	\$8,784	\$8,784	2.1			
(13) Minority-owned DBE	67	\$4,180	\$4,180	1.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	3	\$69	\$69	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	39	\$1,766	\$1,766	0.4			
(18) Native American-owned DBE	25	\$2,345	\$2,345	0.6			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: FHWA funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	3,221	\$917,135	\$917,135				
(2) MBE/WBE	614	\$61,449	\$61,449	6.7	17.9	-11.2	37.4
(3) WBE	392	\$34,074	\$34,074	3.7	5.1	-1.4	72.3
(4) MBE	222	\$27,375	\$27,375	3.0	12.8	-9.8	23.3
(5) Black American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(6) Asian Pacific American-owned	23	\$697	\$697	0.1	0.3	-0.3	23.2
(7) Subcontinent Asian American-owned	3	\$9	\$9	0.0	0.0	0.0	8.9
(8) Hispanic American-owned	141	\$8,002	\$8,002	0.9	0.7	0.2	132.5
(9) Native American-owned	55	\$18,666	\$18,666	2.0	11.6	-9.6	17.6
(10) Unknown MBE	0	\$0					
(11) DBE-certified	338	\$22,036	\$22,036	2.4			
(12) Woman-owned DBE	186	\$15,146	\$15,146	1.7			
(13) Minority-owned DBE	152	\$6,890	\$6,890	0.8			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	15	\$484	\$484	0.1			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	119	\$4,428	\$4,428	0.5			
(18) Native American-owned DBE	18	\$1,979	\$1,979	0.2			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: State funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	533	\$170,089	\$170,089				
(2) MBE/WBE	128	\$14,325	\$14,325	8.4	17.8	-9.4	47.3
(3) WBE	98	\$5,951	\$5,951	3.5	4.3	-0.8	81.1
(4) MBE	30	\$8,375	\$8,375	4.9	13.5	-8.6	36.5
(5) Black American-owned	0	\$0	\$0	0.0	0.4	-0.4	0.0
(6) Asian Pacific American-owned	1	\$5	\$5	0.0	0.0	0.0	38.5
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	22	\$1,799	\$1,799	1.1	1.0	0.1	110.1
(9) Native American-owned	7	\$6,571	\$6,571	3.9	12.1	-8.3	31.8
(10) Unknown MBE	0	\$0					
(11) DBE-certified	85	\$6,046	\$6,046	3.6			
(12) Woman-owned DBE	58	\$4,077	\$4,077	2.4			
(13) Minority-owned DBE	27	\$1,969	\$1,969	1.2			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	21	\$1,666	\$1,666	1.0			
(18) Native American-owned DBE	6	\$302	\$302	0.2			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: FTA funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	40	\$5,430	\$5,430				
(2) MBE/WBE	8	\$493	\$493	9.1	17.1	-8.1	53.0
(3) WBE	5	\$378	\$378	7.0	9.2	-2.2	76.0
(4) MBE	3	\$114	\$114	2.1	8.0	-5.9	26.5
(5) Black American-owned	1	\$40	\$40	0.7	0.3	0.4	200+
(6) Asian Pacific American-owned	1	\$10	\$10	0.2	0.2	0.0	100.3
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	0	\$0	\$0	0.0	4.3	-4.3	0.0
(9) Native American-owned	1	\$64	\$64	1.2	3.2	-2.0	36.8
(10) Unknown MBE	0	\$0					
(11) DBE-certified	5	\$92	\$92	1.7			
(12) Woman-owned DBE	3	\$17	\$17	0.3			
(13) Minority-owned DBE	2	\$75	\$75	1.4			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	1	\$10	\$10	0.2			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(18) Native American-owned DBE	1	\$64	\$64	1.2			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-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.

Funding source: FHWA funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	3,221	\$917,135	\$917,135				
(2) MBE/WBE	614	\$61,449	\$61,449		13.3		
(3) WBE	392	\$34,074	\$34,074		4.6		
(4) MBE	222	\$27,375	\$27,375		8.6		
(5) Black American-owned	0	\$0	\$0		0.2		
(6) Asian Pacific American-owned	23	\$697	\$697		0.0		
(7) Subcontinent Asian American-owned	3	\$9	\$9		0.0		
(8) Hispanic American-owned	141	\$8,002	\$8,002		0.4		
(9) Native American-owned	55	\$18,666	\$18,666		8.0		
(10) Unknown MBE	0	\$0					
(11) DBE-certified	338	\$22,036	\$22,036				
(12) Woman-owned DBE	186	\$15,146	\$15,146				
(13) Minority-owned DBE	152	\$6,890	\$6,890				
(14) Black American-owned DBE	0	\$0	\$0				
(15) Asian Pacific American-owned DBE	15	\$484	\$484				
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0				
(17) Hispanic American-owned DBE	119	\$4,428	\$4,428				
(18) Native American-owned DBE	18	\$1,979	\$1,979				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	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.

