



2020 Disparity Study

City of San Diego

FINAL REPORT

Final Report

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2020 City of San Diego Disparity Study

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CHAPTER ES.

Executive Summary

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Executive Summary

The City of San Diego (the City) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to assess whether any barriers or discrimination exist in its contracting processes or the relevant geographic market area (RGMA) that potentially makes it harder for minority-, woman-, and service-disabled veteran-owned businesses to compete for City contracts and procurements.¹ The City will use information from the study to make refinements to its contracting policies and programs to better encourage the participation of those businesses in its contracts and procurements and to understand whether the use of race- and gender-conscious measures might be appropriate in the future and how to use such measures effectively and in a legally-defensible manner.

The City implements the Small Local Business Enterprise (SLBE) Program to encourage the participation of small businesses, minority-owned businesses, and woman-owned businesses in City contracting. To do so, the City uses various *race- and gender-neutral measures*. In the context of contracting and procurement, race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in a government organization's contracting, regardless of the race/ethnicity or gender of the businesses' owners. In contrast to race- and gender-neutral measures, *race- and gender-conscious measures* are measures that are specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting. The City does not use any race- or gender-conscious measures as part of the SLBE Program because of Proposition 209.

Proposition 209, which California voters passed in 1996, amended Section 31, Article 1 of the California Constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies in California—including the City—from using race- or gender-conscious measures when awarding state- and locally-funded contracts. (However, Proposition 209 did not prohibit those actions if an agency is required to take them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.”)

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

- The percentage of contract and procurement dollars that the City awarded to minority-, woman-, and service-disabled veteran-owned businesses between July 1, 2014 and June 30, 2019 (i.e., *utilization*); and
- The percentage of contract and procurement dollars that minority-, woman-, and service-disabled veteran-owned businesses might be expected to receive based on their availability

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

to perform specific types and sizes of City prime contracts and subcontracts (i.e., *availability*).

BBC also assessed other quantitative and qualitative information related to:

- The legal framework related to the SLBE Program;
- Local marketplace conditions for minority-, woman-, and veteran-owned businesses; and
- Contracting practices and business assistance programs that the City currently has in place.

The City could use information from the study to help refine its implementation of the SLBE Program, including setting an overall aspirational goal for the participation of minority- and woman-owned businesses in City contracting and procurement and determining which program measures to use to encourage the participation of those businesses. BBC summarizes key information from the 2020 City of San Diego Disparity Study in six parts:

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

A. Analyses in the Disparity Study

Along with measuring disparities between the participation and availability of minority-, woman-, and service-disabled veteran-owned businesses for City contracts and procurements, BBC also examined other information related to the City's contracting and procurement processes and implementation of the SLBE Program:

- The study team conducted an analysis of federal, state, and local regulations; case law; and other information to guide the methodology for the disparity study. The analysis included a review of legal requirements related to minority- and woman-owned business programs (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities, women, veterans, and the businesses that they own throughout the *RGMA*.² In addition, the study team collected qualitative information about potential barriers that minorities, women, veterans, and the businesses that they own face in the local marketplace through in-depth interviews, surveys, public meetings, and written testimony (see Chapter 3, Appendix C, and Appendix D).
- BBC analyzed the percentage of relevant City contracting dollars that minority-, woman-, and service-disabled veteran-owned businesses are available to perform. That analysis was

² BBC identified the RGMA for the disparity study as San Diego County.

based on surveys that the study team completed with nearly 400 businesses that work in industries related to the specific types of construction, professional services, and goods and other services contracts that the City awards (see Chapter 5 and Appendix E).

- BBC analyzed the dollars that minority-, woman-, and service-disabled veteran-owned businesses received on more than 4,000 construction, professional services, and goods and other services contracts that the City awarded during the study period (see Chapter 6).
- BBC examined whether there were any disparities between the participation and availability of minority-, woman-, and service-disabled veteran-owned businesses on construction, professional services, and goods and other services contracts that the City awarded during the study period (see Chapter 7).
- BBC reviewed the measures that the City uses to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses in its contracting as well as measures that other organizations in and around San Diego use (see Chapter 8).
- BBC provided guidance related to additional program options and potential changes to current contracting practices and the SLBE Program for the City's consideration (see Chapter 9).

B. Legal Considerations

Although the City does not currently use any race- or gender-conscious measures as part of its contracting processes, it is instructive to review legal standards surrounding their use in case it determines that using such measures is appropriate in the future. To justify the use of any race- or gender-conscious measures, the City would need to comply with state law and federal equal protection requirements. If an exception to California's general prohibition on race- or gender-conscious measures is applied, any program would still need to meet the strict scrutiny standard of constitutional review.

The strict scrutiny standard presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether (as California generally does). Under the strict scrutiny standard, a government organization must:

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

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

participant' in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

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

- The necessity of such measures and the efficacy of alternative race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that 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.³

c. BBC’s methodology. The methodology that BBC used to conduct the disparity study has been approved by the United States District Court of the Eastern District of California as well as by the Ninth Circuit Court of Appeals in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation et al* as it relates to helping organizations’ ensure their use of race- and gender-conscious measures meets the strict scrutiny standard. Key components of BBC’s methodology with regard to strict scrutiny requirements include:

- Defining the relevant geographic market area to account for the vast majority of City spend;
- Using a custom census approach to measure the availability of small, local, and minority- and woman-owned businesses for City contracts that considers the specific characteristics of each business, including business capacity;
- Identifying whether any racial/ethnic or gender groups exhibit substantial disparities between participation and availability and whether those disparities are statistically significant; and
- Conducting comprehensive quantitative and qualitative analyses of marketplace conditions to determine whether the City might be acting as a passive participant in discriminatory marketplace practices.

In addition to meeting the strict scrutiny standard, the City would need to consider state law before implementing any race- and gender-conscious program measures. Proposition 209 prohibits California agencies from using race- and gender-based preferences in awarding state-

³ 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).

and locally-funded contracts. In fact, no California agency has successfully used race- and gender-conscious measures as part of awarding state- or locally-funded contracts since Proposition 209 passed. The City of San Jose implemented such a program, but it was challenged in court, and the California Supreme Court found the program violated Section 31, Article 1 of the California Constitution.⁴

C. Availability Analysis Results

BBC used a *custom census* approach to analyze the availability of minority-, woman-, and service-disabled veteran-owned businesses for City prime contracts and subcontracts, which relied on information from surveys that the study team conducted with potentially available businesses located in the RGMA and information about the contracts and procurements that the City awarded during the study period. BBC's availability analysis approach allowed the project team to develop a representative, unbiased, and statistically-valid database of relevant businesses in the RGMA to estimate the availability of minority-, woman-, and service-disabled veteran-owned businesses for City work. It has been tested and strongly approved by the Ninth Circuit Court of Appeals, the United States Department of Justice, the United States Department of Transportation, the United States Congress, and other authorities across the country. BBC presents availability analysis results for City work overall and for different subsets of contracts and procurements.

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

a. Overall. Figure ES-1 presents dollar-weighted availability estimates by relevant business group for all City contracts and procurements. Overall, the availability of minority- and woman-owned businesses for City work is 31.0 percent, indicating that minority- and woman-owned businesses might be expected to receive 31.0 percent of the contract and procurement dollars that the City awards in construction, professional services, goods, and other services.

⁴ Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000)

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

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	16.6 %
Asian Pacific American-owned	1.2
Black American-owned	1.1
Hispanic American-owned	10.0
Native American-owned	1.7
Subcontinent Asian American-owned	0.3
Total Minority-owned	14.4 %
Total Minority- and Woman-owned	31.0 %

b. Department. BBC examined availability analysis results separately for Purchasing and Contracting (P&C) and Engineering & Capital Projects (E&CP) Department work, because each department is responsible for awarding different types of contracts and procurements. In addition, whereas E&CP uses mandatory SLBE and Emerging Local Business Enterprise (ELBE) goals in awarding work, P&C uses only voluntary goals. Figure ES-2 presents availability estimates separately for each department. As shown in Figure ES-2, the availability of minority- and woman-owned businesses considered together was higher for P&C work (49.5%) than for E&CP work (25.9%).

Figure ES-2.
Availability estimates for E&CP and P&C work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Department	
	E&CP	P&C
Non-Hispanic white woman-owned	10.4 %	39.3 %
Asian Pacific American-owned	1.4	0.3
Black American-owned	0.2	4.6
Hispanic American-owned	11.4	4.9
Native American-owned	2.2	0.2
Subcontinent Asian American-owned	0.3	0.1
Total Minority-owned	15.5 %	10.2 %
Total Minority- and Woman-owned	25.9 %	49.5 %

c. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for City prime contracts and subcontracts. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is higher for City subcontracts (33.2%) than for prime contracts (30.3%).

Figure ES-3.
Availability estimates by
contract role

Note:
 Numbers rounded to nearest tenth of 1 percent
 and thus may not sum exactly to totals.
 For more detail, see Figures F-10 and F-11 in
 Appendix F.

Source:
 BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	17.5 %	13.9 %
Asian Pacific American-owned	0.5	3.4
Black American-owned	1.3	0.6
Hispanic American-owned	9.7	11.2
Native American-owned	1.2	3.4
Subcontinent Asian American-owned	0.1	0.8
Total Minority-owned	12.8 %	19.3 %
Total Minority- and Woman-owned	30.3 %	33.2 %

2. Service-disabled veteran-owned businesses. BBC also examined the overall availability of service-disabled veteran-owned businesses for City work. The availability analysis indicated that the availability of service-disabled veteran-owned businesses for City contracts and procurements is 4.6 percent.

D. Utilization Analysis Results

BBC measured the participation of minority-, woman-, and service-disabled veteran-owned businesses in City contracts and procurements in terms of *utilization*—the percentage of dollars that those businesses were awarded on relevant prime contracts and subcontracts during the study period. BBC measured the participation of minority-, woman-, and service-disabled veteran-owned businesses in City work regardless of whether they were certified as such by the City or other regional and state agencies.

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

a. All contracts and procurements. Figure ES-4 presents the percentage of total dollars that minority- and woman-owned businesses received on all relevant construction, professional services, and goods and other services prime contracts and subcontracts that the City awarded during the study period. As shown in Figure ES-4, minority- and woman-owned businesses considered together received 19.1 percent of the relevant contract and procurement dollars that the City awarded during the study period.

Figure ES-4.
Utilization results for City contracts and procurements

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

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

Source:
 BBC Research & Consulting utilization analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	5.9 %
Asian Pacific American-owned	1.1
Black American-owned	0.2
Hispanic American-owned	9.4
Native American-owned	0.3
Subcontinent Asian American-owned	2.1
Total Minority-owned	13.2 %
Total Minority- and Woman-owned	19.1 %

b. Department. Figure ES-5 presents utilization analysis results separately for P&C and E&CP work. As shown in Figure ES-5, the participation of minority- and woman-owned businesses considered together was much higher for E&CP contracts (21.1%) than for P&C contracts (12.0%).

Figure ES-5.
Utilization analysis results for E&CP and P&C work

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
 For more detail and results by group, see Figures F-5 and F-6 in Appendix F.

Source:
 BBC Research & Consulting utilization analysis.

Business group	Department	
	E&CP	P&C
Non-Hispanic white woman-owned	6.7 %	3.3 %
Asian Pacific American-owned	1.2	0.6
Black American-owned	0.3	0.0
Hispanic American-owned	10.5	5.5
Native American-owned	0.4	0.0
Subcontinent Asian American-owned	1.9	2.6
Total Minority-owned	14.4 %	8.7 %
Total Minority- and Woman-owned	21.1 %	12.0 %

c. Contract role. Figure ES-6 presents utilization analysis results separately for prime contracts and subcontracts that the City awarded during the study period. As shown in Figure ES-6, the participation of minority- and woman-owned businesses considered together was higher in subcontracts (38.8%) than in prime contracts (13.0%).

Figure ES-6.
Utilization analysis results by contract role

Note:

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

For more detail, see Figures F-10 and F-11 in Appendix F.

More than 80 percent of subcontracting dollars examined were associated with construction-related subcontracts.

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	3.7 %	13.3 %
Asian Pacific American-owned	0.4	3.3
Black American-owned	0.1	0.7
Hispanic American-owned	7.4	15.7
Native American-owned	0.0	1.5
Subcontinent Asian American-owned	1.4	4.3
Total Minority-owned	9.3 %	25.5 %
Total Minority- and Woman-owned	13.0 %	38.8 %

2. Service-Disabled veteran-owned businesses. BBC also examined utilization analysis results for service-disabled veteran-owned businesses. The participation of service-disabled veteran-owned businesses in City contracts and procurements was 3.4 percent.

E. Disparity Analysis Results

Although information about the participation of minority-, woman-, and service-disabled veteran-owned businesses in City contracts and procurements is useful on its own, it is even more useful when it is compared with the level of participation one might expect based on their availability for that work. As part of the disparity analysis, BBC compared the participation of minority-, woman-, and service-disabled veteran-owned businesses in City prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work. BBC calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent utilization by percent availability and multiplying by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular contract set (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of less than 80 indicates a *substantial* disparity between participation and availability. Many courts have considered substantial disparities as *inferences of discrimination* against particular business groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.⁵

1. Minority-and woman-owned businesses. BBC assessed disparities between participation and availability for all minority- and woman-owned businesses considered together and separately for each relevant racial/ethnic and gender group.

⁵ For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association 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).

a. All contracts and procurements. Figure ES-7 presents disparity indices for all relevant prime contracts and subcontracts that the City awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. A line is also drawn at a disparity index level of 80, which indicates a substantial disparity. As shown in Figure ES-9, minority- and woman-owned businesses considered together exhibited a disparity index of 62 for relevant contracts and procurements that the City awarded during the study period, indicating substantial underutilization.

Disparity analysis results differed across individual business groups:

- Non-Hispanic white women owned businesses (disparity index of 36), Black American-owned businesses (disparity index of 20), and Native American-owned businesses (disparity index of 20) showed substantial disparities.
- Asian Pacific American-owned businesses (disparity index of 94) and Hispanic American-owned businesses (disparity index of 94) exhibited disparities, although a disparity index of 94 is not considered substantial.

All individual business groups showed disparities for all City contracts and procurements considered together except for Subcontinent Asian American-owned businesses (disparity index of 200+).

Figure ES-7.
Disparity analysis results for all City contracts and procurements

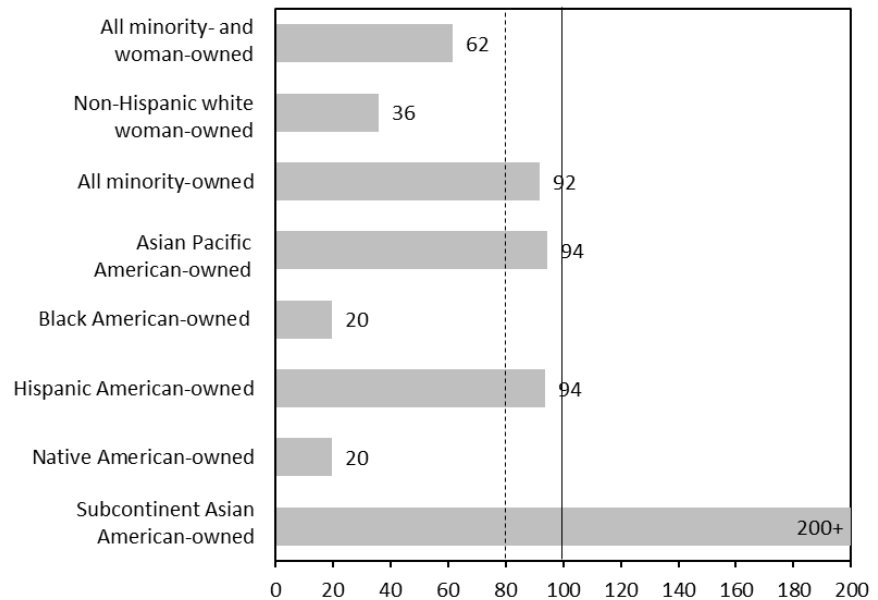
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



b. Department. BBC examined disparity analysis results separately P&C and E&CP work. As shown in Figure ES-8, minority- and woman-owned businesses considered together exhibited a substantial disparity on P&C contracts and procurements (disparity index of 24) indicating that those businesses only received \$0.24 for every dollar one would expect them to receive based on their availability for that work. Minority- and woman-owned businesses considered together also exhibited a disparity on E&CP contracts and procurements (disparity index of 81), although a disparity index of 81 is not considered substantial. Disparity analysis results differed between departments and across individual business groups:

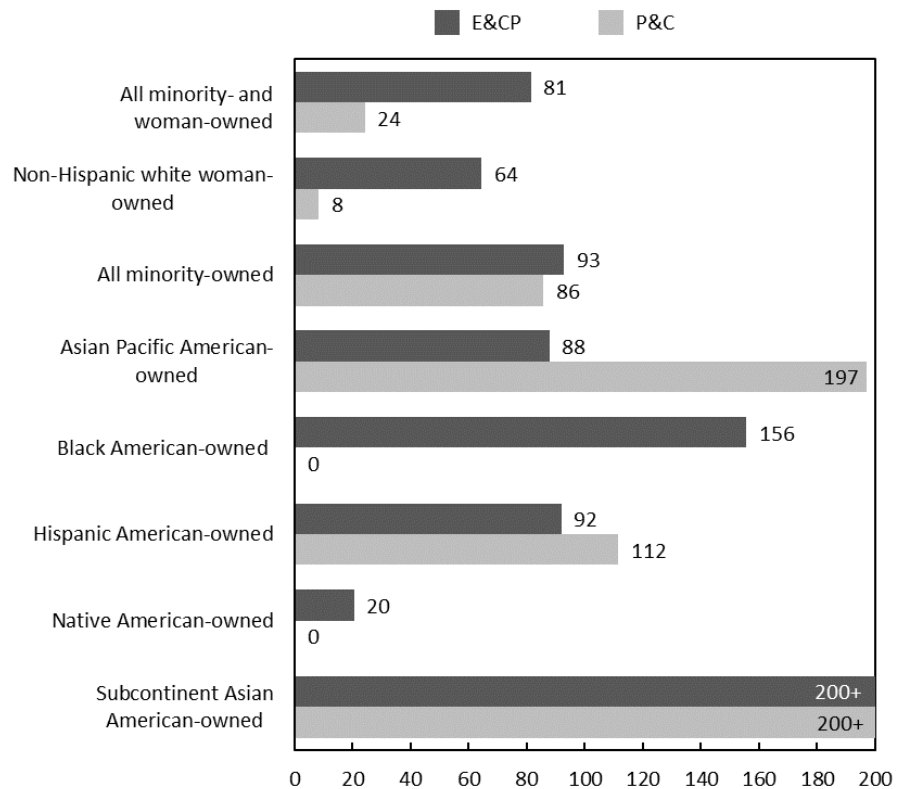
- Non-Hispanic white woman-owned businesses (disparity index of 8), Black American-owned businesses (disparity index of 0), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on P&C contracts and procurements.
- Non-Hispanic white woman-owned businesses (disparity index of 64) and Native American-owned businesses (disparity index of 20) exhibited substantial disparities on E&CP contracts and procurements. Asian Pacific American-owned businesses (disparity index of 88) and Hispanic American-owned businesses (disparity index of 92) also showed disparities on E&CP contracts and procurements, although disparities indices of 88 and 92 are not considered substantial.

The smaller disparities on E&CP could be due to the fact that E&CP uses mandatory SLBE and Emerging Local Business Enterprise goals.

Figure ES-8.
Disparity analysis
for E&CP and P&C
work

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

Source:
 BBC Research & Consulting
 disparity analysis.



c. Contract role. BBC examined disparity analysis results separately for prime contracts and subcontracts. As shown in Figure ES-9, minority- and woman-owned businesses considered together showed substantial disparities for City prime contracts (disparity index of 43) but not for subcontracts (disparity index of 117). All individual business groups showed substantial disparities for prime contracts except for Asian Pacific American-owned businesses (disparity index of 87) and Subcontinent Asian American-owned businesses (disparity index of 200+). Native American-owned businesses (disparity index of 43) was the only group that exhibited a substantial disparity on subcontracts awarded during the study period. Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts and thus may be more accessible to minority- and woman-owned businesses. It could also be due to the City’s use of SLBE and ELBE subcontracting goals on certain contracts.

Figure ES-9.
Disparity analysis
results by contract role

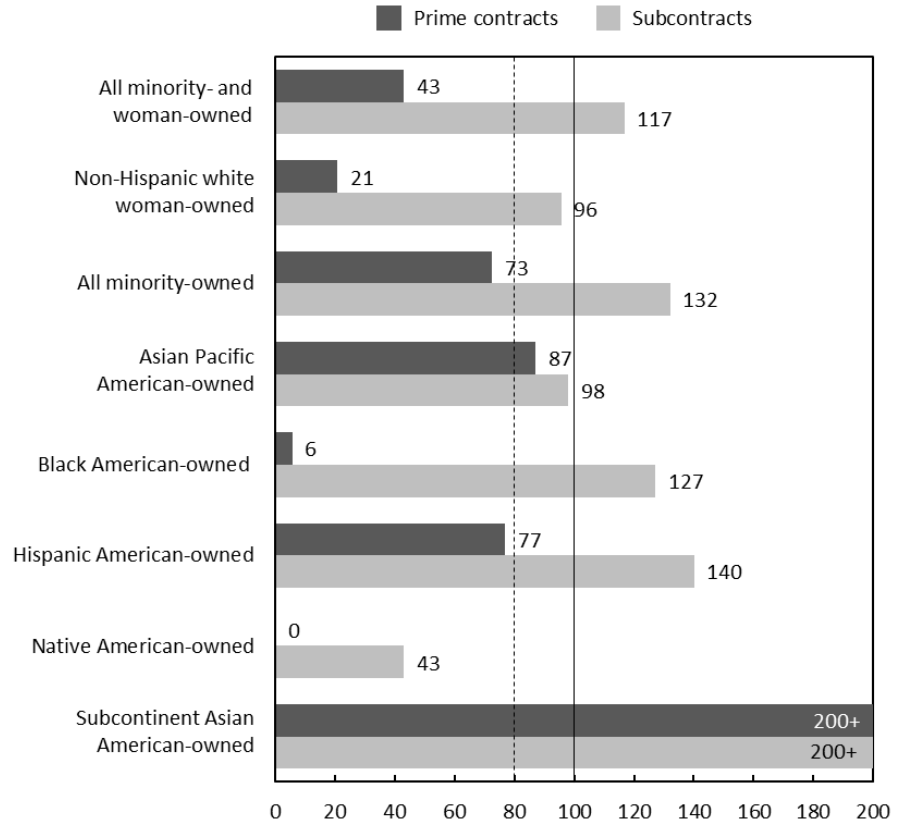
Note:

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-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



2. Service-disabled veteran-owned businesses. BBC also examined disparities between the participation and availability of service-disabled veteran-owned businesses for City contracts and procurements. Disparity analysis results indicated that service-disabled veteran-owned businesses (disparity index of 73) exhibited substantial disparities on City contacts and procurements, indicating that those businesses only received \$0.73 for every dollar one would expect them to receive based on their availability for that work.

F. Program Implementation

The City should review study results and other information in connection with making decisions concerning its implementation of the SLBE Program and other efforts to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses. Key considerations in making any refinements are discussed below. Additional considerations and details about program implementation are presented in Chapter 9. When making considerations, the City should assess whether additional resources, changes in internal policy, or changes in local or state law may be required.

1. Overall aspirational goal. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the City in establishing an overall aspirational goal for the participation of minority- and woman-owned businesses in its contracting and procurement. The availability analysis indicated that minority- and woman-owned businesses might be expected to receive 31 percent of City contract and procurement dollars, which the City could consider as the *base figure* of its overall aspirational goal. In addition, the disparity study provides information about factors that the City should

review in considering whether an adjustment to its base figure is warranted, particularly information about the volume of City work in which minority- and woman-owned businesses have participated in the past; barriers in the San Diego area related to employment, self-employment, education, training, and unions; barriers in San Diego related to financing, bonding, and insurance; and other relevant information.

2. Contract-specific goals. Disparity analysis results indicated that various groups of minority- and woman-owned businesses showed substantial disparities on key sets of contracts and procurements that the City awarded during the study period. Courts often consider substantial disparities as *inferences of discrimination* against such groups in the marketplace, and they often serve as support for the use of race- and gender-conscious measures to address those disparities. Organizations that show evidence of substantial disparities in their contracting often use *contract-specific goals* to award certain contracts and procurements, whereby they set participation goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project, and, as a condition of award, prime contractors have to meet those goals by making subcontracting commitments with certified minority- and woman-owned businesses as part of their bids or by demonstrating sufficient good faith efforts to do so. Prior to implementing race- and gender-conscious measures, such as contract-specific goals, the courts require that a local or state government maximize the use of race-, ethnicity- and gender-neutral efforts to remedy any identified discrimination.

Although the City could consider using contract-specific goals in awarding certain contracts and procurements, it is crucial to note that government organizations in California are subject to Proposition 209—and the subsequent failure of Proposition 16 to overturn Proposition 209—which substantially limits the use of such goals. Proposition 209 led to the addition of Section 31 to Article 1 of the California constitution, which states, “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting” unless required by federal law.⁶ Proposition 16 was introduced in 2020 and sought to overturn Proposition 209 and allow the use of race- and gender-conscious measures to award state- and locally-funded contracts but failed to pass. In addition to the limitations Proposition 209 places on the use of race- and gender-conscious measures, the City would also have to ensure that its use of contract-specific goals meets the *strict scrutiny* standard of constitutional review, including showing a *compelling governmental interest* for their use and ensuring that their use is *narrowly tailored*.

3. Policy and program measures. State and local laws provide the City authority to establish more focused procurement policies and programs than those set forth by state and federal regulations, and enhanced procurement policies could help the City more effectively engage with, and encourage the participation of, minority-, woman-, and service-disabled veteran-owned businesses in its contracting. There are a number of refinements related to procurement policies the City should consider.

⁶ California State Constitution 1.31.a

- **Subcontracting goals.** E&CP uses mandatory subcontracting goals to award certain construction contracts. E&CP sets those goals on individual contracts based on the availability of certified SLBEs and ELBEs for the types of work involved, and prime contractors must meet those goals either by making subcontracting commitments with SLBEs and ELBEs as part of their bids or by demonstrating sufficient good faith efforts to do so. The City could consider expanding the use of such mandatory goals to goods, services, and professional services contracts and procurements which might help address substantial disparities BBC observed for several racial/ethnic and gender groups—Black American-, Native American-, and white woman-owned businesses for goods and other services procurements; and Hispanic American-, Native American-, and white woman-owned businesses for professional services contracts.
- **Small business set asides.** Disparity analysis results indicated substantial disparities for woman-, Black American-, Hispanic American-, and Native American-owned businesses on prime contracts that the City awarded during the study period. The City currently has a small set aside program for construction contracts, and to the extent permitted by state and local law, the City might consider setting aside select small prime professional services and goods and services contracts for small business bidding to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses as prime contractors.
- **Unbundling large contracts.** The City should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller contract pieces. Such efforts might increase contracting opportunities for all small businesses, including many minority-, woman-, and service-disabled veteran-owned businesses.

CHAPTER 1.

Introduction

CHAPTER 1.

Introduction

San Diego is the second-most populous city in California and one of the 10 most populous cities in the United States. The City of San Diego (the City) provides myriad services to the nearly 1.4 million people who live and work in the region. Those services include police and fire protection, road construction and maintenance, and a variety of other social and economic services. As part of providing those services, the City typically spends hundreds of millions of contract and procurement dollars each year to procure various goods and services related to construction, professional services, and goods and other services.

The City's Equal Opportunity Contracting (EOC) Program implements the Small Local Business Enterprise (SLBE) Program to help ensure local businesses have an equal opportunity to participate in City contracts and procurements and that the City does not perpetuate any discrimination or barriers that exist in the marketplace. The City retained BBC Research & Consulting (BBC) to conduct a *disparity study* to examine and identify whether race and gender discrimination or the effects thereof exists related to procurements awarded by the City and to evaluate the effectiveness of current City programs (including the SLBE Program) in encouraging the participation of minority-, woman-, and service-disabled veteran-owned businesses in City contracts and procurements.¹ As part of the study, BBC examined whether there are any *disparities* between:

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

BBC also assessed other quantitative and qualitative information related to:

- The legal framework related to the City's implementation of the SLBE Program;
- Local marketplace conditions for minority-, woman-, disabled-, and veteran-owned businesses; and
- Contracting policies and business assistance programs that the City currently has in place.

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

¹ BBC examines minority- and woman-owned firms, considered to be those firm 51% or more owned by a woman or minority regardless of their certification status, as the basis for the disparity study analyses. Analyzing firms by their ownership, rather than their certification status as minority-owned firms (MBEs), woman-owned firms (WBEs) or disadvantaged business enterprises (DBEs), provides details on marketplace conditions for all firms in specific ownership categories rather than just certified firms. For more information on the definitions used in the study for MBEs, WBEs, or DBEs, see Appendix A.

- The disparity study provides information about how well minority-, woman-, and service-disabled veteran-owned businesses fare in City contracting relative to their availability for that work and whether certain groups are *substantially underutilized* on those contracts and procurements.
- The disparity study provides an evaluation of how effective the SLBE Program is in improving outcomes for minority- and woman-owned businesses in City contracts and procurement.
- The disparity study identifies barriers that minority-, woman-, disabled-, and veteran-owned businesses face in the local marketplace that might affect their ability to compete for City contracts and procurements.
- The disparity study provides insights into how to refine contracting processes and program measures (including the potential of race- or gender-conscious measures) to better encourage the participation of minority- and woman-owned businesses in City contracting and help address marketplace barriers.
- An independent review of the participation of minority- and woman-owned businesses in City contracting is valuable to the EOC Program and external groups that may be monitoring the City's contracting practices.
- Government organizations that have successfully defended programs like the SLBE Program in court have typically relied on information from disparity studies.

BBC introduces the City of San Diego Disparity Study in three parts:

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

A. Background

The SLBE Program is designed to encourage the participation of businesses from all segments of the vendor community in City contracts and procurements and was adopted into the City's Municipal Code in 2010. To try to meet the objectives of the program, the City uses various *race- and gender-neutral* program measures to encourage the participation of those businesses in its own contracting.² Race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in a government organization's contracting, regardless of the race/ethnicity or gender of businesses' owners. Race- and gender-neutral measures that the City currently uses include:

² In contrast to race- and gender-neutral measures, *race- and gender-conscious* measures are measures that are specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting (e.g., participation goals for minority- and woman-owned business on individual contracts). After the passage of Proposition 209 in 1996, the state of California added Section 31 to Article 1 of the State Constitution explicitly disallowing the use of race- and gender conscious measures in any procurement or contract utilizing local or state funds. Therefore, the City does not currently use any race- or gender-conscious measures as part of the SLBE Program. For more information, please see Chapter 2 and Appendix B.

- Establishing overall aspirational goals for SLBE-certified firms to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses in City contracting;
- Monitoring and reporting the participation of SLBE- and ELBE-certified businesses in City contracts and procurements;
- Facilitating and participating in various network and outreach efforts and events, including workshops, pre-bid conferences, local events, and bid alerts;
- Maintaining a directory of SLBE- and ELBE-certified businesses to increase awareness of those businesses among prime contractors and City staff;
- Requiring prime contractors to submit Equal Opportunity Forms and Affirmative Action plans with their bids, quotes, and proposals (in order to encourage a more diverse pool of experienced employees and potential business owners); and
- Using SLBE subcontracting goals and prime set asides to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses on individual contracts and procurements.

B. Study Scope

Information from the disparity study will help the City understand the current barriers to participation in the marketplace by minority-, woman-, and service-disabled veteran-owned businesses in its contracts and procurements and continue to implement procurement programs (such as the SLBE Program) effectively and in a legally-defensible manner.

1. Relevant business groups. BBC focused its analyses on whether barriers or discrimination based on race/ethnicity, gender, disability status, or veteran status affected the participation of businesses in City contracts and procurements, regardless of whether those businesses were certified as SLBEs or ELBEs. Analyzing the participation and availability of businesses regardless of certification allowed BBC to assess whether such barriers affect business success independent of whether they decided to become certified through the City. To interpret the core analyses presented in the disparity study, it is useful to understand how the study team defined the various groups of businesses that are the focus of the SLBE Program.

a. Minority- and woman-owned businesses. BBC analyzed business outcomes for minority- and woman-owned businesses, which were defined as businesses owned and controlled by Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, or non-Hispanic white women. To avoid double-counting, BBC classified minority woman-owned businesses with their corresponding minority groups. (For example, Black American woman-owned businesses were classified with businesses owned by Black American men as Black American-owned businesses.) Thus, *woman-owned businesses* in this report refers specifically to non-Hispanic white woman-owned businesses.

b. Service-disabled veteran-owned businesses. BBC analyzed business outcomes for service-disabled veteran-owned businesses, which were defined as businesses that are owned by veterans of the United States military who, due to their service, have a mental or physical disability.

c. SLBE/ELBE-certified businesses. SLBE/ELBE-certified businesses are all eligible firms, regardless of their status as minority-, woman-, and service-disabled veteran-owned businesses, that are certified as SLBE or ELBEs through the City. Businesses seeking SLBE or ELBE certification are required to submit applications to the EOC Program. The application is available online and requires businesses to submit various information, including business name, contact information, license information, financial information, work specialization, the race/ethnicity and gender of their owners, and, if applicable, proof of certification from other agencies that allow for cross certification, such as certification as a service-disabled veteran-owned business from the California Department of General Services. The EOC Program reviews each application for approval and may conduct site visits to confirm eligibility.

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

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

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

The study focused on construction, professional services, and goods and other services contracts and procurements that the City awarded between July 1, 2014 and June 30, 2019 (i.e., the study period). Information in the disparity study is organized as follows:

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

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

c. Data collection. BBC collected comprehensive data on the prime contracts and subcontracts that the City awarded during the study period as well as information on the businesses that

participated in those contracts. The scope of BBC's data collection efforts is presented in **Chapter 4**.

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

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

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

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

h. Program implementation. BBC reviewed the City's contracting practices and program measures that are part of its implementation of the SLBE Program. BBC provided guidance related to additional program options and potential changes to current contracting practices for the City to consider. The study team's review and guidance related to program implementation is presented in **Chapter 9**.

C. Study Team Members

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

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

2. Action Research. Action Research is a woman-owned professional services firm based in Oceanside, California. Action Research conducted in-depth interviews with San Diego businesses and assisted the project team with community engagement and data collection tasks.

3. GCAP Services (GCAP). GCAP is a Hispanic American-owned professional services firm based in Costa Mesa, California. The firm assisted with policy research and community engagement tasks.

4. Davis Research. Davis Research is a survey fieldwork firm based in Calabasas, California. The firm conducted telephone and online surveys with nearly two thousand California businesses in connection with the availability and utilization analyses.

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

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

CHAPTER 2.

Legal Analysis

CHAPTER 2.

Legal Analysis

The City of San Diego's (the City's) Small Local Business Enterprise (SLBE) Program helps ensure local businesses have an equal opportunity to participate in City contracts and procurements and that the City does not perpetuate any discrimination or barriers that exist in the marketplace. As part of the program, the City uses various *race- and gender-neutral* efforts, which are efforts designed to encourage the participation of small businesses in an organization's contracting regardless of the race/ethnicity or gender of businesses' owners. In contrast, *race- and gender-conscious* measures are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., participation goals for minority- and woman-owned business on individual contracts). The use of any such race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review, because it potentially impinges on the civil rights of businesses that are not minority- or woman-owned.¹

The City does not use any race- or gender-conscious measures when awarding contracts because of Proposition 209. Proposition 209, which California voters passed in 1996, amended Section 31, Article 1 of the California Constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies in California—including the City—from using race- or gender-conscious measures when awarding state- and locally-funded contracts. (However, Proposition 209 did not prohibit those actions if an agency is required to take them "to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.")

Although the City does not currently use any race- or gender-conscious measures, it is instructive to review legal standards surrounding their use in case it determines that using such measures is appropriate in the future. To justify the use of any race- or gender-conscious measures, the City would need to comply with state law and federal equal protection requirements. If an exception to California's general prohibition on race- or gender-conscious measures is applied, any program would still need to meet the strict scrutiny standard of constitutional review.

The strict scrutiny standard presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether (as California generally does). Under the strict scrutiny standard, a government organization must:

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

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

In addition to meeting the strict scrutiny standard, the City would need to consider state law before implementing any race- and gender-conscious program measures. Proposition 209 prohibits California agencies from using race- and gender-based preferences in state- and locally-funded contracts. In fact, no California agency has successfully used race- and gender-conscious measures as part of awarding state- or locally-funded contracts since Proposition 209 passed. The City of San Jose implemented such a program, but it was challenged in court, and the California Supreme Court found the program violated Section 31, Article 1 of the California Constitution.²

BBC Research & Consulting (BBC) summarizes the elements of the SLBE Program as well as the legal standards to which the City must adhere in implementing the program. BBC presents that information in two parts:

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

A. Program Overview

The SLBE Program is designed to encourage the participation of all small, local businesses, especially minority-, woman-, and service-disabled veteran-owned businesses, in City contracts and procurements and was adopted into the Municipal Code in 2010. To try to meet the objectives of the program, the City uses various *race- and gender-neutral* program measures to encourage the participation of those businesses in its own contracting, including:

² Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000)

- Establishing overall aspirational goals for SLBE-certified firms to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses in City contracting;
- Monitoring and reporting the participation of SLBE- and Emerging Local Business Enterprise- (ELBE) certified businesses in City contracts and procurements;
- Facilitating and participating in various network and outreach efforts and events, including workshops, pre-bid conferences, local events, and bid notices;
- Maintaining a directory of SLBE- and ELBE-certified businesses to increase awareness of those businesses among prime contractors and City staff;
- Requiring prime contractors to submit Equal Opportunity Forms and Affirmative Action plans with their bids, quotes, and proposals; and
- Using SLBE/ELBE goals to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses on individual contracts and procurements.

To be SLBE/ELBE-certified, a business must:

- Be headquartered in San Diego County;
- Have been business for at least one year; and
- Earn an average income below an industry-based threshold over a three-year period. The income thresholds for SLBEs are \$7 million for general construction, \$4.5 million for specialty construction and general services, and \$3 million for professional services. The thresholds for ELBEs are one-half of those for SLBEs.

Businesses seeking SLBE or ELBE certification are required to submit applications to the City's Equal Opportunity Contracting (EOC) Program. The application is available online and requires businesses to submit various information, including business name, contact information, license information, financial information, and work specialization. If applicable, businesses must also submit proof of certification from other agencies with which the City shares reciprocity, such as the California Department of General Services which certifies service-disabled veteran-owned business in California. The EOC Program reviews each application for approval and may conduct site visits to confirm eligibility.

B. Legal Standards

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

1. Programs that rely only on race- and gender-neutral measures. Government organizations that implement contracting programs that rely only on race- and gender-neutral measures—such as the SLBE/ELBE Program—must show a *rational basis* for their programs. Showing a rational basis requires organizations to demonstrate that their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government programs that could impinge on the rights of others. When

courts review programs based on a rational basis, only the most egregious violations lead to those programs being deemed unconstitutional.

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

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

Under the strict scrutiny standard, a government organization must show a *compelling governmental interest* to use race- and gender-conscious measures and ensure that its use of such measures is *narrowly tailored*. However, Proposition 209 prohibits government agencies in California from using race- and gender-conscious measures in awarding state- and locally-funded contracts.

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

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

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

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

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

- 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 suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.⁶

c. BBC’s methodology. The methodology that BBC used to conduct the disparity study has been approved by the United States District Court of the Eastern District of California as well as by the Ninth Circuit Court of Appeals in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation et al* as it relates to helping organizations’ ensure their use of race- and gender-conscious measures meets the strict scrutiny standard. Key components of BBC’s methodology with regard to strict scrutiny requirements include:

- Defining the relevant geographic market area to account for the vast majority of City spend;
- Using a custom census approach to measure the availability of small, local, and minority- and woman-owned businesses for City contracts that considers the specific characteristics of each business, including business capacity;
- Identifying whether any racial/ethnic or gender groups exhibit substantial disparities between participation and availability and whether those disparities are statistically significant; and
- Conducting comprehensive quantitative and qualitative analyses of marketplace conditions to determine whether the City might be acting as a passive participant in discriminatory marketplace practices.

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

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

Many programs have failed to meet the strict scrutiny standard, because they have failed to meet the compelling governmental interest requirement, the narrow tailoring requirement, or both. However, many other programs have met the strict scrutiny standard and courts have deemed them to be constitutional. Appendix B provides detailed discussions of the case law related to those programs. However, agencies in California are prohibited from using race- and gender-conscious measures in awarding state- and locally-funded contracts even if they do meet the strict scrutiny standard because of Proposition 209.

CHAPTER 3.

Marketplace Conditions

CHAPTER 3.

Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.^{1, 2, 3, 4} Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.⁵ Historically, minority groups and women in San Diego have faced similar barriers. Discriminatory housing and loan practices segregated minority racial groups into poorer areas of the city.⁶ “Redlining” maps, created in the 1930s by the Federal Home Owners Loan Corporation, designated homes in San Diego’s minority neighborhoods as unqualified for federal mortgage insurance guarantees and resulted in disinvestment from these areas.^{7 8} Racially-restrictive housing covenants prevented minorities from moving into majority white neighborhoods. Minorities were also the victims of racially-motivated harassment and violence in San Diego, where the Ku Klux Klan and other hate groups have a history of activity.⁹

In the middle of the 20th century, many reforms opened up new opportunities for minorities and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women’s Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.¹⁰ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women^{11, 12, 13, 14} However, despite those improvements, minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.^{15, 16, 17, 18}

Federal Courts and the United States Congress have considered barriers that minorities, women, and minority- and woman-owned businesses face in a local marketplace as evidence for the existence of race- and gender-based discrimination in that marketplace.^{19, 20, 21} 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 legally justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for government contracts. Passive participation in discrimination means that agencies unintentionally perpetuate race- or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race- or gender-based

discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{22, 23, 24}

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in San Diego County construction, professional services, and goods and other services industries. In addition, where data were available, the study team conducted analogous analyses for disabled-owned businesses and veteran-owned businesses, because they are also often presumed to be disadvantaged. The study team also examined the potential effects that any such barriers have on the formation and success of businesses and on their participation in, and availability for, contracts that the City of San Diego award. The study team examined local marketplace conditions in four primary areas:

- **Human capital**, to assess whether minorities, women, people with disabilities, and veterans face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether minorities, women, people with disabilities, and veterans face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership** to assess whether minorities, women, people with disabilities, and veterans own businesses at rates that are comparable to that of non-Hispanic white men, people without disabilities, and non-veterans; and
- **Business success** to assess whether minority-, woman-, disabled-, and veteran-owned businesses have outcomes that are similar to those of other businesses.

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

A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Factors such as education, business experience, and managerial experience have been shown to be related to business success.^{25, 26, 27, 28} Any barriers in those areas might make it more difficult for minorities, women, people with disabilities, and veterans to work in relevant industries and prevent some of them from starting and operating businesses successfully.

1. Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{29, 30} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education they receive.^{31, 32} Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³³ In addition, Black American students are more than three times more likely than non-

Hispanic whites to be expelled or suspended from high school.³⁴ For those and other reasons, minorities are far less likely than non-Hispanic whites to attend college, enroll at highly- or moderately selective four-year institutions, or earn college degrees.³⁵

Nationwide disparities in educational outcomes seem to exist in San Diego as well. The study team’s analyses of the San Diego labor force indicate that certain groups are far less likely than others to earn college degrees. Figure 3-1 presents the percentage of San Diego workers that have earned four-year college degrees by race/ethnicity, gender, disability status, and veteran status. As shown in Figure 3-1, Black American, Hispanic American, Native American, and other race minority workers are substantially less likely than non-Hispanic white workers to have four-year college degrees. In addition, people with disabilities are substantially less likely than people without disabilities to have college degrees, and veterans are substantially less likely than non-veterans to have four-year college degrees.

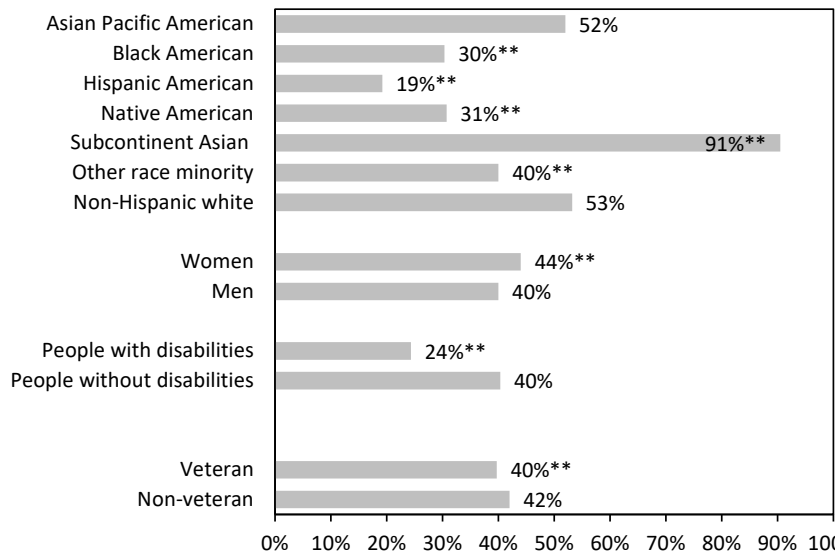
Figure 3-1.
Percentage of San Diego workers 25 and older with at least a four-year college degree

Notes:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men; or people with disabilities and all others; or veterans and non-veterans) is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC Research & Consulting from 2014-2018 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/>.