Funding source: FHWA funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction

Contract role: Prime contractors and subcontractors

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	1,674	\$775,151	\$775,151				
(2) MBE/WBE	344	\$50,626	\$50,626		14.3		
(3) WBE	263	\$29,033	\$29,033		4.2		
(4) MBE	81	\$21,593	\$21,593		10.1		
(5) Black American-owned	0	\$0	\$0		0.2		
(6) Asian Pacific American-owned	7	\$196	\$196		0.0		
(7) Subcontinent Asian American-owned	0	\$0	\$0		0.0		
(8) Hispanic American-owned	59	\$5,390	\$5,390		0.4		
(9) Native American-owned	15	\$16,007	\$16,007		9.5		
(10) Unknown MBE	0	\$0					
(11) DBE-certified	203	\$18,859	\$18,859				
(12) Woman-owned DBE	143	\$14,412	\$14,412				
(13) Minority-owned DBE	60	\$4,446	\$4,446				
(14) Black American-owned DBE	0	\$0	\$0				
(15) Asian Pacific American-owned DBE	1	\$51	\$51				
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0				
(17) Hispanic American-owned DBE	51	\$2,526	\$2,526				
(18) Native American-owned DBE	8	\$1,869	\$1,869				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	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.

Funding source: FHWA funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Consulting

Contract role: Prime contractors and subcontractors

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	1,547	\$141,984	\$141,984				
(2) MBE/WBE	270	\$10,823	\$10,823		7.5		
(3) WBE	129	\$5,041	\$5,041		7.1		
(4) MBE	141	\$5,782	\$5,782		0.4		
(5) Black American-owned	0	\$0	\$0		0.0		
(6) Asian Pacific American-owned	16	\$501	\$501		0.0		
(7) Subcontinent Asian American-owned	3	\$9	\$9		0.1		
(8) Hispanic American-owned	82	\$2,613	\$2,613		0.1		
(9) Native American-owned	40	\$2,659	\$2,659		0.2		
(10) Unknown MBE	0	\$0					
(11) DBE-certified	135	\$3,177	\$3,177				
(12) Woman-owned DBE	43	\$733	\$733				
(13) Minority-owned DBE	92	\$2,444	\$2,444				
(14) Black American-owned DBE	0	\$0	\$0				
(15) Asian Pacific American-owned DBE	14	\$432	\$432				
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0				
(17) Hispanic American-owned DBE	68	\$1,902	\$1,902				
(18) Native American-owned DBE	10	\$110	\$110				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	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.

Funding source: FTA funded

Time period: October 1, 2011 to September 30, 2015

Contract area: Construction and Consulting

Contract role: Prime contractors and subcontractors

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	40	\$5,430	\$5,430				
(2) MBE/WBE	8	\$493	\$493		15.7		
(3) WBE	5	\$378	\$378		8.3		
(4) MBE	3	\$114	\$114		7.3		
(5) Black American-owned	1	\$40	\$40		0.3		
(6) Asian Pacific American-owned	1	\$10	\$10		0.0		
(7) Subcontinent Asian American-owned	0	\$0	\$0		0.0		
(8) Hispanic American-owned	0	\$0	\$0		4.1		
(9) Native American-owned	1	\$64	\$64		2.9		
(10) Unknown MBE	0	\$0					
(11) DBE-certified	5	\$92	\$92				
(12) Woman-owned DBE	3	\$17	\$17				
(13) Minority-owned DBE	2	\$75	\$75				
(14) Black American-owned DBE	0	\$0	\$0				
(15) Asian Pacific American-owned DBE	1	\$10	\$10				
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0				
(17) Hispanic American-owned DBE	0	\$0	\$0				
(18) Native American-owned DBE	1	\$64	\$64				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	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.