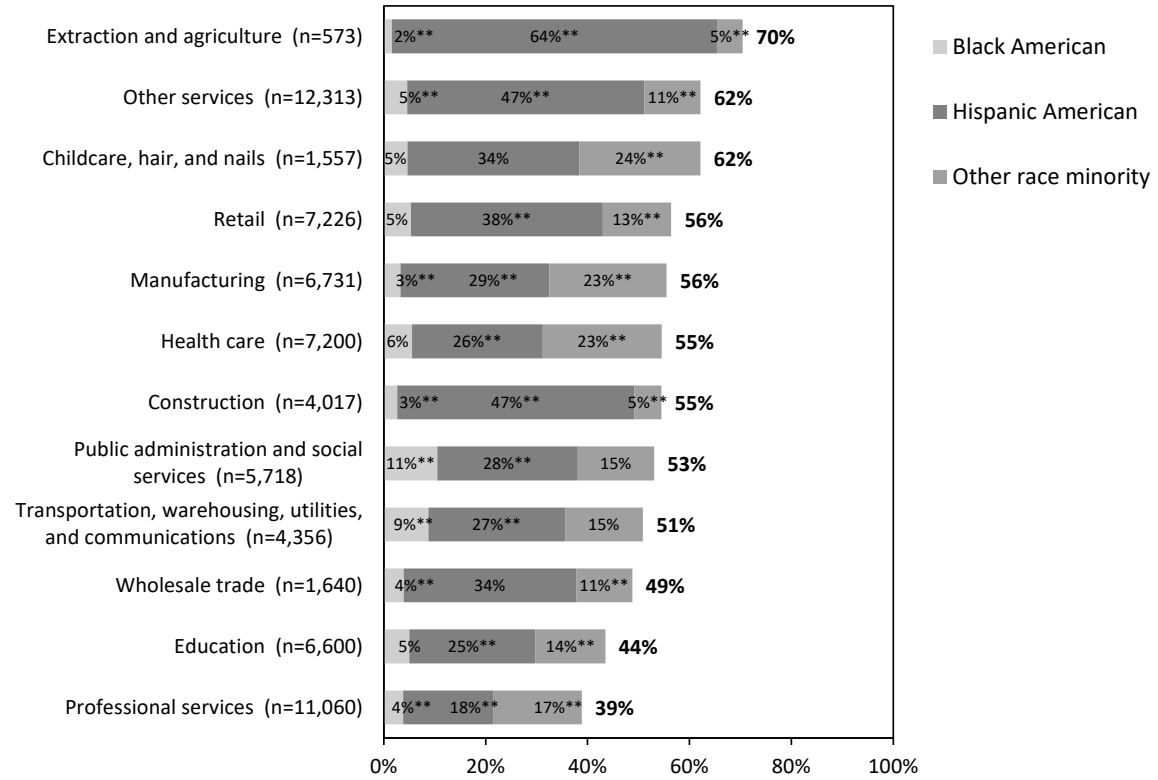


2. Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit minorities, women, people with disabilities, and veterans from acquiring that experience could prevent them from starting and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

a. Employment. On a national level, prior industry experience has been shown to be an important precursor to business ownership and success. However, minorities and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{36, 37, 38} When employed, they are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.^{39, 40, 41, 42, 43} In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in California and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth.^{44, 45, 46, 47}

i. Labor force. The study team’s analyses of the labor force in San Diego are largely consistent with nationwide findings. Figures 3-2 presents the representation of minority workers in various San Diego industries. As shown in Figure 3-2, the industries with the highest representations of minority workers are extraction and agriculture; other services; and childcare, hair, and nails. The San Diego industries with the lowest representations of minority workers are wholesale trade, education, and professional services

Figure 3-2.
Percent representation of minorities in various San Diego industries

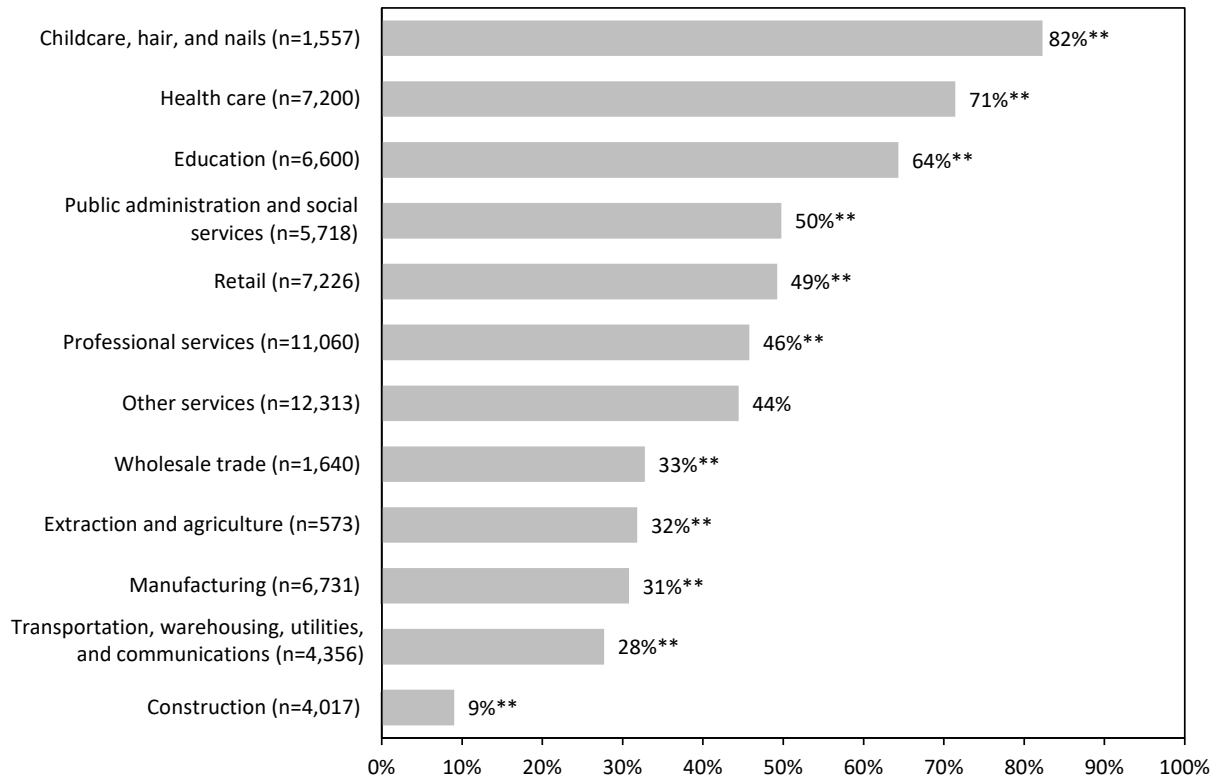


Notes: *, ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.
 The representation of minorities among all San Diego workers is 5% for Black Americans, 32% for Hispanic Americans, 15% for Other minorities and 52% for all minorities considered together.
 "Other race minority" includes Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and other race minorities
 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 2014-2018 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 San Diego industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The industries with the lowest representations of women workers are manufacturing; transportation, warehousing, utilities, and communications; and construction.

Figure 3-3.
Percent representation of women in various San Diego industries



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

The representation of women among all San Diego workers is 45%.

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 2014-2018 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/>

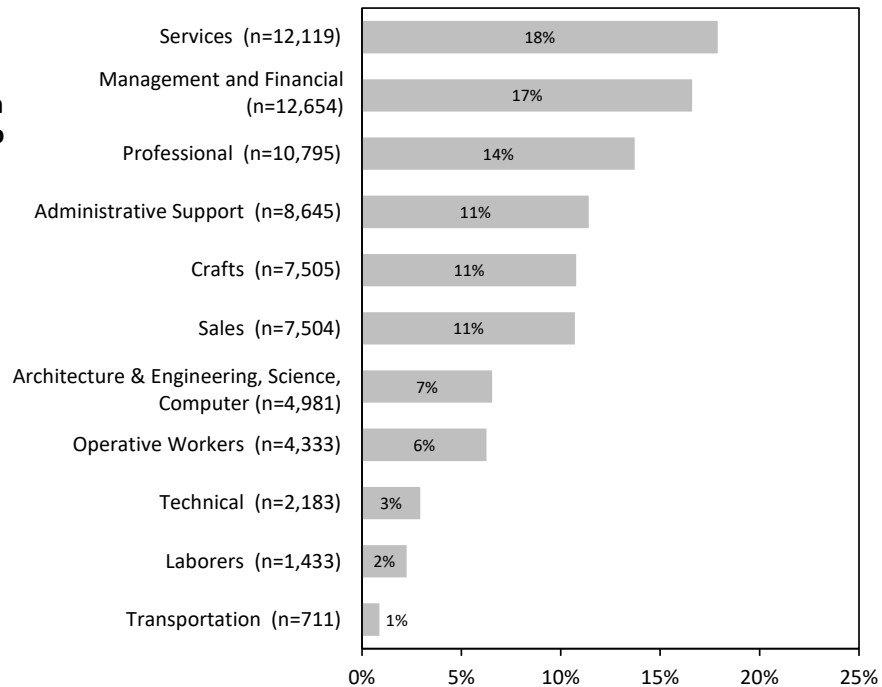
ii. Labor force disparities. BBC further examined the representation of minorities and women in the industries most relevant to the City of San Diego’s (the City’s) Equal Employment Opportunity Outreach Program, which is designed to ensure that businesses working with the City do not engage in discriminatory employment practices. Figure 3-4 presents the 11 industries that are the primary focus of the program and the percentage of San Diego workers in each industry who are minorities or women.

BBC was interested in whether there were statistical disparities in the representation of minorities and women in each relevant industry relative to non-Hispanic whites and men after statistically accounting for various personal characteristics, such as marital status, home ownership, household size, income, and education. The study team examined that question by conducting a series of regression analyses to assess whether there were independent relationships between the race/ethnicity and gender of San Diego workers and the likelihood of working in each relevant industry. Figure 3-5 presents the race/ethnicity and gender factors that

were significantly and inversely related to working in each industry after statistically controlling for personal characteristics. Definitions of each industry are presented at the end of Chapter 3.

Figure 3-4.
Representation of minorities and women as workers in industries relevant to the Equal Employment Opportunity Outreach Program

Source:
 BBC Research & Consulting from 2014-2018 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/>



As shown in Figure 3-5, after accounting for various personal characteristics:

- Relatively to being non-Hispanic white, being Asian Pacific American is associated with a lower likelihood of working in the crafts, sales, laborers, and transportation industries;
- Relatively to being non-Hispanic white, being Black American is associated with a lower likelihood of working in the crafts and sales industries;
- Relatively to being non-Hispanic white, being Hispanic American is associated with a lower likelihood of working in the management and financial; professional; sales; architecture and engineering, science, and computer; and technical industries;
- Relatively to being non-Hispanic white, being Native American is associated with a lower likelihood of working in the technical industry;
- Relatively to being non-Hispanic white, being Subcontinent Asian American is associated with a lower likelihood of working in the services, professional, administrative support, crafts, and sales industry;
- Relatively to being non-Hispanic white, being an other race minority is associated with a lower likelihood of working in the technical industry; and
- Relatively to being a man, being a woman is associated with a lower likelihood of working in the management and financial; crafts; architecture and engineering, science, and computer; operative workers; laborers; and transportation industries.

Figure 3-5.
Race/ethnicity and gender factors that are inversely related to employment in industries relevant to the Equal Employment Opportunity Outreach Program

Industry and statistically significant factors			
Services		A&E, science, and computer	
Subcontinent Asian American	-0.3498	Hispanic American	-0.2064
Management and financial		Women	-0.7033
Hispanic American	-0.0844	Operative workers	
Women	-0.0566	Women	-0.4249
Professional		Technical	
Hispanic American	-0.0902	Hispanic American	-0.0798
Subcontinent Asian American	-0.6463	Native American	-0.2834
Administrative support		Other minority group	-0.7468
Subcontinent Asian American	-0.2657	Laborers	
Crafts		Asian Pacific American	-0.5295
Asian Pacific American	-0.1419	Women	-0.4911
Black American	-0.1869	Transportation	
Subcontinent Asian American	-1.0283	Asian Pacific American	-0.1938
Women	-1.0821	Women	-0.3207
Sales			
Asian Pacific American	-0.1902		
Black American	-0.1990		
Hispanic American	-0.0722		
Subcontinent Asian American	-0.1919		

Notes: The regression included 61,389 observations.

Source: BBC Research & Consulting from 2014-2018 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>. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

b. Management experience. Managerial experience is essential to business success, but discrimination remains a persistent obstacle to greater diversity in management positions.^{48, 49, 50} Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.^{51, 52} Similar outcomes appear to exist for minorities, women, people with disabilities, and veterans in San Diego. BBC examined the concentration of individuals of those groups in management positions in the San Diego construction, professional services, and goods and other services industries. As shown in Figure 3-6:

- Compared to non-Hispanic whites, smaller percentages of Black Americans, Hispanic Americans, and Native Americans work as managers in the construction industry.
- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the professional services industry. In addition, compared to men, a smaller percentage of women work as managers in the professional services industry.
- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, and Hispanic Americans work as managers in the goods and other services industry.

Figure 3-6.
Percentage of workers who
worked as a manager in
study-related industries in San
Diego

Note:

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

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

Source:

BBC Research & Consulting from 2014-2018 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	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	11.6 %	5.1 %	0.6 % **
Black American	4.3 % **	3.8 % *	0.0 % **
Hispanic American	4.1 % **	4.5 % **	0.9 % **
Native American	4.8 % **	9.7 %	0.0 % †
Subcontinent Asian American	0.0 % †	6.8 %	0.0 %
Other race minority	0.0 % †	0.0 % †	0.0 % †
Non-Hispanic white	14.6 %	7.8 %	3.3 %
Gender			
Women	9.3 %	5.1 % **	1.2 %
Men	9.1 %	7.5 %	1.9 %
Disability Status			
People with disabilities	8.6 %	5.8 %	1.6 %
People without disabilities	9.2 %	6.9 %	1.7 %
Veteran Status			
Veteran	8.7 %	7.8 %	1.1 %
Non-veteran	9.2 %	6.7 %	1.7 %
All individuals	9.1 %	6.8 %	1.7 %

3. Intergenerational business experience. Having family members who own and work in businesses 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 run businesses. However, nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.^{53, 54} That lack of experience makes it difficult for minorities and women to subsequently start their own businesses and operate them successfully.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{55, 56, 57} Individuals can acquire financial capital through many sources, including employment wages, personal wealth, homeownership, and financing. If barriers exist in financial capital markets, minorities, women, people with disabilities, and veterans may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various personal factors that are ostensibly unrelated to race and gender.^{58, 59, 60} For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.^{61, 62} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.⁶³ Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

BBC observed wage gaps in San Diego consistent with those that researchers have observed nationally. Figure 3-7 presents mean annual wages for San Diego workers by race/ethnicity, gender, disability status, and veteran status. As shown in Figure 3-7:

- Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans in San Diego earn substantially less than non-Hispanic whites;
- Women earn substantially less than men; and
- People with disabilities earn substantially less than people without disabilities.

Figure 3-7.
Mean annual wages
in San Diego

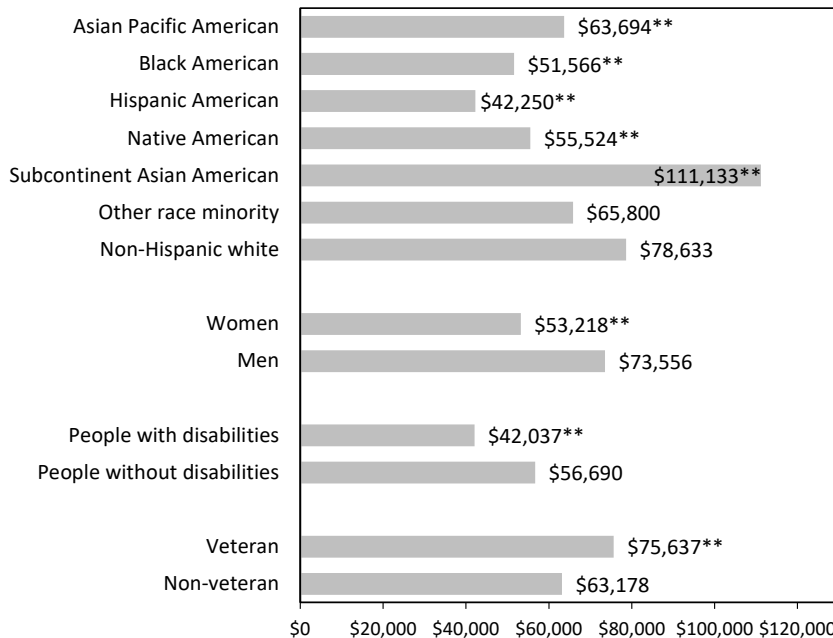
Note:

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

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

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to assess whether wage disparities exist even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for various personal factors, being Black American or Hispanic American was associated with substantially lower earnings than being non-Hispanic white. In addition, being a woman was associated with substantially lower earnings than being a man and having a disability was associated with substantially lower earnings than not having a disability (for details, see Figure C-21 in Appendix C).

2. Personal wealth. Another potentially important source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.^{64, 65} For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent that of non-Hispanic whites, respectively. In addition, approximately one-out-of-five Black Americans and Hispanic Americans in the United States are living in poverty, about double the comparable rate for non-Hispanic whites.⁶⁶ 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 (for details, see Figure C-20 in Appendix C).⁶⁷

3. Homeownership. Homeownership and home equity have also been shown to be key sources of business capital.^{68, 69} However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.⁷⁰ 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.^{71, 72} Minorities who own homes tend to own homes that are worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.^{73, 74} Differences in home values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to the depressed property values that tend to exist in racially-segregated neighborhoods.^{75, 76}

Minorities appear to face homeownership barriers in San Diego that are similar to those observed nationally. BBC examined homeownership rates in San Diego for relevant racial/ethnic groups. As shown in Figure 3-8, all relevant racial/ethnic groups in San Diego exhibit homeownership rates that are substantially lower than that of non-Hispanic whites.

Figure 3-8.
Home ownership rates in San Diego

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 2014-2018 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/>.

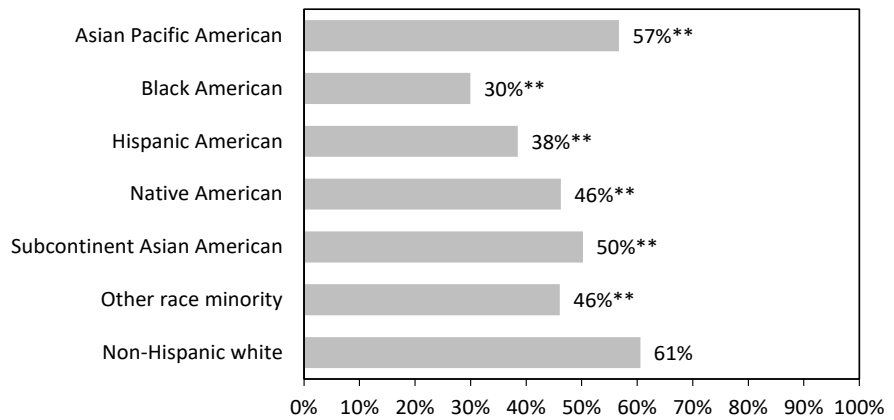


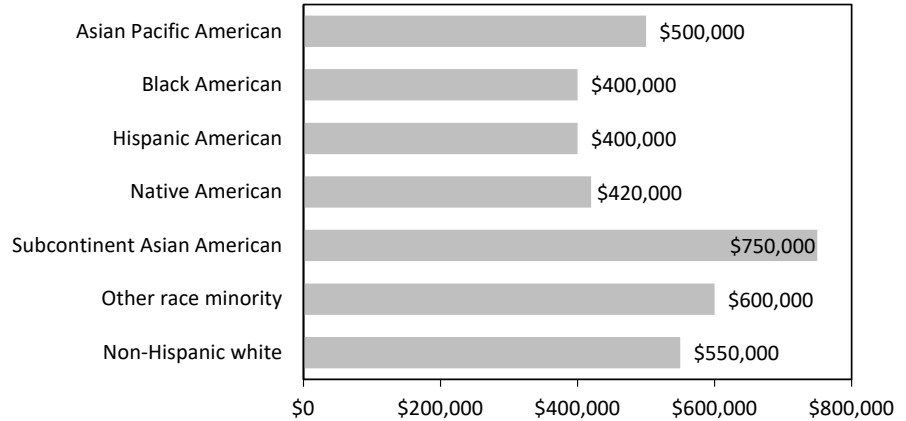
Figure 3-9 presents median home values among homeowners of different racial/ethnic groups in San Diego. Consistent with national trends, homeowners that identify with certain minority groups—Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans—own homes that, on average, are worth less than those of non-Hispanic whites.

4. 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.^{77, 78, 79, 80, 81, 82} The study team assessed difficulties that minorities and women face in home credit and business credit markets.

Figure 3-9.
Median home values in San Diego

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

Source:
BBC Research & Consulting from 2014-2018 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/>.

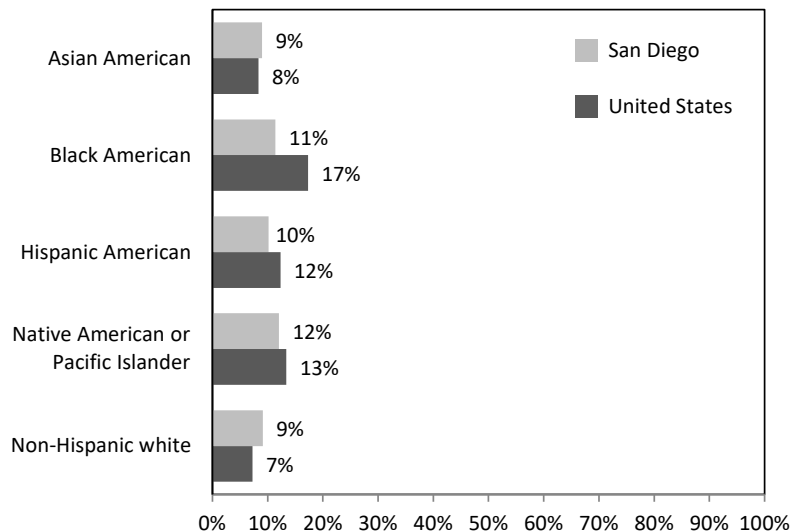


a. Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.^{83, 84, 85, 86, 87} Race- and gender-based barriers in home credit markets, as well as the foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{88, 89, 90, 91} To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for San Diego and the United States as a whole. As shown in Figure 3-10, Black Americans and Native Americans or Other Pacific Islanders in San Diego appear to have been denied home loans at higher rates than non-Hispanic whites. In addition, the study team’s analyses indicate that certain minority groups in San Diego are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-25 in Appendix C).

Figure 3-10.
Denial rates of conventional purchase loans for high-income households in San Diego

Note:
High-income households are those with 120% or more of the HUD area median family income. Native Americans are combined with Pacific Islanders due to small samples.

Source:
FFIEC HMDA data 2017. The raw data was obtained from Consumer Financial Protection Bureau HMDA data tool:
<http://www.consumerfinance.gov/hmda/explore>.



b. Business credit. Minority- and woman-owned businesses also face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.⁹² Researchers have shown that Black American-owned businesses and Hispanic American-owned

businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.^{93, 94, 95} In addition, women are less likely to apply for credit and receive loans of less value when they do.^{96, 97} Without equal access to business capital, minority- and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances (for details and information specific to the Pacific Region, see Figure C-26 and Figure C-27 in Appendix C).^{98, 99, 100, 101}

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, Black American-owned businesses increased by 35 percent, and Hispanic American-owned businesses increased by 46 percent.¹⁰² 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.^{103, 104, 105, 106} 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 already include large concentrations of individuals from disadvantaged groups.^{107, 108, 109}

The study team examined rates of business ownership in San Diego County construction, professional services, and goods and other services industries by race/ethnicity, gender, disability status, and veteran status. As shown in Figure 3-11:

- Black Americans, Hispanic Americans, and Native Americans own construction businesses at lower rates than non-Hispanic whites; women own construction businesses at a lower rate than men; and people with disabilities own construction businesses at a lower rate than people without disabilities;
- Asian Pacific Americans, Black Americans, and Subcontinent Asian Americans own professional services businesses at lower rates than non-Hispanic whites and people with disabilities own professional services businesses at a lower rate than people without disabilities; and
- Asian Pacific Americans, Black Americans, and Subcontinent Asian Americans own goods and other services businesses at a lower rate than non-Hispanic whites and women own goods and other services businesses at a lower rate than men.

Figure 3-11.
Business ownership rates in study-related industries in San Diego

San Diego	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	24.5 %	12.3 % **	3.5 % **
Black American	15.8 % **	8.9 % **	7.0 % **
Hispanic American	19.3 % **	18.8 %	14.2 %
Native American	13.5 % **	20.8 %	0.0 % †
Subcontinent Asian American	0.0 % †	5.6 % **	0.0 % **
Other minority group	0.0 % †	3.5 % †	0.0 % †
Non-Hispanic white	26.7 %	22.2 %	15.6 %
Gender			
Women	11.8 % **	17.3 %	17.2 % **
Men	23.8 %	19.7 %	11.1 %
Disability Status			
People with disabilities	32.4 % **	13.2 % **	11.2 %
All Others	22.2 %	19.7 %	13.2 %
Veteran Status			
Veteran	22.3 %	23.1 %	13.9 %
Non-veteran	22.7 %	18.8 %	13.0 %
All individuals	22.7 %	19.0 %	13.0 %

Note: For each industry and group, business ownership rates were calculated by determining the proportion of total workers in the labor force and the number that are self-employed as either an incorporated or non-incorporated business. As shown in the figure, the business ownership rate for Black Americans in the professional services industry is 8.9%, meaning that of all the Black Americans in the labor force in the professional services industry in San Diego, 8.9% own their businesses.

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

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

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

BBC also conducted regression analyses to determine whether differences in business ownership rates based on race/ethnicity, gender, disability status, and veteran status exist even after statistically controlling for various personal factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. Figure 3-12 presents the racial/ethnic-, gender-, disability-, and veteran-related factors that were significantly and independently related to business ownership for each relevant industry. As shown in Figure 3-12, even after accounting for various personal factors:

- Being a woman is associated with a lower likelihood of owning a construction business compared to being a man, and being a veteran is associated with a lower likelihood of owning a construction business compared to being a non-veteran.
- Being Asian Pacific American, Black American, or Subcontinent Asian American is associated with a lower likelihood of owning a professional services business compared to

being non-Hispanic white. In addition, being a veteran is associated with a lower likelihood of owning a professional services business compared to being a non-veteran.

- Being Asian Pacific American or Black American is associated with a lower likelihood of owning a goods and other services business compared to being non-Hispanic white.

Figure 3-12.
Predictors of business ownership in relevant industries in San Diego (probit regression)

Source:
 BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Industry and group	Coefficient
Construction	
Women	-0.5545
Veteran	-0.3737
Professional services	
Asian Pacific American	-0.3726
Black American	-0.3625
Subcontinent Asian American	-0.7329
Veterans	-0.6533
Goods and other services	
Asian Pacific American	-0.8096
Black American	-0.4668

D. Business Success

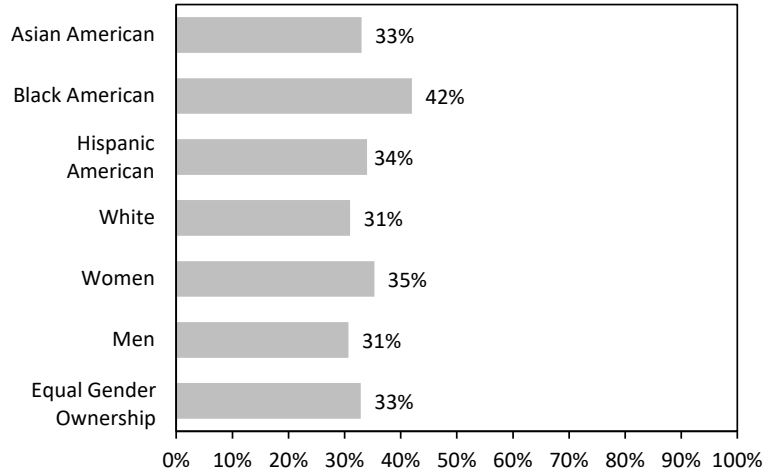
There is a great deal of research indicating that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of business closures than non-Hispanic whites and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men, respectively, using a number of different indicators such as profits and business size (but also see Robb and Watson 2012).^{110, 111, 112} The study team examined data on business closure, business receipts, and business owner earnings to further explore business success in San Diego.

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

Figure 3-13.
Rates of business closure in San Diego

Note:
 Data include only non-publicly held businesses.
 Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.
 Statistical significance of these results cannot be determined, because sample sizes were not reported.

Source:
 Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.
 Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

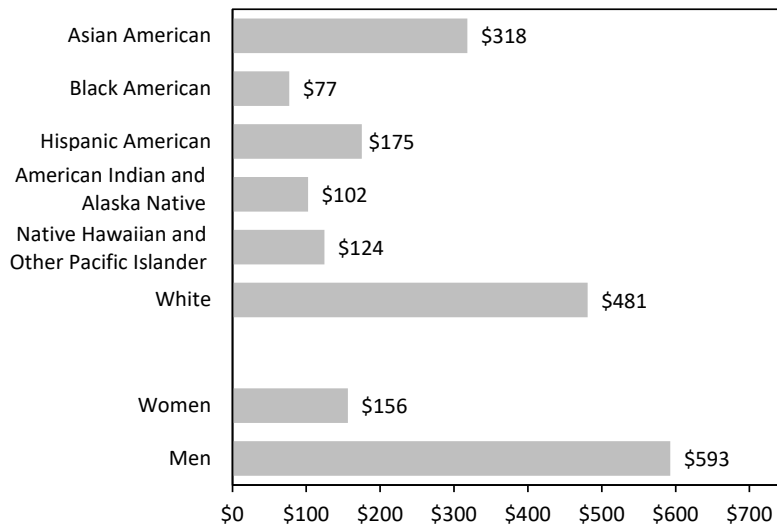


2. Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in San Diego earn as much as businesses owned by whites or men, respectively. Figure 3-14 shows mean annual receipts for businesses in San Diego by the race/ethnicity and gender of owners. Those results indicate that, in 2012, all relevant minority groups in San Diego showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses showed lower mean annual business receipts than businesses owned by men.

Figure 3-14.
Mean annual business receipts (in thousands) in San Diego

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.



3. Business owner earnings. The study team analyzed business owner earnings to assess whether minorities, women, people with disabilities, and veterans in San Diego earn as much from the businesses they own as others do. As shown in Figure 3-15:

- Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities earn less on average from their businesses than non-Hispanic whites earn from their businesses;

- Women earn less from their businesses than men earn from their businesses; and
- People with disabilities earn less from their businesses than people without disabilities earn from their businesses.

BBC also conducted regression analyses to determine whether differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being non-Hispanic white, being Black American or Native American was associated with substantially lower business owner earnings. Similarly, compared to being a man, being a woman was associated with substantially lower business owner earnings, compared to not having a disability, having a disability was associated with substantially lower business owner earnings, and, compared to being a non-veteran, being a veteran was associated with substantially lower business owner earnings (for details, see Figure C-39 in Appendix C).

Figure 3-15.
Mean annual business owner earnings in San Diego

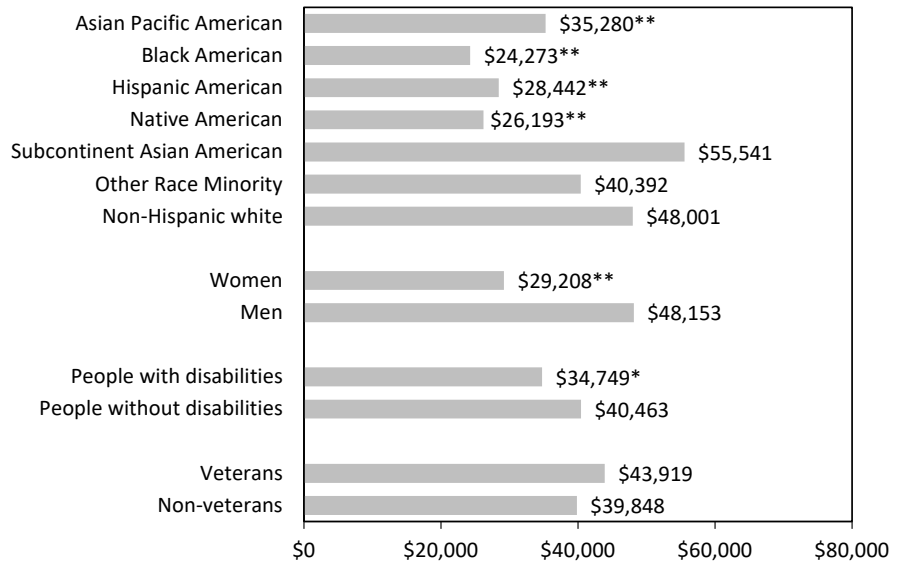
Note:

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

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

Source:

BBC Research & Consulting from 2014 - 2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



E. Summary

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

Barriers in the marketplace likely have important effects on the ability of minorities, women, people with disabilities, and veterans to start businesses in relevant industries—construction, professional services, and goods and other services—and operating those businesses successfully. Any difficulties that those individuals face in starting and operating businesses may reduce their availability for government work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in

the marketplace indicates that government agencies in the region may be passively participating in discrimination that makes it more difficult for minority-, woman-, disabled- and veteran-owned businesses to successfully compete for their contracts. Many courts have held that passive participation in any such discrimination establishes a compelling governmental interest for agencies to take remedial action to address it. Due to the legal limitations Proposition 209 and the subsequent Article 1 Section 31 of the California State Constitution places on race- and gender-conscious measures in contracting and procurement, careful consideration must be made by the City to determine which programs and actions are best suited to remedy demonstrated disparities.

Definitions of Industries Relevant to Equal Employment Opportunity Outreach Program

Management and Financial

Advertising, marketing, promotions, public relations, and sales managers; business operations specialists; financial specialists; operations specialties managers; other management occupations; and top executives

Professional

Art and design workers; counselors, social workers, and other community and social service specialists; entertainers and performers; sports and related workers; health diagnosing and treating practitioners; lawyers, judges, and related workers; librarians, curators, archivists, life scientists, media and communication workers; postsecondary teachers, primary, secondary, and special education school teachers; other teachers and instructors; religious workers and social scientists and related workers

Architecture and Engineering, Science, and Computer

Computer specialists, mathematical science occupations, architects, surveyors, cartographers, engineers, and physical scientists

Technical

Drafters, engineers and mapping technicians; life, physical, and social science technicians; media and communication equipment workers, and health technologists and technicians

Services

Nursing, psychiatric, and home health aides; occupational and physical therapist assistants and aides; other healthcare support occupations; first-line supervisors and managers of protective service workers; law enforcement workers; firefighting and prevention workers; other protective service workers; supervisors of food preparation and serving workers; cooks and food preparation workers; food and beverage serving workers; other food preparation and serving related workers; building cleaning and pest control workers; supervisors of personal care and service workers; entertainment attendants and related workers; funeral service workers; personal appearance workers; transportation, tourism, and lodging attendants; and other personal care and service workers

Laborers

Supervisors of building and grounds cleaning and maintenance workers; grounds maintenance workers; animal care and service workers; supervisors of farming, fishing, and forestry workers; agricultural workers; fishing and hunting workers; forest, conservation, and logging workers and helpers; and construction trade workers

Sales

Retail sales workers, sales representatives, and other sales and related workers

Administrative Support

Legal support workers; supervisors of office and administrative support workers; financial clerks; information and record clerks; material recording, scheduling, dispatching, and distributing workers; secretaries and administrative assistants; and other office and administrative support workers

Operative Workers

Communications equipment operators; supervisors of production workers, assemblers, fabricators, food processing workers, metal workers, plastic workers, printing workers, textile, apparel, and furnishings workers; other production occupations; and motor vehicle operators

Crafts

Supervisors of construction and extraction workers; construction trades workers; other construction and related workers; extraction workers; supervisors of installation, maintenance, and repair workers; mechanics, installers, and repairers; electrical and electronic equipment; vehicle and mobile equipment mechanics, installers, and repairers; other installation, maintenance, and repair occupations; woodworkers; plant and system operators; and material moving workers

Transportation

Supervisors of transportation and material workers, air transportation workers, rail transportation workers, water transportation workers, other transportation workers, and moving workers

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CHAPTER 4.

Collection and Analysis of Contract Data

CHAPTER 4.

Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies the City of San Diego (the City) uses to award contracts and procurements, the contracts and procurements the study team analyzed as part of the disparity study, and the process BBC Research & Consulting (BBC) used to collect relevant prime contract and subcontract data for the study. Chapter 4 is organized into six parts:

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

A. Contracting and Procurement Policies

The City has developed detailed guidelines for the procurement of goods, supplies, and services. The Purchasing & Contracting Department (P&C) is responsible for procuring goods, services, and professional services, other than architecture and engineering (AE) services. The Director of P&C serves as the City's central Purchasing Agent and establishes thresholds below which other appointed purchasing agents and the City Manager may award contracts without City Council approval.¹ The Engineering & Capital Projects Department (E&CP) is responsible for procuring construction and AE services. P&C and E&CP provide guidance to other City departments and their appointed purchasing agents to ensure consistency in procurement procedures and compliance with City municipal codes, City and San Diego County ordinances, and administrative policies.^{2, 3}

1. P&C. P&C follows San Diego Municipal Code (SDMC) Chapter 2, Article 2, Division 32 to procure goods, services, and professional services (other than AE services). P&C uses various purchasing methods depending on the estimated cost of the purchase, the required goods or services, and the needs of the using department. In general, P&C purchasing procedures can be categorized into five types:

- Small purchases;
- Informal written or verbal quotes;

¹ City of San Diego Municipal Code (SDMC) Section 22.3201

² SDMC 22.3201-22.3208 regulates contracts for goods, services, and consulting.

³ SDMC Section 22.3101-22.3110 regulates contracts for public works.

- Competitive written quotes;
- Competitive public bids; and
- Consultant contracts.

P&C implements the Small Local Business Enterprise (SLBE) Program by using voluntary subcontracting goals to award publicly bid contracts and requiring Equal Employment Opportunity (EEO) forms with each bid.

a. Small purchases. As authorized by the City’s central Purchasing Agent, individual City departments can use methods of their choosing to procure goods, services, and professional services worth \$25,000 or less. However, using departments are encouraged to solicitate at least one written or verbal quote for small purchases.⁴

b. Informal written or verbal quotes. Individual City departments are also responsible for procuring goods and services worth more than \$25,000 and up to \$50,000 but must follow informal quote procedures to do so.⁵ Under such procedures, using departments are required to solicit one written or verbal quote but are encouraged to seek additional quotes.

c. Competitive written quotes. Individual City departments follow competitive written quote procedures to procure goods and services worth more than \$50,000 and up to \$150,000. A department is required to solicit five or more written quotes for goods and non-professional services contracts of this size. ⁶ Written quotes do not require formal advertising, and the originating department is responsible for evaluating written quotes.

d. Competitive public bids. P&C is responsible for the award of goods and services contracts worth more than \$150,000, which must be procured through public bidding procedures and require an invitation for sealed bids. Under public bidding procedures, solicitations must be advertised in the City’s official newspaper for at least one day at least 10 days prior to the bid or proposal deadline. Bid documents are posted on the City’s website or the City’s electronic bidding portal. Solicitations must include descriptions of the required goods or services, details outlining how bids will be evaluated, contractual terms and conditions, times and locations for bid openings, and other relevant information. Bids must be opened publicly at the time and location specified in the solicitation. After public opening, procurement staff evaluate each bid or proposal for responsiveness and completeness. The contract is then awarded to the lowest responsive and responsible bidders.

e. Consultant contracts. P&C awards consultant contracts for professional services worth more than \$25,000 through a Request for Qualifications (RFQ) process.⁷ RFQs must be published in a newspaper, posted on the City’s website, or posted on the website of a hired third party.

⁴ SDMC 22.3208

⁵ SDMC 22.3203 (a).

⁶ SDMC 22.3203 (b).

⁷ The City defines professional services as services which require a license and formal education to provide such as accounting, law, and medicine.

Consultant contracts are awarded to the bidder that offers the best value to the City considering price, experience, responsibility, and any additional factors deemed relevant to the scope of services.⁸ The Purchasing Agent may award consultant contracts worth less than \$250,000, in total or in any given fiscal year, without the approval of City Council. The Purchasing Agent may also exercise RFQ or proposal procedures to establish a short list of qualified businesses that are then eligible to compete for consultant contracts on a rotating, as-needed basis.

2. E&CP. E&CP follows SDMC Chapter 2, Article 2, Divisions 31 and 36 to award minor public works construction contracts (those worth \$500,000 or less), major public works construction contracts (those worth more than \$500,000), and AE contracts. E&CP uses various purchasing methods depending on the estimated cost of the contract, the required services, and the needs of the using department. In general, E&CP's purchasing procedures can be categorized into three types:

- Competitive written quotes;
- Competitive public bids; and
- AE contracts.

E&CP implements the SLBE Program by applying mandatory subcontracting goals to all publicly bid construction contracts worth more than \$500,000, providing sheltered bidding for Emerging Local Business Enterprise- (ELBE-) and SLBE-certified primes for construction contracts worth \$500,000 or less, and requiring EEO forms with each bid. All public works procurements require bid bonds to be submitted with bids in amounts that the City Manager determines.⁹

a. Competitive written quotes. The City appropriates funds for some public works contracts in the agency's annual Capital Improvement Program (CIP) budget. Individual City departments, under E&CP guidance, can award minor public works contracts worth less than \$250,000 for which funding has not be appropriated in the CIP budget using competitive written quotes procedures.¹⁰ Per City code, the using department must solicit written quotes from at least three SLBE- or ELBE-certified businesses for minor public works contracts worth \$100,000 or less and from at least five SLBE- or ELBE-certified businesses for minor public works contracts valued between \$100,000 and \$250,000.^{11,12} Written quotes procedures do not have formal advertising requirements. The originating department is responsible for evaluating quotes.

b. Competitive public bids. E&CP follows public bidding procedures similar to those followed by P&C to procure minor public works contracts worth less than \$250,000 for which funding has

⁸ SDMC 22.3202 (c)

⁹ The bid bond requirement does not apply to sole course contracts, job order contracts, design-build contracts, or construction manager at risk contracts, unless otherwise required by the City Manager per SDMC 22.3005.

¹⁰ SDMC 223612 (c)

¹¹ SDMC 22.3612(c)(1).

¹² SDMC 22.3612(c)(2).

been appropriated in the CIP budget and all public works contracts worth \$250,000 or more.¹³ Competitive bid procedures vary depending on the size and type of contract.

i. Appropriated minor public works contracts worth less than \$250,000. Minor public works contracts worth less than \$250,000 for which funding has been appropriated in the CIP budget are procured using competitive public bid procedures, but such opportunities are limited to certified ELBEs.¹⁴ If there are no businesses on the ELBE eligibility list that have the requisite licenses for the contract, the solicitations may be opened up to certified SLBEs. If there are no bidders or no responsive and eligible SLBE bidders, the City then follows the competitive public bid processes applicable to public works contracts worth more than \$500,000.

ii. Minor public works contracts valued between \$250,000 and \$500,000. Minor public works contracts worth at least \$250,000 and up to \$500,000 are also procured using competitive bid procedures but are limited to certified ELBEs and SLBEs. If there are no ELBE or SLBE bidders or no appropriately licensed ELBEs or SLBEs to compete for the work, the City follows the competitive public bid processes applicable to public works contracts worth more than \$500,000.

iii. Major public works contracts valued between \$500,000 and \$1,000,000. Major public works contracts worth more than \$500,000 but less than \$1,000,000 are procured using competitive public bid procedures but carry additional bid requirements. Bid discounts of up to 5 percent may be awarded by the City Manager for various reasons, including if the prime contractors are certified ELBEs or SLBEs, if a non-certified prime contractor meets or exceeds the mandatory SLBE/ELBE subcontracting goal, or if bidders are City-approved joint ventures that include ELBE or SLBE participation.¹⁵ For contracts of that size, SLBE or ELBE subcontractor participation is mandatory and goals for such participation are determined on a project-by-project basis. Prime contractors can meet mandatory goals by making subcontractor commitments to SLBEs or ELBEs at the time of bid or by submitting documentation showing they made reasonable good faith efforts to meet the goals but were unable to do so. SLBE or ELBE prime contractors can meet mandatory subcontractor requirements if they self-perform at least 51 percent of the public works contract. The City cannot apply subcontracting participation goals to public works contracts worth more than \$500,000 if it includes any state or federal funds.

iv. Major public works contracts worth \$1,000,000 or more. Major public works contracts worth \$1,000,000 or more are generally procured as either design-build contracts, job order contracts, or construction manager at risk contracts. Design-build contracts are awarded through an RFQ process or an invitation to bid (ITB) process and may be awarded to multiple qualified

¹³ SDMC 22.3107.

¹⁴ SDMC 22.3612(a).

¹⁵ Bid discounts allow eligible firms whose bid is up to 5 percent higher than the next lowest bidder to still be considered the low bid. For example, if a certified SLBE firm bid \$105,000 and the next lowest majority-owned firm's bid is \$100,001, the SLBE firm's bid is discounted by 5 percent and is now considered to be a bid of \$100,000. The SLBE firm is now the lowest bidder.

businesses to perform on a task order basis.^{16, 17} Job order contracts are awarded to the responsible and reliable bidder with the lowest total unit cost.¹⁸ Construction manager at risk contracts, or those defined by written agreements between the City and a firm performing both pre-construction and construction services, are awarded by establishing a list of qualified firms through an RFQ process and issuing a request for proposals (RFP) to that short list.¹⁹ All other major public works contracts worth \$1,000,000 or more are awarded to the lowest responsible and reliable bidders.

c. AE contracts. E&CP awards AE contracts on the basis of demonstrated competence and professional qualifications deemed necessary for the performance of required services. The City must publish solicitations and RFPs for AE services worth \$25,000 or more in the City's official newspaper for at least one day at least 10 days prior to the bid or proposal deadline.²⁰ The responsible purchasing agent may establish short lists of qualified businesses through RFQs or proposals to compete for AE services on a rotating, as-needed basis. The City encourages competition for AE contracts when feasible.

3. Procurements requiring City Council Approval. Purchasing agents may award contracts for goods or services worth more than \$3 million using competitive public bid procedures if they have been budgeted for in the Annual Appropriation Ordinance. Otherwise, contracts and procurements of that size must be approved by City Council. AE contracts awarded by E&CP required Council approval if the total value exceeds \$1,000,000 either in total or in any given fiscal year. Consultant contracts awarded by P&C require City Council approval if the total value exceeds \$250,000 either in total or in any given fiscal year.²¹ Purchasing agents may award construction contracts worth less than \$30 million without City Council approval if the procurement was previously appropriated through the annual CIP budget and has met the public bidding requirements. All construction contracts worth more than \$30 million require approval from the City Council.

4. Special procurements. The City can use special purchasing methods in situations provided under SDMC 22.3208-10. P&C requires as much competition as practical even when using special procurement practices. If using special procurements, the originating department must provide written justification for why the use of the special procurement method was necessary. The need for special procurements must qualify under one of the following criteria:

- Purchases that involve contracts necessary to safeguard life, health, or property due to extraordinary fires, floods, storms, epidemics, or other disasters, provided that purchasing

¹⁶ SDMC 22.3304

¹⁷ SDMC 22.3310

¹⁸ SDMC 22.3107

¹⁹ SDMC 22.3803

²⁰ SDMC 22.3206 (d)(2)

²¹ SDMC 22.3207

agents immediately report emergency awards and their justification to City Council, and they are approved by resolution and a two-thirds vote;²²

- Cooperative purchases for which another agency, such as other cities, counties, or states, were responsible for the solicitations, providing that the purchasing agent certified in writing that the cooperative procurement contract is in the best interest of the City; is to the City's economic advantage; and was competitively awarded using a process that complies with the policies, rules, and regulations developed and implemented by the City Manager;²³
- Sole source procurements for which the City must certify that strict compliance with the competitive process is either untenable or not advantageous to the City;²⁴
- Purchases that involve annual blanket purchase orders for expenditures greater than \$25,000 for commercially available materials and supplies provided they are required by City forces for immediate completion of work in progress, not normally kept in City stores, and are worth less than \$150,000;
- Purchases that involve inmate services;²⁵ or
- Purchases that involve contracts with agencies or non-profit organizations.²⁶

4. Prequalification. Per SDMC 22.3004, the City has the option to require prime contractors to be prequalified prior to bidding on construction contracts. Certification as an SLBE or ELBE allows businesses to be prequalified to bid up to \$500,000 or their single-project bond limits, whichever is less, by submitting a complete financial statement, bond letter, and three references with their Prequalification Program Application. All businesses seeking prequalification of more than \$500,000 must also submit financial statements, bond letters, and references with their Prequalification Program Applications. To be prequalified for up to \$15 million, financial statements must be reviewed by independent accountants. To be prequalified for more than \$1 million, financial statements must be audited by independent accountants. The City reviews applications for financial and technical qualifications, necessary experience and resources, past performance, and compliance with applicable statutes and regulations. Prequalification is valid for two years for all businesses.

B. Collection and Analysis of Contract Data and Procurement Data

BBC Research & Consulting (BBC) collected contracting and vendor data from the City's PlanetBids, SAP, ARIBA, and PRISM data systems to serve as the basis of key disparity study analyses, including the utilization, availability, and disparity analyses. The study team collected the most comprehensive data available on prime contracts and subcontracts that the City awarded between July 1, 2014 and June 30, 2019 (i.e., the *study period*). BBC sought data that included information about prime contracts and subcontracts regardless of the race/ethnicity

²² SDMC 22.3208 (b)

²³ SDMC 22.3208 (c).

²⁴ SDMC 22.3208 (d); SDMC 22.3016 (a)

²⁵ SDMC 22.3209

²⁶ SDMC 22.3210

and gender of the owners of the businesses that performed the work or their statuses as certified minority-, woman-, or service-disabled veteran-owned businesses. The study team collected data on construction, AE, other professional services, and goods and services prime contracts and subcontracts the City awarded during the study period.

1. Prime contract data collection. The City provided the study team with electronic data on relevant prime contracts awarded during the study period. The City maintains those data through the Equal Opportunity Contracting (EOC) Program. As available, BBC collected the following information about each relevant prime contract:

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

The City advised the study team on how to interpret the provided data, including how to identify unique bid opportunities and how to aggregate related payment amounts. When possible, the study team aggregated individual payments or purchase order line items into contract or purchase order elements. In instances where payments or line items could not be aggregated, the study team treated payment and line-item records as individual contract elements.

2. Subcontract data collection. The City also provided the study team with electronic data on subcontracts related to contracts that it awarded during the study period, as it was available. The City provided subcontract data for 424 prime contracts, which accounted for approximately \$518 million of the contract dollars that it awarded during the study period.

As available, BBC collected the following information about each relevant subcontract:

- Associated prime contract number;
- Subcontract commitment amount;
- Amount paid on the subcontract as of June 30, 2019;
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

3. Contracts included in study analyses. The study team collected information on 779 relevant prime contract elements and 3,339 associated subcontracts that the City awarded

during the study period, accounting for approximately \$2.2 billion of City spend. Figure 4-1 presents the number of contract elements by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

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

Contract type	Number	Dollars (in thousands)
Construction	2,459	\$1,381,929
Professional services	1,485	\$675,367
Good and other services	174	\$145,978
Total	4,118	\$2,203,274

Source:

BBC Research & Consulting from City contract and payment data.

4. Prime contract and subcontract amounts. For each contract element included in the study team’s analyses, BBC examined the dollars that the City awarded or paid to each prime contractor and the dollars that the prime contractor paid to any subcontractors. If a contract did not include any subcontracts, the study team attributed the entire amount awarded or paid during the study period to the prime contractor. If a contract included subcontracts, the study team calculated subcontract amounts as the total amount paid to each subcontractor during the study period. BBC then calculated the prime contract amount as the total amount paid during the study period less the sum of dollars paid to all subcontractors.

C. Collection of Vendor Data

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

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

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

- City contract and vendor data;
- City vendor registration lists;
- City SLBE certification and ownership lists;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;

- State of California Unified Certification Program certification and ownership lists;
- State of California Public Utilities Supplier Diversity certification and ownership lists;
- State of California Department of General Services certification and ownership lists;
- Supplier Clearing House certification and ownership lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Surveys that the study team conducted with business owners and managers as part of the utilization and availability analyses; and
- Business websites.

D. Relevant Geographic Market Area

The study team used City data to help determine the *relevant geographic market area (RGMA)*—the geographical area in which the organization spends the substantial majority of its contracting dollars—for the study. The study team’s analysis showed that 87 percent of relevant contracting dollars during the study period went to businesses with locations in San Diego County, indicating that San Diego County should be considered the RGMA for the study. BBC’s analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on San Diego County.

E. Relevant Types of Work

For each prime contract and subcontract element, the study team determined the *subindustry* that best characterized the business’s primary line of work (e.g., heavy construction). BBC identified subindustries based on City contract and vendor data, surveys that the study team conducted with prime contractors and subcontractors, business certification lists, D&B business listings, and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-2 presents the dollars that the study team examined in the various construction, professional services, and goods and services subindustries that BBC included in its analyses.

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

Figure 4-2.
City contract dollars
by subindustry

Note:

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

Source:

BBC Research & Consulting from City contract data.

Industry	Total (in thousands)
Construction	
Water, sewer, and utility lines	\$ 329,276
Heavy construction	\$ 295,647
Building construction	\$ 227,037
Other construction services	\$ 105,169
Electrical work	\$ 66,270
Landscape services	\$ 51,358
Concrete work	\$ 51,207
Plumbing and HVAC	\$ 44,875
Other construction materials	\$ 41,719
Excavation, drilling, wrecking, and demolition	\$ 39,088
Heavy construction equipment rental	\$ 36,074
Electrical equipment and supplies	\$ 29,281
Concrete, asphalt, sand, and gravel products	\$ 21,026
Rebar and reinforcing steel	\$ 14,193
Fencing, guardrails, barriers, and signs	\$ 7,975
Painting, striping, and marking	\$ 7,480
Remediation and cleaning	\$ 6,727
Trucking, hauling and storage	\$ 4,179
Landscaping supplies and equipment	\$ 3,123
Traffic control and safety	\$ 225
Total construction	\$ 1,381,929
Professional services	
Architecture and Engineering	\$ 369,049
IT and data services	\$ 194,922
Environmental services	\$ 43,908
Construction management	\$ 31,003
Transportation and urban planning	\$ 13,342
Landscape architecture	\$ 6,756
Other professional services	\$ 6,134
Surveying and mapmaking	\$ 3,782
Advertising, marketing and public relations	\$ 3,730
Testing and inspection	\$ 1,447
Human resources and job training services	\$ 1,293
Total professional services	\$ 675,367

**Figure 4-2
(continued).
City contract dollars
by subindustry**

Note:

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

Source:

BBC Research & Consulting from City contract data.

Industry	Total
Goods and services	
Automobiles, parts, and services	\$ 56,364
Security guard services	\$ 16,079
Safety equipment	\$ 14,647
Waste and recycling services	\$ 14,061
Other goods	\$ 13,458
Other services	\$ 12,517
Cleaning and janitorial services	\$ 10,054
Industrial equipment and machinery	\$ 6,611
Portable toilet rental	\$ 2,186
Total goods and services	\$ 145,978
GRAND TOTAL	\$ 2,203,273

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

- The City awarded to government agencies, universities, utility providers, hospitals, or nonprofit organizations (\$140 million);
- Were classified in subindustries that reflected *national markets* (i.e., subindustries that are dominated by large national or international businesses) or were classified in subindustries for which the City awarded the majority of contracting dollars to businesses located outside of the RGMA (\$213 million);²⁷
- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate leases or banking services; \$7.6 million); or
- Were classified in subindustries not typically included in a disparity study and account for small proportions of City contracting dollars (\$33 million).²⁸

F. Agency Review Process

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

²⁷ Examples of such industries include computers, software, and specialized medical equipment.

²⁸ Examples of industries not typically included in a disparity study include subscription services and lodging.

CHAPTER 5.

Availability Analysis

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority-, woman-, and service-disabled veteran-owned businesses that are *ready, willing, and able* to perform prime contracts and subcontracts the City of San Diego (the City) awards in the areas of construction, professional services, and goods and other services.¹ Chapter 5 describes the availability analysis in five parts:

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

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority-, woman-, and service-disabled veteran-owned businesses for City prime contracts and subcontracts to help refine the Small Local Business Enterprise (SLBE) Program and to use as benchmarks against which to compare the actual participation of those businesses in City work. Comparisons between participation and availability allowed BBC to determine whether certain business groups were *underutilized* during the study period relative to their availability for City contracts and procurements (for details, see Chapter 7).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of contracts and procurements the City awarded during the study period, which served as a proxy for the contracts and procurements it might award in the future. BBC began the availability analysis by identifying the specific subindustries in which the City 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 the City spends those contracting dollars are located (i.e., the relevant geographic market area, or RGMA).²

BBC then conducted extensive surveys to develop a representative, unbiased, and statistically-valid database of potentially available businesses located in the RGMA that perform work within

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

² BBC identified the relevant geographic market area for the disparity study as San Diego County.

relevant subindustries. The objective of the surveys was not to collect information from each and every relevant business operating in the local marketplace. It was to collect information from an unbiased subset of the business population that appropriately represents the entire relevant business population operating in San Diego County. That approach allowed BBC to estimate the availability of minority-, woman-, and service-disabled veteran-owned businesses in an accurate, statistically-valid manner.

1. Overview of availability surveys. The study team conducted telephone surveys with business owners and managers to identify local businesses that are potentially available for City prime contracts and subcontracts. BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of businesses—regardless of ownership—that perform work in relevant industries and have a location within the RGMA based on information from Dun & Bradstreet (D&B) Marketplace. BBC collected information about all business establishments listed under 8-digit work specialization codes, as developed by D&B, that were most related to the contracts and procurements that the City awarded during the study period. BBC obtained listings on 1,919 local businesses that do work related to those work specializations. BBC did not have working phone numbers for 363 of those businesses but attempted availability surveys with the remaining 1,556 businesses.

2. Availability survey information. BBC worked with Customer Research International (CRI) and Davis Research to conduct surveys with the owners or managers of the identified businesses. Survey questions covered many topics about each business, including:

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

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

- Being a private sector business;
- Having performed work relevant to City construction, professional services, or goods and other services contracting or procurement;

- Having bid on or performed construction, professional services, or goods and other services prime contracts or subcontracts in either the public or private sector in the RGMA in the past five years; and
- Being interested in work for local government organizations.³

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

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

C. Businesses in the Availability Database

After conducting availability surveys, BBC developed a database of information about San Diego businesses potentially available for relevant City contracts and procurements. Information from the database allowed BBC to identify businesses ready, willing, and able to perform work for the City. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority-, woman-, or service-disabled veteran-owned. The analysis included 395 businesses potentially available for specific construction, professional services, and goods and other services contracts and procurements the City awards. As shown in Figure 5-1, of those businesses, 37.2 percent were minority- or woman-owned, and 4.6 percent were service-disabled veteran-owned.

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

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

Source:
 BBC Research & Consulting availability analysis.

Business group	Percent
Non-Hispanic white woman-owned	14.4 %
Asian Pacific American-owned	2.3
Black American-owned	4.1
Hispanic American-owned	13.4
Native American-owned	1.8
Subcontinent Asian American-owned	1.3
Total Minority-owned	22.8 %
Total Minority- and Woman-owned	37.2 %
Total Service-Disabled Veteran-owned	4.6 %

The information in Figure 5-1 merely reflects a simple *head count* of businesses with no analysis of their availability for specific City contracts or procurements. It represents only a first step toward analyzing the availability of minority-, woman-, and service-disabled veteran-owned businesses for City work. BBC used a *custom census* approach to calculate the availability of minority-, woman-, and service-disabled veteran-owned businesses, because it goes well beyond a simple head count to account for specific business characteristics such as work type, relative business capacity, contractor role, and interest in relevant work. A custom census approach has

³ That information was gathered separately for prime contract and subcontract work.

been accepted in federal court as the preferred methodology for conducting availability analyses.

D. Availability Calculations

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

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

1. For each contract element, BBC identified businesses in the availability database that reported they:
 - Are interested in performing construction, professional services, or goods and other services work in that particular role for that specific type of work for government organizations in San Diego;
 - Can serve customers in San Diego; and
 - Have bid on or performed work of that size in the past five years.
2. The study team then counted the number of minority-owned businesses, woman-owned businesses, service-disabled veteran-owned businesses, and businesses owned by non-Hispanic white men who are not service-disabled veterans 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 included in the disparity study, and then multiplied percentage availability for each contract element by the dollars associated with it, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses overall—and separately for each relevant racial/ethnic and gender group—and of service-disabled veteran-owned businesses. Figure 5-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that the City awarded during the study period.

BBC's availability calculations are based on prime contracts and subcontracts the City awarded between July 1, 2014 and June 30, 2019. A key assumption of the availability analysis is that the contracts and procurements the City awarded during the study period are representative of the contracts and procurements that it will award in the future. If the types and sizes of the contracts and procurements that the City awards in the future differ substantially from the ones it awarded in the past, then the City should consider adjusting availability estimates accordingly.

E. Availability Results

BBC estimated the availability of minority-, woman-, and service-disabled veteran-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts the City awarded during the study period. BBC presents availability analysis results for minority- and woman-owned businesses and separately for service-disabled veteran-owned businesses, regardless of the race or gender of business owners.

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

a. Overall. Figure 5-3 presents dollar-weighted estimates of the availability of minority- and woman-owned businesses for City contracts and procurements. Overall, the availability of minority- and woman-owned businesses for City work is 31.0 percent, indicating those businesses might be expected to receive 31.0 percent of the dollars the City awards in construction, professional services, and goods and other services. Non-Hispanic white woman-owned businesses (16.6%) and Hispanic American-owned businesses (10.0%) exhibited the highest availability among all relevant groups.

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

On a contract the City awarded during the study period, the prime contractor awarded a subcontract worth \$1,291,605 for engineering services. To determine the overall availability of minority-, woman-, and service-disabled veteran-owned businesses for the subcontract, BBC identified businesses in the availability database that:

- a. Indicated that they performed engineering work;
- b. Reported bidding on work of similar or greater size in the past;
- c. Can serve customers in San Diego; and
- d. Reported interest in working as a subcontractor on government contracts or procurements.

BBC found 17 businesses in the availability database that met those criteria. Of those businesses, 5 were minority- or woman-owned businesses, and 1 was a service-disabled veteran-owned business. Thus, the availability of minority- and woman-owned businesses for the subcontract was 29.4 percent (i.e., $5/17 \times 100 = 29.4$), and the availability of service-disabled veteran-owned businesses was 5.9 percent (i.e., $1/17 \times 100 = 5.9$).

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

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
 For more detail and results by group, see Figure F-2 in Appendix F.

Source:
 BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	16.6 %
Asian Pacific American-owned	1.2
Black American-owned	1.1
Hispanic American-owned	10.0
Native American-owned	1.7
Subcontinent Asian American-owned	0.3
Total Minority-owned	14.4 %
Total Minority- and Woman-owned	31.0 %

b. Department. BBC examined availability analysis results separately for Purchasing and Contracting (P&C) and Engineering & Capital Projects (E&CP) Department work, because each department is responsible for awarding different types of contracts and procurements. Whereas E&CP is responsible for awarding construction and architecture and engineering contracts, P&C is responsible for awarding goods and services contracts unrelated to construction and architecture and engineering. In addition, whereas E&CP utilizes mandatory SLBE/ELBE goals in awarding work, P&C employs only voluntary goals. Figure 5-4 presents availability estimates separately for each department. As shown in Figure 5-4, the availability of minority- and woman-owned businesses considered together was higher for P&C work (49.5%) than for E&CP work (25.9%).

Figure 5-4.
Availability estimates for E&CP and P&C work

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
 For more detail and results by group, see Figures F-5 and F-6 in Appendix F.

Source:
 BBC Research & Consulting availability analysis.

Business group	Department	
	E&CP	P&C
Non-Hispanic white woman-owned	10.4 %	39.3 %
Asian Pacific American-owned	1.4	0.3
Black American-owned	0.2	4.6
Hispanic American-owned	11.4	4.9
Native American-owned	2.2	0.2
Subcontinent Asian American-owned	0.3	0.1
Total Minority-owned	15.5 %	10.2 %
Total Minority- and Woman-owned	25.9 %	49.5 %

c. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for City prime contracts and subcontracts. Figure 5-5 presents those results. As shown in Figure 5-5, the availability of minority- and woman-owned businesses considered together was lower for City prime contracts (30.3%) than for subcontracts (33.2%).

Figure 5-5.
Availability estimates
by contract role

Note:

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

For more detail, see Figures F-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	17.5 %	13.9 %
Asian Pacific American-owned	0.5	3.4
Black American-owned	1.3	0.6
Hispanic American-owned	9.7	11.2
Native American-owned	1.2	3.4
Subcontinent Asian American-owned	0.1	0.8
Total Minority-owned	12.8 %	19.3 %
Total Minority- and Woman-owned	30.3 %	33.2 %

d. Industry. BBC also examined availability analysis results separately for City construction, professional services, and goods and other services contracts. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is highest for City professional services contracts (41.3%) and lowest for goods and other services contracts and procurements (18.5%).

Figure 5-6.
Availability
estimates by
industry

Note:

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

For more detail, see Figures F-7, F-8, and F-9 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	11.3 %	30.7 %	0.9 %
Asian Pacific American-owned	1.3	1.2	0.0
Black American-owned	0.2	0.1	14.7
Hispanic American-owned	12.7	6.3	3.0
Native American-owned	1.7	2.3	0.0
Subcontinent Asian American-owned	0.0	0.8	0.0
Total Minority-owned	15.9 %	10.6 %	17.7 %
Total Minority- and Woman-owned	27.2 %	41.3 %	18.5 %

e. Time period. BBC examined availability analysis results separately for contracts and procurements that the City awarded in the early study period (i.e., July 1, 2014 – June 30, 2016) and the late study period (i.e., July 1, 2016 – June 30, 2019) to determine whether the types and sizes of contracts that the City awarded across the study period changed over time, which in turn would affect availability. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together is higher for the early study period (32.4%) than for the late study period (27.5%).

Figure 5-7.
Availability estimates
by time period

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail, see Figures F-3 and F-4 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Time Period	
	Early	Late
Non-Hispanic white woman-owned	18.7 %	11.5 %
Asian Pacific American-owned	0.9	1.8
Black American-owned	1.1	1.1
Hispanic American-owned	9.5	11.3
Native American-owned	1.8	1.6
Subcontinent Asian American-owned	0.3	0.2
Total Minority-owned	13.7 %	16.1 %
Total Minority- and Woman-owned	32.4 %	27.5 %

f. Contract size. BBC examined availability analysis results separately for contracts and procurements worth \$500,000 or more (large) and contracts and procurements worth less than \$500,000 (small) that the City awarded during study period to determine the effect of contract size on availability. As shown in Figure 5-8, the availability of minority- and woman-owned businesses considered together is higher for small contracts (34.4%) than for large contracts (30.1%).

Figure 5-8.
Availability estimates
by contract size

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail, see Figures F-12 and F-13 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Contract Size	
	Small	Large
Non-Hispanic white woman-owned	12.2 %	17.6 %
Asian Pacific American-owned	1.4	0.5
Black American-owned	2.5	1.3
Hispanic American-owned	15.2	9.5
Native American-owned	2.1	1.2
Subcontinent Asian American-owned	1.0	0.1
Total Minority-owned	22.2 %	12.5 %
Total Minority- and Woman-owned	34.4 %	30.1 %

2. Service-disabled veteran-owned businesses. BBC also examined the overall availability of service-disabled veteran-owned businesses for City work. The availability analysis indicated that the availability of service-disabled veteran-owned businesses for City contracts and procurements is 4.6%.

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority-, woman-, and service-disabled veteran-owned businesses in construction, professional services, and goods and other services prime contracts and subcontracts that the City of San Diego (the City) awarded between July 1, 2014 through June 30, 2019 (i.e., the *study period*).¹ BBC Research & Consulting (BBC) measured the participation of minority-, woman-, and service-disabled veteran-owned businesses in terms of *utilization*—the percentage of prime contract and subcontract dollars the City awarded to those businesses during the study period. For example, if 5 percent of City prime contract and subcontract dollars went to woman-owned businesses on a particular set of contracts, utilization of woman-owned businesses for that set of contracts and procurements would be 5 percent. The study team measured the participation of minority-, woman-, and service-disabled veteran-owned businesses regardless of whether they were certified as Small Local Business Enterprises (SLBEs) or Emerging Local Business Enterprises (ELBEs) by the City.

A. Minority- and Woman-owned Businesses

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

Figure 6-1.
Overall utilization analysis
results 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 utilization analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	5.9 %
Asian Pacific American-owned	1.1
Black American-owned	0.2
Hispanic American-owned	9.4
Native American-owned	0.3
Subcontinent Asian American-owned	2.1
Total Minority-owned	13.2 %
Total Minority- and Woman-owned	19.1 %

1. Overall. Figure 6-1 presents the percentage of total dollars minority- and woman-owned businesses received on relevant construction, professional services, and goods and other services prime contracts and subcontracts the City awarded during the study period. Minority- and woman-owned businesses considered together received 19.1 percent of the relevant contract and procurement dollars the City awarded during the study period. Less than half of those dollars—8.5 percent—went to minority- and woman-owned businesses that were

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

certified as SLBEs or ELBEs by the City. Hispanic American-owned businesses (9.4%) and non-Hispanic white woman-owned businesses (5.9%) exhibited the highest levels of participation.

2. Department. BBC examined utilization analysis results separately for Purchasing and Contracting (P&C) and Engineering & Capital Projects (E&CP) Department work, because each department is responsible for awarding different types of contracts and procurements. Whereas E&CP is responsible for awarding construction and architecture and engineering contracts, P&C is responsible for awarding goods and services contracts unrelated to construction and architecture and engineering. In addition, E&CP applies mandatory SLBE/ELBE contract goals to many of the contracts that it awards, whereas P&C only applies voluntary SLBE/ELBE goals. SLBE/ELBE goals are designed to encourage the participation of small and emerging local businesses, many of which are minority- and woman-owned businesses, in City work. BBC examined utilization analysis results separately for E&CP and P&C contracts and procurements, because doing so provides information about the efficacy of City’s use of SLBE/ELBE contract goals in encouraging the participation of minority- and woman-owned businesses in City work. As shown in Figure 6-2, the participation of minority- and woman-owned businesses considered together was much higher for E&CP contracts (21.1%) than for P&C contracts (12.0%).

Figure 6-2.
Utilization analysis results for E&CP and P&C work

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail and results by group, see Figures F-5 and F-6 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Department	
	E&CP	P&C
Non-Hispanic white woman-owned	6.7 %	3.3 %
Asian Pacific American-owned	1.2	0.6
Black American-owned	0.3	0.0
Hispanic American-owned	10.5	5.5
Native American-owned	0.4	0.0
Subcontinent Asian American-owned	1.9	2.6
Total Minority-owned	14.4 %	8.7 %
Total Minority- and Woman-owned	21.1 %	12.0 %

3. Contract role. Many minority- and woman-owned businesses are small businesses, and thus, often work as subcontractors, so it is useful to examine utilization analysis results separately for prime contracts and subcontracts. As shown in Figure 6-3, the participation of minority- and woman-owned businesses considered together was in fact higher for subcontracts (38.8%) the City awarded during the study period than for prime contracts (13.0%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts and thus may be more accessible to minority- and woman-owned businesses. In addition, it could be due to City’s use of SLBE/ELBE contract goals, which benefit woman-, minority-, and service-disabled veteran-owned firms that tend to be smaller in size and qualify for certification as SLBE or ELBE firms, to award many of its contracts during the study period.

Figure 6-3.
Utilization analysis results
by contract role

Note:

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

For more detail, see Figures F-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	3.7 %	13.3 %
Asian Pacific American-owned	0.4	3.3
Black American-owned	0.1	0.7
Hispanic American-owned	7.4	15.7
Native American-owned	0.0	1.5
Subcontinent Asian American-owned	1.4	4.3
Total Minority-owned	9.3 %	25.5 %
Total Minority- and Woman-owned	13.0 %	38.8 %

4. Industry. BBC also examined utilization analysis results separately for the City's construction, professional services, and goods and other services contracts and procurements to determine whether the participation of minority- and woman-owned businesses in City work differs by industry. As shown in Figure 6-4, the participation of minority- and woman-owned businesses considered together was highest for construction contracts (23.9%) and lowest for goods and other services contracts and procurements (6.5%).

Figure 6-4.
Utilization analysis
results by industry

Note:

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

For more detail and results by group, see Figures F-7, F-8, and F-9 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	6.7 %	4.9 %	3.6 %
Asian Pacific American-owned	0.8	1.6	2.0
Black American-owned	0.3	0.1	0.0
Hispanic American-owned	13.6	2.8	0.4
Native American-owned	0.3	0.5	0.0
Subcontinent Asian American-owned	2.1	2.3	0.6
Total Minority-owned	17.1 %	7.4 %	3.0 %
Total Minority- and Woman-owned	23.9 %	12.3 %	6.5 %

5. Time Period. BBC examined utilization analysis results separately for contracts and procurements that the City awarded in the early study period (i.e., July 1, 2014 – June 30, 2016) and the late study period (i.e., July 1, 2016 – June 30, 2019) to determine whether outcomes for minority- and woman-owned businesses changed over time. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was higher for the late study period (24.9%) than for the early study period (16.7%).

Figure 6-5.
Utilization analysis results
by time period

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Time Period	
	Early	Late
Non-Hispanic white woman-owned	6.0 %	5.8 %
Asian Pacific American-owned	1.0	1.5
Black American-owned	0.3	0.1
Hispanic American-owned	7.7	13.4
Native American-owned	0.4	0.2
Subcontinent Asian American-owned	1.3	3.9
Total Minority-owned	10.8 %	19.0 %
Total Minority- and Woman-owned	16.7 %	24.9 %

6. Contract Size. E&CP limits competition to certified SLBE/ELBE firms for construction contracts worth less than \$500,000, so it is useful to examine utilization analysis results separately for contracts and procurements worth \$500,000 or more (large) and those worth less than \$500,000 (small).² As shown in Figure 6-6, the participation of minority- and woman-owned businesses considered together was higher for small contracts (28.4%) than for large contracts (12.4%).

Figure 6-6.
Utilization analysis results
by contract size

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract Size	
	Small	Large
Non-Hispanic white woman-owned	9.5 %	3.4 %
Asian Pacific American-owned	1.6	0.4
Black American-owned	1.2	0.0
Hispanic American-owned	8.7	7.4
Native American-owned	0.0	0.0
Subcontinent Asian American-owned	7.5	1.2
Total Minority-owned	19.0 %	9.0 %
Total Minority- and Woman-owned	28.4 %	12.4 %

B. Service-Disabled Veteran-owned Businesses

BBC also examined utilization analysis results for service-disabled veteran-owned businesses. The participation of service-disabled veteran-owned businesses in City contracts and procurements was 3.4%.

² The City limits competition for E&CP contracts worth less than \$250,000 to ELBE bidders. If there are no eligible ELBE bidders for a contract of that size, then the City opens the opportunity to SLBEs. The City limits competition for E&CP contracts worth between \$250,000 and 500,000 to both ELBE and SLBE bidders. When no SLBE/ELBE bidders are eligible for a E&CP contract worth less than \$500,000, the opportunity is opened to all businesses. Application of program may not apply if state or federal funding exists.

C. Concentration of Dollars

BBC analyzed whether the contracting and procurement dollars the City awarded to each relevant business group during the study period were spread across a relatively large number of businesses or were concentrated with relatively few businesses. The study team assessed that question by calculating:

- The number of different businesses within each group to which the City awarded contracting dollars during the study period; and
- The number of different businesses within each group that accounted for 75 percent of the group’s total contracting dollars during the study period.

Figure 6-7 presents those results for each relevant business group. Most notably, although the City awarded contract and procurement dollars to 126 different Hispanic American-owned businesses, 14 of them (or, 11.1%) accounted for 75 percent of those dollars. By itself, one Hispanic American-owned business accounted for 25 percent of all dollars that were awarded to Hispanic American-owned businesses. Similarly, although the City awarded contracting dollars to 45 different service-disabled veteran-owned businesses during the study period, 6 of them (or, 13.3%) accounted for 75 percent of those dollars. By itself, one service-disabled veteran-owned business accounted for 39 percent of the dollars awarded to all service-disabled veteran-owned businesses.

Figure 6-7.
Concentration of City contracting dollars that went to minority-, woman-, and service-disabled veteran-owned businesses

Source:
 BBC Research & Consulting utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	161	34	21.1 %
Asian Pacific American-owned	25	6	24.0
Black American-owned	16	6	37.5
Hispanic American-owned	126	14	11.1
Native American-owned	12	3	25.0
Subcontinent Asian American-owned	16	4	25.0
Service-Disabled Veteran-owned	45	6	13.3

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority-, woman-, and service-disabled veteran-owned businesses in prime contracts and subcontracts the City of San Diego (City) awarded between July 1, 2014 and June 30, 2019 (i.e., the *study period*) with the percentage of contract dollars those businesses might be expected to receive based on their *availability* for that work.¹ The analysis focused on construction, professional services, and goods and other services contracts and procurements the City awarded during the study period. Chapter 7 presents the disparity analysis in three parts:

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

A. Overview

BBC expressed both participation and availability as percentages of the total dollars associated with a particular set of contracts or procurements, and then calculated a *disparity index* to help compare participation and availability results across relevant business groups and contract sets using the following formula:

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

A disparity index of 100 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity ratio of less than 100 indicates a *disparity* between participation and availability. That is, the group is considered to have been *underutilized* relative to its availability. Finally, a disparity index of less than 80 indicates a *substantial disparity* between participation and availability. That is, the group is considered to have been *substantially underutilized* relative to its availability. Many courts have considered substantial disparities as *inferences of discrimination* against particular business groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.²

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

² For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association 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).

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

- Construction, professional services, and goods and other services work;
- Different City departments; and
- Prime contracts and subcontracts.

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

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

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as Small Local Business Enterprises (SLBEs) or Emerging Local Business Enterprises (ELBEs) by the City.
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as SLBEs/ELBEs by the City.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as SLBEs/ELBEs by the City.
- Rows (5) through (10) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as SLBEs/ELBEs by the City.
- Rows (11) through (19) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as SLBEs/ELBEs by the City.

The tables in Appendix F do not present disparity analysis results separately for service-disabled veteran-owned businesses. Those results are presented at the end of Chapter 7.

1. Utilization analysis results. Each results table includes the same columns of information:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 4,016 contract elements the City awarded during the study period. The values presented in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (6) of column (a), Black American-owned businesses participated in 41 prime contracts and subcontracts the City awarded during the study period.

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

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,016	\$2,171,712	\$2,171,712				
(2) Minority and woman-owned businesses	1,709	\$415,176	\$415,176	19.1	31.0	-11.8	61.7
(3) Non-Hispanic white woman-owned	628	\$129,172	\$129,172	5.9	16.6	-10.7	35.8
(4) Minority-owned	1,081	\$286,004	\$286,004	13.2	14.4	-1.2	91.7
(5) Asian Pacific American-owned	104	\$24,307	\$24,307	1.1	1.2	-0.1	94.4
(6) Black American-owned	41	\$4,888	\$4,888	0.2	1.1	-0.9	19.8
(7) Hispanic American-owned	757	\$204,313	\$204,313	9.4	10.0	-0.6	93.8
(8) Native American-owned	72	\$7,514	\$7,514	0.3	1.7	-1.4	19.8
(9) Subcontinent Asian American-owned	107	\$44,982	\$44,982	2.1	0.3	1.8	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (certified)	1,182	\$184,885	\$184,885	8.5			
(12) Non-Hispanic white woman-owned (certified)	348	\$56,504	\$56,504	2.6			
(13) Minority-owned (certified)	834	\$128,381	\$128,381	5.9			
(14) Asian Pacific American-owned (certified)	0	\$0	\$0	0.0			
(15) Black American-owned (certified)	28	\$3,128	\$3,128	0.1			
(16) Hispanic American-owned (certified)	573	\$72,828	\$72,828	3.4			
(17) Native American-owned (certified)	65	\$7,029	\$7,029	0.3			
(18) Subcontinent Asian American-owned (certified)	99	\$32,452	\$32,452	1.5			
(19) Unknown minority-owned (certified)	0	\$0					

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

Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6.

Source: BBC Research & Consulting disparity analysis.

- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-1, BBC examined approximately \$2.2 billion for the entire set of contract elements. The dollar totals include both prime contracts and subcontracts dollars. The value presented in column (b) for each individual business group represents the dollars businesses of that particular group received on the set of contract elements. For example, as shown in row (6) of column (b), Black American-owned businesses received approximately \$4.9 million of the prime contracts and subcontracts the City awarded during the study period.
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses BBC identified as minority-owned but for which specific race/ethnicity information was not available. Amounts in columns (b) and (c) are equal, because there were no minority-owned businesses with unknown race/ethnicity.
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Black American-owned businesses, the study team divided \$4.9 million by \$2.2 billion and multiplied by 100 for a result of 0.2 percent, as shown in row (6) of column (d).

2. Availability results. Column (e) of Figure 7-1 presents the availability of each relevant group for all contract elements BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts. For example, as shown in row (6) of column (e), the availability of Black American-owned businesses for City work is 1.1 percent. That is, Black American-owned businesses might be expected to receive 1.1 percent of City contract and procurement dollars based on their availability for that work.

3. Differences between participation and availability. Column (f) of Figure 7-1 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group for City work. For example, as presented in row (6) of column (f) of Figure 7-1, the participation of Black American-owned businesses in City contracts and procurements was less than their availability for that work by a difference of 0.9 percentage points.

4. Disparity indices. BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (g) of Figure 7-1 presents the disparity index for each group. For example, as reported in row (6) of column (g), the disparity index for Black American-owned businesses was approximately 19.8, indicating that Black American-owned businesses actually received approximately \$0.20 for every dollar they might be expected to receive based on their availability for the prime contracts and subcontracts the City awarded during the study period. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.

B. Disparity Analysis Results

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

1. Minority-and woman-owned businesses. BBC assessed disparities between participation and availability for all minority- and woman-owned businesses considered together and separately for each relevant racial/ethnic and gender group.

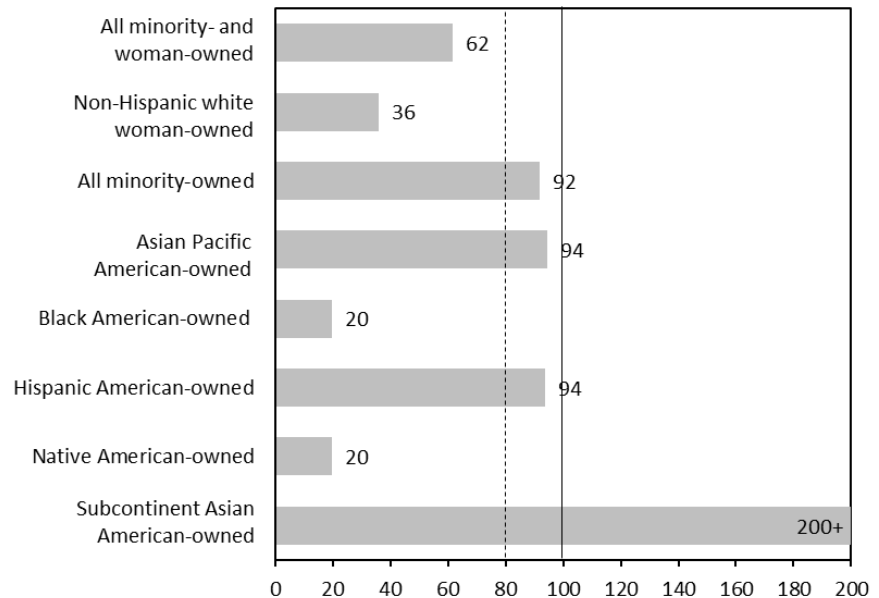
a. Overall. Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts the City awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, indicating a substantial disparity. As shown in Figure 7-2, minority- and woman-owned businesses considered together exhibited a substantial disparity (disparity index of 62) for City contracts and procurements indicating that those businesses only received \$0.62 for every dollar one would expect them to receive based on their availability for that work. Disparity analysis results differed across individual business groups:

- Non-Hispanic white women owned businesses (disparity index of 36), Black American-owned businesses (disparity index of 20), and Native American-owned businesses (disparity index of 20) showed substantial disparities.
- Asian Pacific American-owned businesses (disparity index of 94) and Hispanic American-owned businesses (disparity index of 94) exhibited disparities, although a disparity index of 94 is not considered substantial.

Figure 7-2.
Overall disparity analysis results by racial/ethnic and gender group

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

Source:
BBC Research & Consulting disparity analysis.



b. Department. BBC examined disparity analysis results separately for Purchasing and Contracting (P&C) and Engineering & Capital Projects (E&CP) work, because each department is responsible for awarding different types of contracts and procurements. Whereas E&CP is responsible for awarding construction and architecture and engineering contracts, P&C is responsible for awarding goods and services contracts unrelated to construction and architecture and engineering. In addition, E&CP applies mandatory SLBE/ELBE contract goals to many of the contracts that it awards, whereas P&C only applies voluntary goals. SLBE/ELBE goals are designed to encourage the participation of small and emerging local businesses, many of which are minority- and woman-owned businesses, in City work. Examining disparity analysis results separately for E&CP and P&C contracts and procurements provides information about the efficacy of the City's use of SLBE/ELBE contract goals in encouraging the participation of minority- and woman-owned businesses in City work. F

Figure 7-3 presents disparity analysis results separately for E&CP and P&C contracts and procurements. As shown in Figure 7-3, minority- and woman-owned businesses considered together exhibited a substantial disparity on P&C contracts and procurements (disparity index of 24) indicating that those businesses only received \$0.24 for every dollar one would expect them to receive based on their availability for that work. Minority- and woman-owned businesses considered together also exhibited a disparity on E&CP contracts and procurements (disparity index of 81), although a disparity index of 81 is not considered substantial. Disparity analysis results differed between departments and across individual business groups:

- Non-Hispanic white woman-owned businesses (disparity index of 8), Black American-owned businesses (disparity index of 0), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on P&C contracts and procurements.
- Non-Hispanic white woman-owned businesses (disparity index of 64) and Native American-owned businesses (disparity index of 20) exhibited substantial disparities on E&CP contracts and procurements. Asian Pacific American-owned businesses (disparity index of 88) and Hispanic American-owned businesses (disparity index of 92) also showed disparities on E&CP contracts and procurements, although disparities indices of 88 and 92 are not considered substantial.

Disparity analysis results between E&CP and P&C work suggest that E&CP's use of mandatory SLBE/ELBE contract goals is somewhat effective in reducing disparities between the participation and availability of minority- and woman-owned businesses for City work, at least for some groups.

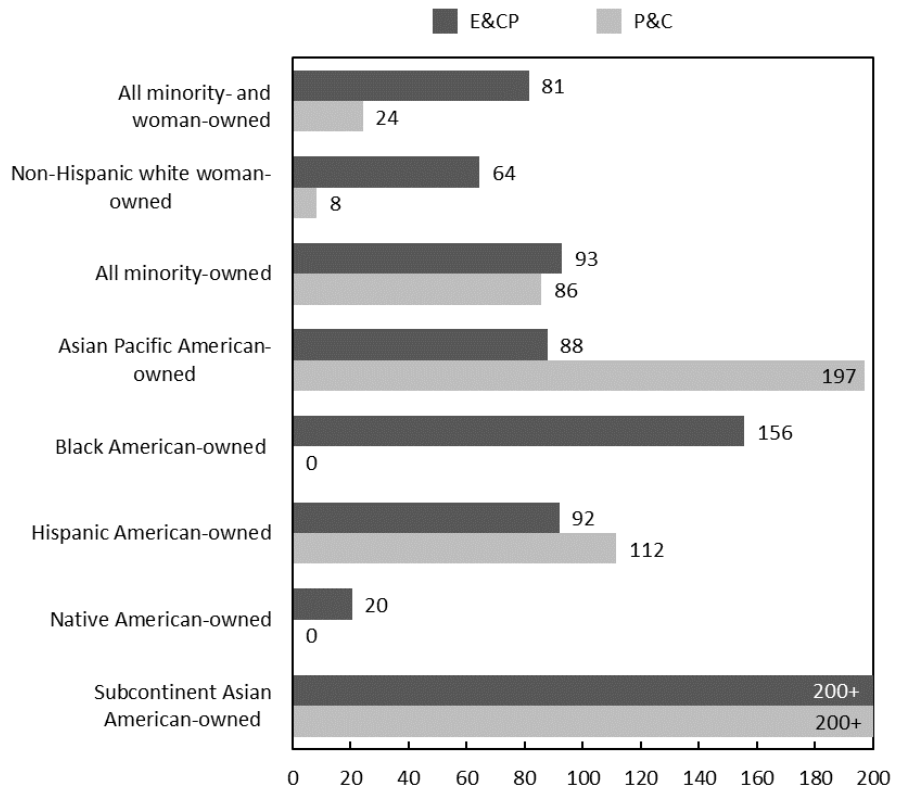
Figure 7-3.
Disparity analysis
for E&CP and P&C
work

Note:

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

Source:

BBC Research & Consulting disparity analysis.



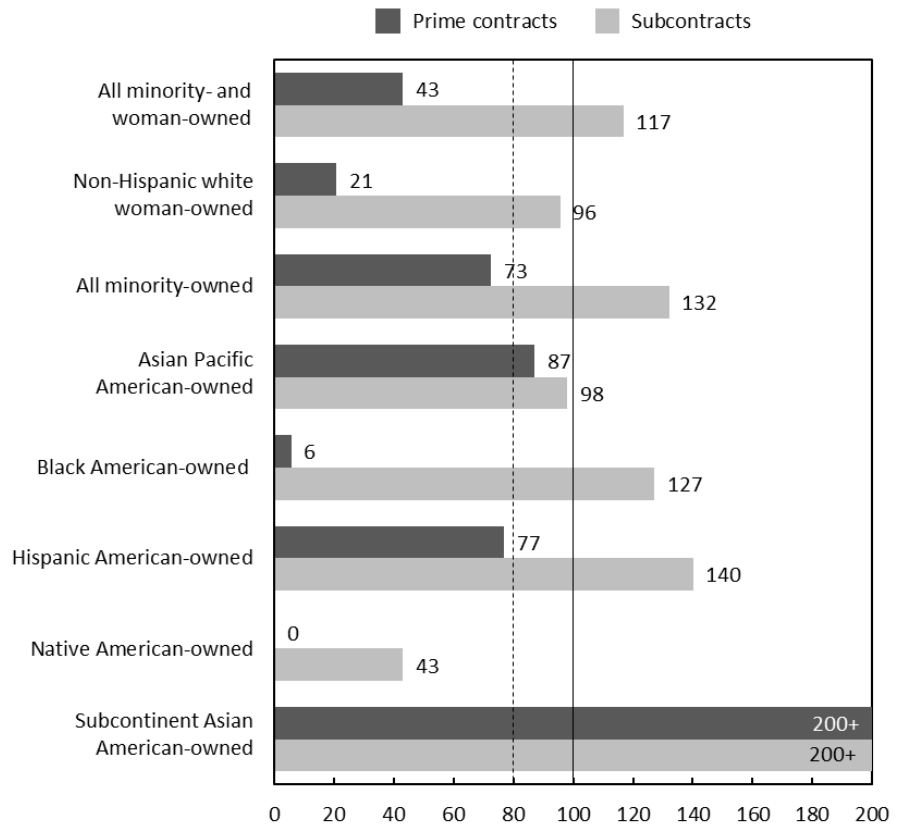
c. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine disparity analysis results separately for prime contracts and subcontracts. As shown in Figure 7-4, minority- and woman-owned businesses considered together exhibited substantial disparities on prime contracts that the City awarded (disparity index of 43), indicating that those businesses only received \$0.43 for every dollar one would expect them to receive based on their availability for that work. Minority- and woman-owned businesses did not exhibit a disparity on subcontracts that the City awarded during the study period (disparity index of 117). Disparity analysis results differed across individual business groups:

- Non-Hispanic white woman-owned businesses (disparity index of 21), Black American-owned businesses (disparity index of 6), Hispanic American-owned businesses (disparity index of 77), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on prime contracts awarded during the study period. Asian Pacific American-owned businesses also exhibited a disparity on prime contracts (disparity index of 87), although a disparity index of 87 is not considered substantial.
- Native American-owned businesses (disparity index of 43) was the only group that exhibited a substantial disparity on subcontracts awarded during the study period.

Figure 7-4.
Disparity analysis
results by contract
role

Note:
 For more detail, see Figures
 F-10 and F-11 in Appendix F.

Source:
 BBC Research & Consulting
 disparity analysis.



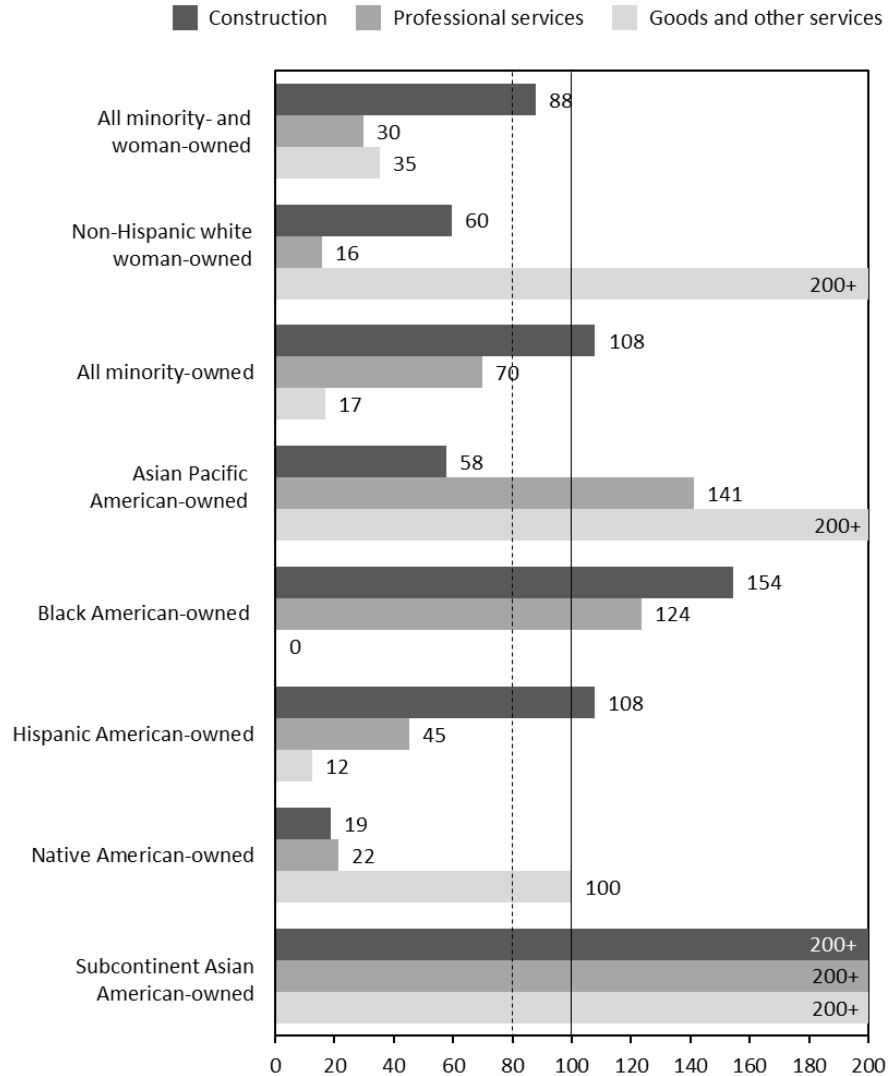
d. Industry. BBC examined disparity analysis results separately for the City’s construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by work type. As shown in Figure 7-5, minority- and woman-owned businesses considered together exhibit substantial disparities on professional services contracts (disparity index of 30) and goods and other services contracts (disparity index of 35) indicating that those businesses only received \$0.30 and \$0.35, respectively, for every dollar one would expect them to receive based on their availability for that work. Minority- and woman-owned businesses considered together also exhibited a disparity on construction contracts (disparity index of 88), although a disparity index of 88 is not considered substantial. Disparity analysis results differed across individual business groups and work type:

- Non-Hispanic white woman-owned businesses (disparity index of 60), Asian Pacific American-owned businesses (disparity index of 58), and Native American-owned businesses (disparity index of 19) exhibited substantial disparities on construction contracts.
- Non-Hispanic white woman-owned businesses (disparity index of 16), Hispanic American-owned businesses (disparity index of 45), and Native American-owned businesses (disparity index of 22) exhibited substantial disparities on professional services contracts.
- Black American-owned businesses (disparity index of 0) and Hispanic American-owned businesses (disparity index of 12) exhibited substantial disparities on goods and other services contracts.

Figure 7-5.
Disparity analysis
results by industry

Note:
 For more detail and results by group, see Figures F-7, F-8, and F-9 in Appendix F.

Source:
 BBC Research & Consulting disparity analysis.



e. Time period. BBC examined disparity analysis results separately for contracts and procurements that the City awarded in the early study period (i.e., July 1, 2014 – June 30, 2016) and the late study period (i.e., July 1, 2016 – June 30, 2019) to determine whether outcomes for minority- and woman-owned businesses changed over time. As shown in Figure 7-6, minority- and woman-owned businesses considered together exhibited a substantial disparity on contracts awarded during the early study period (disparity index of 52) indicating that those businesses only received \$0.52 for every dollar one would expect them to receive based on their availability for that work. Minority- and woman-owned businesses considered together also exhibited a disparity on contracts awarded during the late study period (disparity index of 90), although a disparity index of 90 is not considered substantial. Disparity analysis results differed across individual business groups:

- Non-Hispanic white woman-owned businesses (disparity index of 32), Black American-owned businesses (disparity index of 25), and Native American-owned businesses (disparity index of 24) exhibited substantial disparities on contracts awarded during the early study period. Hispanic American-owned businesses (disparity index of 82) also

exhibited a disparity on early study period contracts, although a disparity index of 82 is not considered substantial.

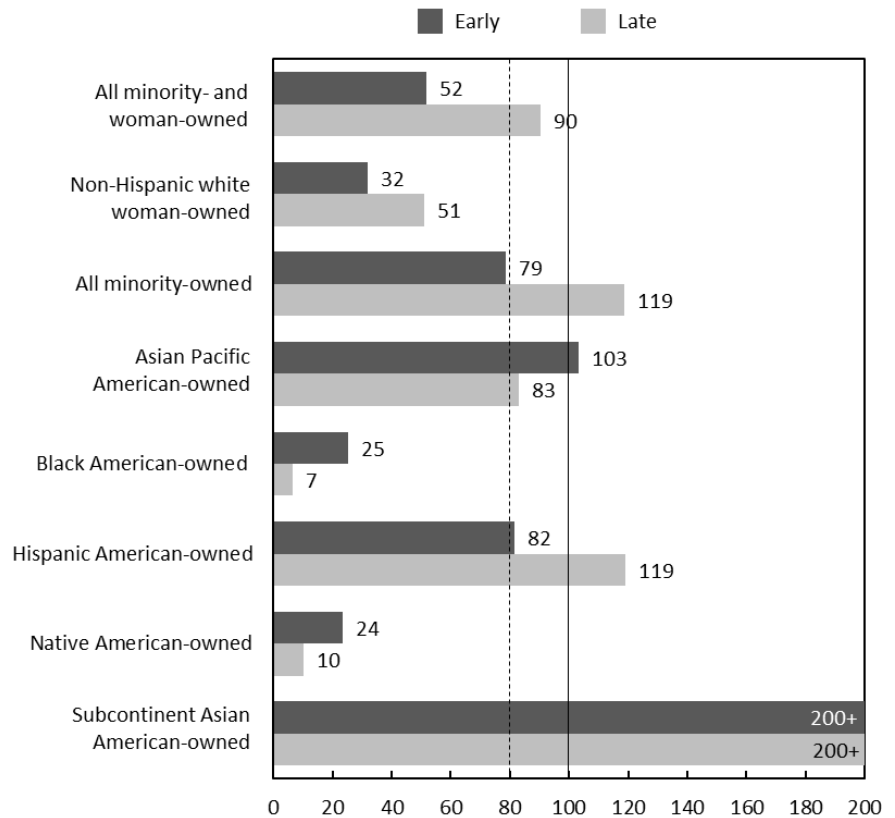
- Non-Hispanic white woman-owned businesses (disparity index of 51), Black American-owned businesses (disparity index of 7), and Native American-owned businesses (disparity index of 10) exhibited substantial disparities on contracts awarded during the late study period. Asian Pacific American-owned businesses (disparity index of 83) also showed a disparity on late study period contracts, although a disparity index of 83 is not considered substantial.

The difference in disparity analysis results between the early study period and late study period could be due to the fact that the average size of contracts that the City awarded in the late study period was larger than in the early study period, resulting in lower availability for minority- and woman-owned businesses, and thus, smaller disparities. In addition, two of the largest contracts that the City awarded to minority-owned businesses during the study period were awarded during the late study period.

Figure 7-6.
Disparity analysis
results by time period

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail, see Figures F-3 and F-4 in Appendix F.

Source:
BBC Research & Consulting disparity analysis.



f. Contract size. E&CP limits competition on construction contracts worth less than \$500,000 to certified SLBE/ELBE firms, so it is useful to examine disparity analysis results separately for contracts and procurements worth \$500,000 or more (large contracts) and those worth less

than \$500,000 (small contracts).³ As shown in Figure 7-7, minority- and woman-owned businesses considered together exhibited a substantial disparity on large contracts (disparity index of 41) indicating that those businesses only received \$0.41 for every dollar one would expect them to receive based on their availability for that work. Minority- and woman-owned businesses considered together also exhibited a disparity on small contracts (disparity index of 83), although a disparity index of 83 is not considered substantial. Disparity analysis results differed across individual business groups:

- Non-Hispanic white woman-owned businesses (disparity index of 78), Black American-owned businesses (disparity index of 46), Hispanic American-owned businesses (disparity index of 57), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on small contracts.
- Non-Hispanic white woman-owned businesses (disparity index of 20), Black American-owned businesses (disparity index of 3), Hispanic American-owned businesses (disparity index of 78), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on large contracts. Asian Pacific American-owned businesses (disparity index of 84) also exhibited a disparity on large contracts, although a disparity index of 84 is not considered substantial.

2. Service-disabled veteran-owned businesses. BBC also examined disparities between the participation and availability of service-disabled veteran-owned businesses for City contracts and procurements. Disparity analysis results indicated that service-disabled veteran-owned businesses (disparity index of 73) exhibited substantial disparities on City contacts and procurements, indicating that those businesses only received \$0.73 for every dollar one would expect them to receive based on their availability for that work.

C. Statistical Significance

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

1. Overview of Monte Carlo. BBC used a Monte Carlo approach to randomly select businesses to “win” each individual contract element that was included in the disparity study. For each contract element, the availability analysis provided information on individual businesses available to perform that contract element based on type of work, contractor role, contract size, and other factors. BBC assumed that each available business had an equal chance of winning the contract element, so the odds of a business from a certain group winning it were equal to the number of businesses from that group available for it divided by the total number of

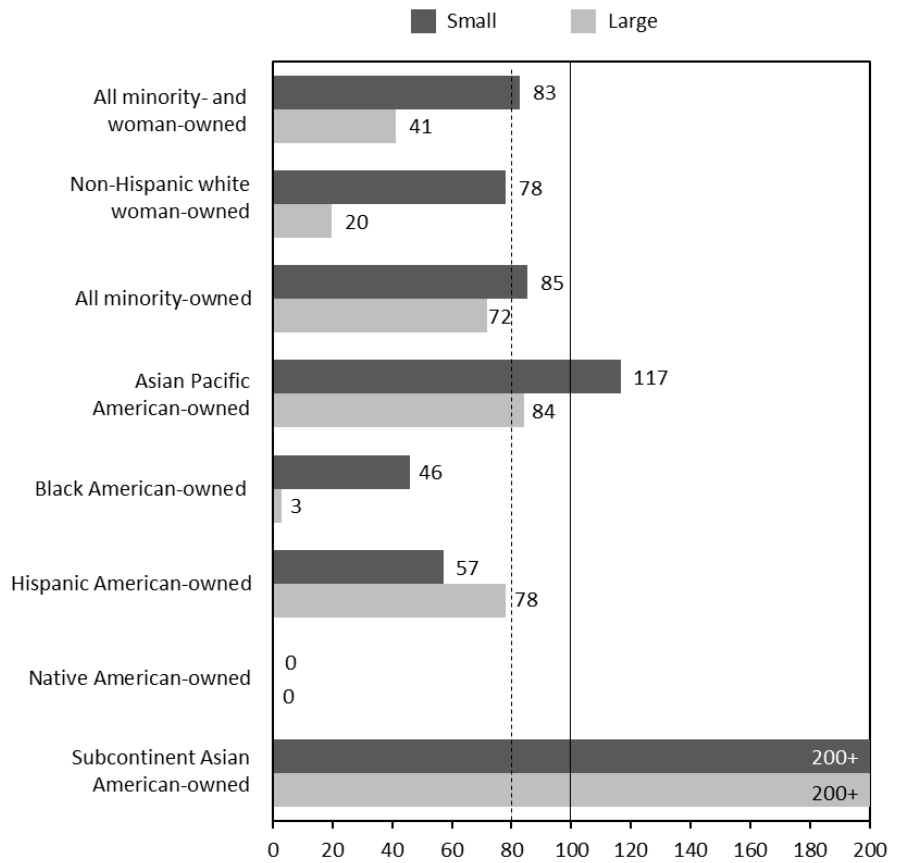
³ The City limits competition for PWC contracts worth less than \$250,000 to ELBE bidders. If there are no eligible ELBE bidders for a contract of that size, then the City opens the opportunity to SLBEs. The City limits competition for PWC contracts worth between \$250,000 and 500,000 to both ELBE and SLBE bidders. When no SLBE/ELBE bidders are eligible for a PWC contract worth less than \$500,000, the opportunity is opened to all businesses.

businesses available for it. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to win the contract element.

Figure 7-7.
Disparity analysis
results by contract
size

Note:
 Numbers rounded to nearest
 tenth of 1 percent and thus
 may not sum exactly to totals.
 For more detail, see Figures
 F-12 and F-13 in Appendix F.

Source:
 BBC Research & Consulting
 disparity analysis.



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

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

2. Results. BBC ran Monte Carlo simulations on all City contracts and procurements considered together to assess whether the substantial disparities that relevant business groups exhibited

for those contracts and procurements were statistically significant. As shown in Figure 7-8, results from the Monte Carlo analysis indicated that the disparity that all minority- and woman-owned businesses considered together exhibited for all City contracts and procurements was statistically significant at the 95 percent confidence level, as were the disparities that non-Hispanic white woman-owned businesses, Black American-owned businesses, and Native American-owned businesses exhibited for all City contracts and procurements.

Figure 7-8
Monte Carlo simulation results for all City contracts and procurements

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
Minority-owned and woman-owned	62	0	<0.1 %
Non-Hispanic white woman-owned	36	0	<0.1 %
Minority-owned	92	201,363	20.1 %
Asian Pacific American-owned	94	440,679	44.1 %
Black American-owned	20	100	<0.1 %
Hispanic American-owned	94	325,642	32.6 %
Native American-owned	20	0	<0.1 %
Subcontinent Asian American-owned	200+	N/A	N/A %

Source: BBC Research & Consulting disparity analysis.

CHAPTER 8.

Program Measures

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Program Measures

As part of implementing the Small Local Business Enterprise (SLBE) Program, the City of San Diego (City) uses various *race- and gender-neutral* measures to encourage the participation of small businesses, minority-owned businesses, woman-owned businesses, and service-disabled veteran-owned businesses in its contracting.¹ Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an organization’s contracting. Participation in such measures is not limited to minority- and woman-owned businesses. In contrast, race- and gender-conscious measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization’s contracting (e.g., using minority-owned business subcontracting goals on individual contracts). The City does not currently use any race- or gender-conscious measures as part of its contracting or procurement processes.

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

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

A. Program Overview

The City implements the SLBE Program to encourage the participation of small businesses, minority-owned businesses, woman-owned businesses, and service-disabled veteran-owned businesses in its contracting and procurement. To be SLBE or ELBE-certified, a business must:

- Be headquartered in San Diego County;
- Be in business for at least one year; and
- Earn an average income below an industry-based threshold over a three-year period. The income thresholds for SLBEs are \$7 million for general construction, \$4.5 million for

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

specialty construction and general services, and \$3 million for professional services. The thresholds for ELBEs are one-half of those for SLBEs.

The City's Equal Opportunity Contracting (EOC) Program is responsible for certifying SLBEs and ELBEs. Once businesses submit documentation verifying they are eligible for SLBE or ELBE certification, staff will review the documents. When resources are available, staff may also conduct site visits with the applying businesses. In addition, businesses that are certified by the state of California as microbusinesses or disabled veteran-owned businesses may be automatically certified as SLBEs. The EOC Program is also responsible for maintaining a list of SLBE/ELBE-certified businesses, reporting annually on the participation of certified firms, including certified SLBE or ELBEs and outreach, and reviewing SLBE/ELBE participation goals on individual construction contracts set by the Goal Setting Committee established by the City.

B. Race- and Gender-Neutral Measures

As part of the SLBE Program, the City uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many minority-, woman-, and service-disabled veteran-owned businesses—in its contracting. The City uses the following types of race- and gender-neutral measures:

- Outreach;
- Partnerships; and
- Contract goals with strict good-faith effort requirements.

1. Outreach. The City participates in various outreach events, which are designed to further develop relationships between local businesses and the City as well as between prime contractors and subcontractors.

a. Meet the Primes. For large, multiple-award construction contracts (known as MACC), the City hosts “Meet the Prime” events, during which potential subcontractors can meet with the shortlist of prime contractor bidders.

b. SLBE vendor list. The City updates its certified SLBE vendor list weekly and posts it on its website so primes can find SLBEs with which to work.

c. Quarterly industry meetings. The City also holds quarterly industry meetings for SBLE/ELBEs to help them network with each other and learn about upcoming contract and procurement opportunities. The meetings are part of the larger Capital Improvements Program Transparency policy that City Council enacted in 2012.

2. Partnerships. The City engages in various partnerships with other local organizations to encourage the participation of SLBE/ELBEs in City work, including participating in a consortium of local agencies and operating a mentor-protégé program.

a. Public Agency Consortium (PAC). The City is a part of the PAC, which serves as a “one stop shop” for small businesses in the San Diego region to gain information about public contracting opportunities. The PAC includes agencies such as the San Diego Association of Governments, the

California Department of Transportation, and others. The agencies in the PAC share resources, such as contractor databases, as well as host events together and publicize each other's events. They also host "Meet the Buyer" fairs, in which vendors, including many minority-, woman-, and service-disabled veteran-owned businesses, can meet with individual agencies and learn about their procurement and contracting processes.

b. C&C Mentor Protégé Program. The City also helps facilitate the C&C Mentorship Protégé Program. The program fosters relationships between large businesses and small businesses, which can include SLBEs/ELBEs, to develop the business' expertise, capacity-building skills, networking efforts, and more.

c. Calmentor. Caltrans North Region Consultant Services Unit (CSU), in conjunction with the San Diego Association of Governments (SANDAG), have implemented an Architectural & Engineering (A&E) mentor-protégé program, also known as "Calmentor". This program is designed to encourage and support small businesses through voluntary partnerships with mid-size and larger firms. As part of the steering committee for District 11's implementation of Calmentor, the City of San Diego assists in developing program materials for the mentorship program.

3. Contract Goals and Strict Good Faith Effort Requirements. The City uses SLBE/ELBE participation goals to award individual contracts and has relatively strict good faith efforts (GFE) requirements in place that ensure prime contractors make opportunities available for SLBE/ELBEs to participate as subcontractors on construction contracts.

a. Goals setting. The City sets goals for the participation of SLBE/ELBEs based on contract size and work type for city-funded public works construction contracts.

i. Public Works construction . For construction contracts worth less than \$250,000, the City restricts competition to ELBEs. If at least two ELBEs are not available or responsive, SLBEs may also bid. If SLBEs are not responsive, any businesses can bid. For construction contracts worth between \$250,000 and \$500,000, the City restricts competition to SLBEs and ELBEs. If SLBEs or ELBEs are not available or responsive, any businesses can bid. For construction contracts worth between \$500,000 and \$1 million, SLBEs/ELBEs that bid, or prime contractors who meet or exceed the mandatory subcontracting goal, receive a 5 percent bid discount of up to \$50,000 above the lowest non-discounted bidder. Contracts valued at \$500,00 or more will include mandatory goals, or if the mandatory goal cannot be met, submittal of good faith effort documentation, based on SLBE/ELBE availability, is required.

ii. Professional services. For consulting contracts worth more than \$50,000, the City applies preference points to a bidder's final score based on SLBE or ELBE participation, as outlined in Council Policy 100-10. The City is also in the process of developing set-aside policies for professional services contracts.

iii. Goods and services. For all goods and services contracts worth more than \$50,000, the City implements a voluntary 20 percent goal for the participation of SLBE/ELBEs. The City also offers a 5 percent bid discount up to \$50,000 over the lowest non-discounted bidder to SLBE/ELBEs

submitting bids as prime contractors or to non-SLBE/ELBE prime contractors that meet the 20 percent goal.

b. Good-Faith Effort Requirements. In the event that prime contractors cannot meet mandatory SLBE/ELBE goals on City-funded construction contracts, they are required to show proof that they sufficiently tried to partner with such businesses, including:

- Written solicitations at least 10 days prior to bid opening specifying as many work items as possible available for subcontracting;
- Making plans and specifications available to interested SLBE/ELBEs;
- Providing assistance to SLBE/ELBEs in obtaining necessary equipment, bonding, and insurance;
- Soliciting all certified SLBE/ELBEs that work in relevant NAICS codes, excluding those that do not provide subcontracting work;
- Follow-up communications with all interested SLBE/ELBEs, including at least three follow-up calls;
- Documentation of subcontractor bid information, including reasons for selection or non-selection; and
- Contacting at least five local organizations to assist in recruiting SLBE/ELBEs for the work.

C. Workforce Participation Program

The EOC Program requires prime contractors to submit a workforce report after winning a contract but before beginning work. The report includes company information and the race and gender of administrative staff. It also includes the race and gender information of the trade workforce that will be working on the project, if the contract is related to construction. The EOC Program compares that information against county demographic information to identify any discrepancies. If substantial under representation exists, the prime contractor is required to submit an Equal Employment Opportunity (EEO) plan and may be subject to an Equal Employment Opportunity audit to verify the plan is being implemented.

D. Other Organizations' Program Measures

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

Figure 8-1.

Race- and gender-neutral program measures that organizations in San Diego use

Type	Program
Technical Assistance	<p>The San Diego Public Library provides numerous resources for small businesses and entrepreneurs in the local area at no cost to the user. The library offers an e-library collection that provides business plan reference materials for small businesses seeking funding as well as an in-depth “Small Business Resource Center” section. The “Small Business Resource Center” helps small businesses learn how to start, finance, or manage a small business. Resources include sample business plans, how-to guides, articles, and websites.</p>
	<p>The Labor & Workforce Development Agency provides resources for employers and workers such as financial and technical assistance for small businesses and is updated frequently to cover account for impacts of the COVID-19 pandemic. Webinars are also made available for small business that cover important and relevant topics such as “Navigating Federal Funding in the Time of COVID-19.” Numerous other resources are available for small businesses and start-ups.</p>
	<p>The Small Business Centers Map from the California Governor’s Office of Business and Economic Development provides a map showing California Technical Assistance Providers. California Technical Assistance Providers offer free one-on-one consulting at no cost or low-cost to help businesses get funded, enter new markets, and strengthen operations.</p>
	<p>The Office of the Small Business Advocate (SB Advocate) helps to ensure that California’s small businesses and entrepreneurs have the information, tools, and resources they need to plan, launch, manage, and grow their businesses successfully and to be resilient. The SB Advocate helps support economic growth and innovation by elevating the voices of small businesses in state government and advocates on their behalf to help ensure all aspiring and current small business owners and entrepreneurs are provided with the opportunity to access capital, access markets, and connect to the networks and resources they need to succeed.</p>
	<p>The California Small Business Development Center (SBDC) has multiple locations but the lead center is the San Diego & Imperial Regional Network location. SBDC provides direct and personalized technical assistance through professional consulting, low-cost or free seminars and conferences as well as: regulatory compliance, procurement, contracting opportunities, financing, and best practices for small businesses etc. Capital access assistance is also available for small businesses who would like to request assistance with small business loans and other capital. Furthermore, SBDC hosts business trainings and workshops for small businesses throughout San Diego County.</p>
	<p>The University of San Diego Small Business Development Office seeks to improve small business participation by creating opportunities for underutilized small businesses that contribute to the overall growth and expansion of the university's strategic initiatives and programs. The majority of relevant resources for small businesses involves topics related to local licensing and registering as a supplier. In addition, the organization also makes resources available to become certified as a small business.</p>
	<p>The San Diego East County Economic Development Council, along with its sister organization the East County Economic Development Council Foundation, has a small business development center as well as procurement technical assistance center to help small business effectively compete for and perform on government contracts.</p>
	<p>The Procurement Technical Assistance Center (PTAC) is an economic development program from Southwestern College that serves San Diego, Orange, and Imperial Counties and helps small businesses with information, resources, and technical assistance to effectively compete for and perform on federal, state, and local government contracts.</p>
<p>The San Diego Chapter of the National Defense Industrial Association (NDIA), Department of Navy Gold Coast: Small Business Procurement Event is the premier Navy procurement conference in the county. It provides a forum to educate, guide, and assist businesses, large and small, in support of the warfighter mission within the Department of the Navy and throughout the Department of Defense.</p>	

Figure 8-1 (continued).

Race- and gender-neutral program measures that organizations in San Diego use

Type	Program
<p>Technical Assistance</p>	<p>The District 11 Small Business Council from the California Department of Transportation (Caltrans) was established to promote effective implementation of federal and state requirements and helps with issues relating to participation in Caltrans contracts for the San Diego region. The Small Business Council hosts forums in which interested small businesses can offer suggestions from their unique perspectives in an advisory capacity on Caltrans's practices and procedures. The Small Business Council also provides networking opportunities for small businesses as it is comprised of individuals from business trade associations, Caltrans, construction industry representatives, public agency partners, and various other businesses.</p>
	<p>The Council for Supplier Diversity has been a nonprofit organization since 1999 that facilitates corporate outreach to disadvantaged businesses. The organization seeks to facilitate business opportunities and market share growth for minority, woman, and service-disabled businesses through interaction with its corporate members. Technical assistance and business development opportunities with the Council for Supplier Diversity include a "Diverse Business Development Center," certification services, and legal support services, among other opportunities and resources.</p>
	<p>The Diversity Supplier Alliance (DSA) is based in San Diego and provides support and guidance through the diversity certification application process in order to expand opportunities for minority- and woman-owned businesses. In addition to certification assistance, DSA also provides consultations, project management, strategic planning, training, and business consultation.</p>
	<p>The San Diego International Airport's Small Business Development Department strives to create a level playing field for workers of all genders and ethnicities. Small businesses, minority- and woman-owned businesses, and service disabled veteran-owned business in San Diego County are provided resources and assistance with certification in order to allow them the opportunity to bid on airport projects.</p>
<p>Advocacy and Outreach</p>	<p>The Women's Foundation of California is a statewide, publicly supported foundation dedicated to achieving racial, economic, and gender justice. The organization works to invest in, train, and connect community leaders to advance gender, racial, and economic justice. The organization provides grants to community-led organizations, training through the Women's Policy Institute, and fostering a community of advocates, donors, policymakers, grant makers, academics and many others through convenings to share knowledge and strengthen the social justice movement in California. The organization hosts events to provide networking opportunities and support businesses in various development areas.</p>
	<p>The Latino Community Foundation (LCF) connects civically engaged philanthropic leaders to Latino-led organizations, thereby increasing political participation of Latinos in California. This organization provides advocacy and outreach opportunities and are the largest network of Latino philanthropists in the county.</p>
	<p>The San Diego Unified School District – Construction Management Department provides the necessary staff and resources to each Facilities Planning & Construction (FPC) project for construction and inspections. In addition to its primary responsibilities, San Diego Unified School District also has a robust outreach program that supports local, small, and emerging businesses. The program features a proprietary database, hands-on small business outreach and networking efforts, one-on-one meetings with contractors, workshops on how to do business with the district, a quarterly newsletter, and more. The department hosts an annual "Construction Expo," which shares advice, requirements, and tips for winning subcontracts on San Diego Unified construction projects.</p>

Figure 8-1 (continued).

Race- and gender-neutral program measures that organizations in San Diego use

Type	Program
Advocacy and Outreach	<p>The San Diego Association of Governments (SANDAG) Diversity in Small Contractor Opportunities (DISCO) program was developed specifically to outreach to small and Disadvantaged Business Enterprises (DBE) that want to work on SANDAG contracts. The program also advocates for small and disadvantaged businesses by providing training, guidance, and strategies for maximizing opportunities in government contracts with SANDAG and in the local market area.</p>
	<p>The San Diego & Imperial Women’s Business Center (WBC) works to secure economic justice and entrepreneurial opportunities for women by providing training, mentoring, business development, and financing opportunities to women entrepreneurs throughout San Diego and Imperial Counties. One-on-one consulting services are provided at no-cost to the customer. Furthermore, networking events and opportunities to work on accelerating a business are also provided through WBC.</p>
	<p>The Black Contractors Association of California, located in San Diego, is a non-profit that provides small business development, apprenticeship training, and other opportunities to facilitate economic opportunities for African Americans and other members of the construction industry. The association has been working with major contractors, governmental agencies and politicians for more than 37 years, and as such, provides many advocacy and outreach opportunities. Membership is a requirement in order to gain exposure to the organization’s pool of resources in the public and private sectors.</p>
	<p>The Asian Business Association of San Diego (ABASD) is a membership-based organization that serves entrepreneurs and small businesses with low to no-cost services to support business growth. The organization provides a network base of the region’s largest ethnic business associations. Services that it provides include educational workshops, technical assistance, business mentorship, and access to capital to minority-owned small and disadvantaged businesses, entrepreneurs and start-ups. ABASD events provide members and prospective members with an opportunity for business networking at various venues throughout San Diego County. The organization also offers a mentorship program called Legacy Circle made up of influential Asian Pacific Islander business leaders dedicated to mentoring the next generation of leaders. Many more events and monthly speaker luncheons provide additional advocacy and outreach opportunities.</p>
	<p>The San Diego Women’s Foundation participates in various advocacy and outreach efforts in the San Diego community, particularly for underserved communities. Training and educational programs are offered year-round. Membership is required in order to access events, resources, and services that the organization provides.</p>
	<p>The Pacific Southwest Minority Supplier Development Council is an affiliate of the National Minority Supplier Development Council and provides a local touchpoint for Arizona and San Diego County-based corporate members and certified minority businesses. The organization helps to certify minority-owned businesses and promote the value of certification. It also develops stakeholders and builds capacity and capabilities. The organization connects certified minority business entrepreneurs with corporate members and advocates for minority-owned businesses and their development.</p>
	<p>The National Minority Supplier Development Council (NMSDC) seeks to advocate for business opportunities for certified minority-owned business enterprises (MBE) and connects them to corporate members. NMSDC is one of the country’s leading corporate membership organizations and includes many of the largest public and privately-owned companies as well as colleges and universities. In addition to membership connections, NMSDC assists with MBE certification, support services for MBEs, outreach programs, and events.</p>
	<p>The Women’s Construction Coalition is a non-profit that hosts networking, mentoring, and educational events in the San Diego area. The organization advocates for empowering, enlightening, and elevating women in the construction industry. It also examines and influences public policy issues that are germane to women in the construction industry. Membership to the Women’s Construction Coalition provides connections to industry professionals thereby putting small businesses in front of public agencies and increasing contracting opportunities.</p>

Figure 8-1 (continued).

Race- and gender-neutral program measures that organizations in San Diego use

Type	Program
<p>Advocacy and Outreach</p>	<p>The San Diego County Hispanic Chamber of Commerce is a non-profit that participates in various advocacy and outreach efforts in order to achieve their mission of creating and promoting a favorable business climate for Latino companies in the greater San Diego community. Membership is required and members get access to the organization's network and contacts, resources for small and minority-owned businesses, and monthly networking events throughout the San Diego region.</p>
	<p>The National Association of Minority Contractors, Southern California Chapter strives for the growth and advocacy of minority construction firms through business development, training, political influence, and relevant communication. Educational seminars and courses, procurement information, as well as legal and legislative briefs and updates are all provided as part of the organization's outreach efforts in the region. The organization also provides training to minority contractors in construction, advocacy with relevant law, business development, and networking opportunities.</p>
	<p>The American Subcontractors Association seeks to promote the rights and interests of subcontractors, specialty contractors, and suppliers by building strength in community through education, advocacy, networking, and professional growth. With membership, small businesses can then use the resources and events that the association provides, including model contract language to use in the creation of contracts, prime contract and subcontract bidding support, advocacy in Washington D.C. regarding applicable industry regulations and legislation, and weekly e-news bulletins.</p>
	<p>The American Indian Chamber of Commerce of California advocates for support of American Indian business in California. A central tenet of achieving that mission is to encourage outreach efforts and networking opportunities throughout San Diego and the state of California. Membership is a requirement for the uses of resources and network base within the organization. The organization annually hosts an expo that is focused on building and linking American Indian businesses with procurement opportunities. One-on-one business coaching by top corporate, government, and tribal procurement and supplier development specialists is also available both at the expo and with membership. Additional advocacy and outreach events are held monthly and quarterly.</p>
<p>Capital, Bonding, and Insurance</p>	<p>The United States Small Business Administration (SBA) provides small business guidance and loan resources, including free business counseling and informative resources regarding how to qualify to win federal government contracting. Furthermore, the SBA works with lenders to provide loans to small businesses. Those loans are helpful for small businesses as they generally have rates and fees that are comparable to non-guaranteed loans but with lower down payments, flexible overhead requirements, and no collateral in many cases. Some of the loans also come with continued support to help small businesses start up successfully and effectively run their own business.</p>
	<p>The South County Economic Development Council (SCEDC) is a non-profit organization whose mission is to encourage economic development in the South San Diego County region through private investment and business development and nurture binational business growth. Services include resources and tools for businesses, technical assistance, financial assistance, and loan programs. SCEDC also has its own lending program, with loans available for approved applicants. The loans are set at competitive fixed interest rates with no hidden fees or late payments and are open to members and non-members alike. Loan recipients also receive access to business development resources.</p>
	<p>The California Treasury Department offers the California Capital Access Program (CalCAP) for Small Business. The program encourages banks and other financial institutions to make loans to small businesses that have difficulty obtaining financing. CalCAP loans offer more favorable loan terms and can be short or long-term. The loans are strictly for small businesses under United States Small Business Administration guidelines.</p>

Figure 8-1 (continued).

Race- and gender-neutral program measures that organizations in San Diego use

Type	Program
Capital, Bonding, and Insurance	<p>The California Infrastructure and Economic Development Bank provides financial assistance to support infrastructure and economic development in California and has a Small Business Finance Center (SBFC). The SBFC helps businesses create and retain jobs and encourages investment in low- to moderate-income communities. The SBFC has several programs to support small businesses, including a Disaster Relief Loan Guarantee and a Jump Start Loan Program. The disaster relief loan is currently being offered to small businesses in California that have been impacted by COVID-19.</p>
	<p>Kiva is a non-profit based in California that expands access to capital for entrepreneurs around the world. The loans are set at 0 percent interest for United States small businesses. In addition to loans, Kiva offers small businesses free marketing and access to its community of 1.6 million supportive lenders. The platform is a crowdsourcing model, where loans are posted on the Kiva database for lenders to support. There are no fees associated with Kiva, which means that 100 percent of the funds go towards supporting borrowers' loans.</p>
	<p>CDC Small Business Finance is a non-profit lender providing capital to small businesses so that they can expand, grow, and create jobs in California, Arizona, and Nevada. CDC Small Business Finance also assists specifically in the San Diego Area in order to support small businesses in San Diego to achieve the financing they need. CDC Small Business Finance also advocates to ensure that all small businesses can succeed and grow. In addition, the organization offers a variety of low-interest financing that fits the needs of small businesses no matter where they are in the growth cycle.</p>
	<p>United States Department of Transportation's Bonding Education Program (BEP) partners with the Surety and Fidelity Association of America (SFAA) to help small businesses become bond-ready. It includes one-on-one sessions with businesses to assist in the compilation of the necessary materials to complete bond applications. The program is primarily tailored to businesses competing for transportation-related contracts.</p>
	<p>The California Southern Small Business Development Cooperation is chartered and regulated by the California Infrastructure and Economic Development Bank to provide loan guarantees to financial institutions. The organization supports both San Diego and Imperial Counties and helps small and mid-size businesses that lack credit strength in obtaining the financial assistance they need by securing financing through more than 40 banks and lending institutions. The program places emphasis on assisting small businesses, particularly minority- and women-owned businesses, that cannot qualify for bank loans without guarantees.</p>
	<p>Accion is a nationwide, non-profit, mission-based microlender that is dedicated to connecting entrepreneurs with the accessible financing and resources it takes to create and grow healthy businesses. Accion serves businesses in Imperial, Riverside, San Bernardino, and San Diego Counties and offers loans ranging from \$300 to \$100,000. It also offers additional support services and resources, such as free business counseling and educational business resource events. Accion also assists in networking by connecting small businesses with peers, local organizations, and banks to provide as many opportunities for growth as possible.</p>
	<p>The Small Business Relief Fund (SBRF) was established by the City of San Diego to help businesses impacted by COVID-19 retain employees and sustain continuity of operations. Awards are based on availability, program guidelines, and the submission of all required information and supporting documentation proving financial hardship related to COVID-19.</p>
	<p>The Small Business Stimulus Grant through San Diego county is funded by Board of Supervisors-allocated federal CARES Act funding. The goal of the grant is to provide a lifeline to many local small businesses. It provides economic assistance to help businesses and non-profit organizations impacted by COVID-19.</p>
	<p>The Minority Business Development Agency is an agency within the United States Department of Commerce that promotes the growth of minority-owned businesses through the mobilization and advancement of public and private sector programs, policy, and research. The organization works to connect minority-owned businesses with capital, contracts, and markets they need to grow. The organization also advocates and promotes minority-owned businesses with elected officials, policy makers, and business leaders.</p>

Figure 8-1 (continued).

Race- and gender-neutral program measures that organizations in San Diego use

Type	Program
Business Networking	The Business Associations and Chambers of Commerce section of the City of San Diego's website lists local chambers of commerce in the region that promote local business interests with support of members from their communities. It is a resource for small businesses looking to reach out and network in the San Diego area.
	“ The Brink, ” located in the Small Business Development Center (SBDC) for Innovation at University of San Diego, provides consulting and advising, targeted training and workshops, and the San Diego Angel Conference for small businesses. The Brink pools resources from the United States Small Business Administration, GoBiz, and a partnership with the County of San Diego in order to provide business networking opportunities and insightful guidance to small businesses.
	The American Institute of Architects in San Diego County is a membership-based organization that promotes the profession of architecture in the region and supports members in professional excellence. The San Diego Chapter comprises nearly 1,000 members who are a part of the greater network of nearly 11,000 AIA members in California
	The Southwestern College’s Center for Business Advancement brings together four business service organizations in order to better provide support to small businesses and help them achieve success and stimulate the local and regional economy.
	The Service Corps of Retired Executives Association (SCORE) offers free, confidential business advice from expert advisors as well as workshops and resources for small businesses and entrepreneurs. SCORE is a national organization that is the premier source of free small business advice for entrepreneurs. The organization provides low-cost and free workshops, confidential business assistance, templates, and tools in addition to various business networking opportunities, which are provided through SCORE’s mentor program, numerous workshops and events hosted throughout the year, and resource lists.
	The San Diego Regional Chamber of Commerce is a hub for connections and collaboration for the business community and advocates for pro-business policies and candidates. It has 2,500 business members and more than 300,000 employees making up its networking list. Membership is required to use the Chamber’s business networking resources.
	The California Department of Transportation (Caltrans) Public Agency Consortium (PAC) comprises regional agencies focused on increasing the diversity of business participation on public agency contracts and procurement. PAC hosts various networking events, including the Procurement and Resource Fair, Construction Expo, and Meet the Primes. Those events have the specific goal of helping to improve small business success. The Meet the Primes event is one of several outreach events designed to ensure that local, small, historically underutilized, service-disabled veteran, and emerging businesses have the opportunity to do business with local government organizations.
	The Veterans in Business Network (VIB) is a non-profit that strives to provide education, training, resources, and outreach to help veterans succeed in business. In addition to facilitating partnerships for contracting opportunities, VIB provides free business resources, educational seminars, outreach opportunities, and a Veteran 2 Veteran Business Cohort Program. The organization is free to join.
	The Associated General Contractors of America San Diego Chapter, Inc. is a membership-based organization that focuses on the construction industry. It facilitates various networking opportunities between construction contractors and industry-related companies. The organization also offers Training, meetings, events, and additional business networking benefits to members.
The National Association of Women in Construction (NAWIC) , San Diego Chapter 21, hosts several business networking events and opportunities that include educational seminars, conferences, joint meetings with other San Diego professional organizations, charitable events, and the Women in Construction Week. The organization’s mission is to create a support network for women in the construction industry.	

Figure 8-1 (continued).

Race- and gender-neutral program measures that organizations in San Diego use

Type	Program
Mentor-Protégé Programs	<p>The San Diego Youth Entrepreneurship Program offers business lessons, mentoring, counseling, and business plans for young people ages 14-27. Business training is a self-paced online training module where participants can learn how to start their own businesses. Attendees can also learn how to market their businesses both on a national and international level as well as how to write business plans. Completion of the program involves participating in a business plan competition. Top three business plans are awarded a package of prizes designed to help launch the businesses. Financial, legal structure and permits, and licenses are also reviewed in one-on-one counseling and mentoring sessions.</p>
	<p>The Entrepreneur Academy is a San Diego-based chapter of TIE (The Indus Entrepreneur) committed to providing education, mentorship, and resources to the next generation of young entrepreneurs. The program matches ambitious high school students with successful entrepreneurs as mentors and college professors to help the participants learn the art, science, and business of entrepreneurship. Networking opportunities are also available to assist young entrepreneurs in building relationships with mentors and other programs participants.</p>
	<p>The C&C Mentor Protégé Program assists small businesses to grow and develop in the San Diego region. The program supports small businesses through voluntary partnerships with larger firms and public agency support. The primary mission of the program is to provide a forum for small businesses and prime contractors connect through collaborative and cooperative partnerships. Benefits of participating in the mentor protégé program, include organizational skills development, building relationships, networking contacts, and industry sustainability.</p>
	<p>The All Small Mentor-Protégé Program from the United States Small Business Administration provides small business learning opportunities from an experienced government contractor. Proteges can get valuable business development advice and assistance from their mentors in several areas, including internal business management systems, accounting, marketing, manufacturing, and strategic planning. Financial assistance in the form of equity investments, loans, and bonding are also features of the program as well as assistance with federal contract bidding, acquisition, and performance processes.</p>
	<p>The Mentor Protégé Program (MPP) is a program through the City of San Diego developed in cooperation with the Associated General Contractors of America, San Diego Chapter (AGC). The City of San Diego initiated the program in order to directly address and overcome barriers that typically inhibit or restrict the success of emerging minority- and women-owned construction companies and assist with maximizing their economic opportunities. Protégés are paired with high level construction business professionals (mentors) who are also AGC members. Working together in monthly meetings, mentors, protégés and the Program Manager focus on developing a business plan, reviewing existing financial conditions, and formulating specific plans to enhance each protégé's capacity and capabilities. In addition to one-on-one mentor-protégé meetings, proteges also have additional networking opportunities by attending events sponsored by AGC and other organizations.</p>
<p>The Calmentor Program is designed to encourage and support small businesses through voluntary partnerships with mid-sized and larger firms. Calmentor supports the participation of certified Small Business Enterprises, Disadvantaged Business Enterprises, and Disabled Veterans Business Enterprises.</p>	

CHAPTER 9.

Program Considerations

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Program Considerations

The disparity study provides substantial information that the City of San Diego (City) should examine as it considers potential refinements to the Small Local Business Enterprise (SLBE) Program and ways to better encourage the participation of minority- and woman-owned businesses in City contracts and procurements. BBC Research & Consulting (BBC) presents several considerations the City could make. In making those considerations, the City should assess whether additional resources, new data systems, changes in internal policy, or changes in law might be required.

A. Overall Aspirational Goal

Many organizations establish overall aspirational percentage goals for the participation of minority- and woman-owned businesses in their contracts and procurements. Such goals help guide efforts to encourage the participation of minority- and woman-owned businesses and create a shared understanding of an organization's diversity objectives among internal and external stakeholders. Typically, organizations use various *race- and gender-neutral*, and if appropriate and legal, *race- and gender conscious* measures to meet those goals each year. If they do not meet their overall aspirational goal, organizations assess why they failed to do so and develop plans to meet their goal the following year.¹

Given the legal requirements for developing overall aspirational goals, the City should consider using a two-step process to develop its own goal for the participation of minority- and woman-owned businesses in its contracts and procurements, consisting of *establishing a base figure* and *considering an adjustment* to the base figure based on conditions in the local marketplace and other factors. BBC presents an example of a two-step process for setting an overall aspirational goal based on disparity study results.

1. Establishing a base figure. The availability analysis provides information the City can use for establishing a *base figure* for its overall aspirational goal. The analysis indicates that minority- and woman-owned businesses are potentially available to participate in 31.0 percent of the City's contracting and procurement dollars (as shown in Chapter 5, Figure 5-3), which the City could consider as its base figure for its overall aspirational goal.

2. Considering an adjustment. In setting overall aspirational goals, organizations often examine various information to determine whether adjustments to their base figures are necessary to account for:

¹ Government agencies in California are prohibited from using race- and gender-conscious measures in awarding state- and locally-funded contracts because of Proposition 209.

- Past participation of minority- and woman-owned businesses in their contracting;
- Current conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses; and
- Other relevant factors that may impact the current availability of minority- and woman-owned businesses for organizations’ contracting and procurement.

For example, regulations for the Federal Disadvantaged Business Enterprise (DBE) Program, which organizations sometimes use as a model for goal-setting, outlines several factors that organizations might consider when assessing whether to adjust their goals:

- a. Volume of work minority- and woman-owned businesses have performed in recent years;
- b. Information related to employment, self-employment, education, training, and unions;
- c. Information related to financing, bonding, and insurance; and
- d. Other relevant data.

a. Volume of work minority- and woman-owned businesses have performed in recent years.

The City could consider making an adjustment to its base figure based on the degree to which minority- and woman-owned businesses have participated in its contracts and procurements in recent years. Figure 9-1 presents the percentage of contract and procurement dollars the City awarded to minority- and woman-owned businesses in each year of the study period. The median participation of minority- and woman-owned businesses in City contracts and procurements during that time was 19.5 percent, which supports a downward adjustment to the City’s base figure.

Figure 9-1.
Minority- and woman-owned business participation in City work during the study period

Source:
 BBC Research & Consulting utilization analysis.

Fiscal year	Minority- and woman-owned business participation
2015	19.5 %
2016	17.3 %
2017	14.9 %
2018	23.6 %
2019	27.4 %

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

Chapter 3 summarizes information about conditions in the local marketplace 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 C and D. BBC’s analyses indicate that there are barriers certain minority groups and women face related to human capital, financial capital, and business ownership in the local marketplace. For example, marketplace analyses indicated that:

- Black, Hispanic, and Native Americans are far less likely than non-Hispanic whites to earn college degrees in San Diego;
- Minorities are less likely to work as managers in various industries in San Diego; and

- Most minorities and women earn substantially less in wages than non-Hispanic white men in San Diego.

Such barriers may decrease the availability of minority- and woman-owned businesses for City contracts and procurements, which supports an upward adjustment to the base figure.

c. Information related to financing, bonding, and insurance. BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in San Diego do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men. For example, minorities were less likely to own homes than non-Hispanic whites in San Diego and were more likely to be denied home loans. Qualitative information collected through public meetings, surveys, and in-depth interviews with local businesses also indicated that minority- and woman-owned businesses often have difficulties obtaining business loans and credit. Any barriers to obtaining financing, bonding, or insurance might limit opportunities for minorities and women to successfully form and operate businesses in the local marketplace, which supports an upward adjustment to the base figure.

d. Other factors. The Federal DBE Program suggests that organizations also examine "other factors" when determining whether to adjust their overall aspirational goals. For example, there is quantitative evidence that businesses owned by minorities and women earn less than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix C presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix D. Many businesses reported experiencing stereotyping, double standards, and business networks that are closed off to minority- and woman-owned businesses. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects certain types of businesses in the local market.

3. Goal revisions. If it decides to establish an overall aspirational goal for minority- and woman-owned business participation, the City should determine how frequently it will revise its goal. It should also consider any changes it plans on making to business development programs, procurement processes, staff resources, or other processes and programs that might affect its ability to support the growth of minority- and woman-owned businesses. The City should also assess how those changes might affect the availability and capacity of minority- and woman-owned businesses to perform work on its contracts and procurements. It should also regularly review its goal-setting process to ensure that it provides adequate flexibility to respond to recent changes in marketplace conditions, anticipated contract and procurement opportunities, new statistical or anecdotal evidence, and other factors.

B. Contract-specific Goals

Disparity analysis results indicated that various groups of minority- and woman-owned businesses showed substantial disparities on key sets of contracts and procurements that the City awarded during the study period. Courts often consider substantial disparities as *inferences of discrimination* against such groups in the marketplace, and they often serve as support for the

use of race- and gender-conscious measures to address those disparities. Organizations that show evidence of substantial disparities in their contracting often use *contact-specific goals* to award certain contracts and procurements, whereby they set participation goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project, and, as a condition of award, prime contractors have to meet those goals by making subcontracting commitments with certified minority- and woman-owned businesses as part of their bids or by demonstrating sufficient good faith efforts to do so.

It is crucial to note that government organizations in California are subject to Proposition 209—and the subsequent failure of Proposition 16 to overturn Proposition 209—which limits the use of such goals. Proposition 209 led to the addition of Section 31 to Article 1 of the California constitution, which states, “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting” unless required by federal law.² Proposition 16 was introduced in 2020 and sought to overturn Proposition 209 and allow the use of race- and gender- conscious measures in awarding state- and locally-funded contracts but failed to pass. In addition to the limitations Proposition 209 places on the use of race- and gender-conscious measures, the City would have to ensure that its use of contract-specific goals meets the *strict scrutiny* standard of constitutional review, including showing a compelling governmental interest for their use and ensuring that their use is narrowly tailored (for details, see Chapter 2 and Appendix B).

C. Race- and Gender-Neutral Measures

In contrast to race- and gender-conscious measures, there are several race- and gender-neutral measures the City could consider to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements, including refinements to its contracting and procurement policies as well as to the SLBE Program. Based on input from stakeholders and staff, BBC organized potential policy changes and program refinements into three categories:

1. **Primary considerations:** Policy and program changes that staff and stakeholders agree might have a substantial impact in the near future;
2. **Program and policy refinements:** Minor adjustments to current City policies and programs; and
3. **Future considerations:** Programs and policies for future consideration that may have limited impact and appear to be more difficult to implement in the short term.

1. Primary considerations. BBC presents various changes the City could make to its procurement policies and business assistance programs that might make it easier for all small businesses, including many minority- and woman-owned businesses, to compete for City work, regardless of the race/ethnicity and gender of business owners. Many of those refinements will

² California State Constitution 1.31.a

require substantial time and resources for Equal Opportunity Contracting (EOC) Program staff, procurement officers, and other City staff.

a. EOC Program. The City's EOC Program is responsible for operating the SLBE Program and monitors the participation of minority- and woman-owned businesses in City contracts and procurements. However, interviews with City staff and anecdotal evidence collected from public meetings, in-depth interviews, and surveys indicated that the EOC Program does not have a large enough staff to fully implement monitoring activities, support services programs, and other program measures that could help improve outcomes for minority- and woman-owned businesses. Similar issues were also raised regarding the Purchasing and Contracting (P&C) Department. The City should consider expanding the size of EOC staff to carry out essential program functions, especially if the City is considering setting SLBE and Emerging Local Business Enterprise (ELBE) goals on goods, services, and professional services contracts. When considering how many additional staff members it might need, the City should consider various EOC functions, including:

- Certifying businesses, assisting businesses with certification requirements, and conducting required reviews to determine initial and ongoing eligibility;
- Implementing business development programs, technical assistance programs, and other program measures;
- Conducting compliance reviews including collecting data and monitoring the participation of minority- and woman-owned businesses in City contracts and procurements on an on-going basis;
- Training City staff on program policies, contract compliance, and data reporting requirements; and
- Working with other City departments and other local agencies to host networking and outreach events.

b. Program manual. The City should consider developing a comprehensive program plan and manual to communicate the SLBE Program's objectives effectively across City departments and to reinforce the City's commitment to those objectives. Anecdotal evidence the study team collected as part of the disparity study indicated that having a program manual might help vendors and staff better understand what is required of them in terms of supplier diversity and how to comply with different aspects of the program appropriately. The plan and manual might set forth information and requirements related to the following areas:

- Program objectives and justification;
- Overall SLBE aspirational goals;
- Monitoring and reporting requirements;
- Networking and outreach guidelines;
- Race- and gender-neutral measures; and
- Subcontracting goals programs (if applicable).

c. Subcontracting goals. The Engineering & Capital Projects (E&CP) Department uses mandatory ELBE and SLBE subcontracting goals to award certain construction contracts. The E&CP Department sets those goals on individual contracts based on the availability of certified SLBEs/ELBEs for the types of work involved, and prime contractors must meet those goals either by making subcontracting commitments with certified SLBEs/ELBEs as part of their bids or by demonstrating sufficient good faith efforts to do so. The City could consider expanding the use of such mandatory goals to goods, services, and professional services contracts and procurements which might help address substantial disparities BBC observed for several racial/ethnic and gender groups—Black American-, Native American-, and white woman-owned businesses for goods and other services procurements; and Hispanic American-, Native American-, and white woman-owned businesses for professional services contracts. According to City staff, expansion of the program will take additional resources to train City procurement staff, develop criteria for goal setting, review procurements, and evaluate good faith efforts.

d. Small business set asides. Disparity analysis results indicated substantial disparities for Black American-, Native American-, and white woman-owned businesses on goods and services prime contracts and substantial disparities for Hispanic American-, Native American-, and white woman-owned businesses on professional services prime contracts that the City awarded during the study period. In addition, as part of in-depth interviews and public meetings, several business owners indicated that small business set asides would help many small businesses compete for City work and build capacity.

The City might consider setting aside select small goods and services prime contracts for small business bidding to encourage the participation of those businesses, including many minority- and woman-owned businesses, as prime contractors. The City already certifies SLBEs and ELBEs and could limit bidding on eligible contracts to those businesses. Similarly, the San Diego Association of Governments currently offers a bench, or list of pre-approved and qualified businesses, that the agency solicits to perform certain contracts. The City could implement such a program with certified SLBEs and ELBEs for its own work. Implementing set asides on goods and services contracts would require additional EOC staff time and establishing a committee of procurement staff to determine contract eligibility for the program.

e. Unbundling large contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts the City awarded during the study period. To further encourage the participation of all small businesses, including many minority- and woman-owned businesses, in its work, the City should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller contract pieces. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontracting opportunities into smaller contract pieces and accepts such attempts as good faith efforts as part of its contracting goals program. Such efforts might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses.

f. Bonding assistance. San Diego Municipal Code Chapter 2 Article 2 Division 31 requires bonds for many types of procurements, including for relatively small construction projects, and requires bid bonds for all Capital Improvements Projects except job order contracts. Projects of that size are relatively accessible to small businesses but the bonding requirements on that work

present a substantial barrier for small businesses, as indicated in anecdotal evidence that the study team collected. The City should consider offering bonding assistance to small businesses pursuing City work and should evaluate the value of the bonds required for minor public works projects, which are generally set aside for certified SLBEs and ELBEs. The City could establish its own bid deposit and bonding assistance program under the current City Small Business Administration.

2. Program and policy refinements. The City should also consider race- and gender-neutral enhancements it can make to current programs and policies to further encourage the participation of small businesses, including many minority- and woman-owned businesses, in its contracts and procurements.

a. Advertising and outreach. The EOC Program currently maintains a list of certified SLBEs and ELBEs on its website that it updates weekly. During the study period, the list was only maintained in non-searchable PDF format. The City is in the process of revising the format and accessibility of the list, but in the future, the City should ensure the lists are available in accessible and easily searchable formats, such as searchable PDF format or in Microsoft Excel.

b. Prompt payment. As part of in-depth interviews and telephone surveys, several businesses, including many minority- and woman-owned businesses, reported difficulties receiving payment in a timely manner on government contracts, particularly when they work as subcontractors and suppliers. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. The City currently implements a robust prompt payment program to help ensure that subcontractors receive payment in a timely manner and minority- and woman-owned businesses have enough operating capital to remain competitive and successful. The City should periodically review its prompt payment program to ensure it is effectively in meeting the needs of subcontractors and subconsultants and is compliant with state regulations.³

c. Capacity building. Results from the disparity study indicated that there are many minority- and woman-owned businesses in the San Diego area but that many have relatively low capacities for City work. The City should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for relatively large City contracts and procurements. Anecdotal evidence indicated that businesses find such programs—when implemented well—to be valuable in helping them grow and learn the skills required to compete in their industries. In addition to considering programs that could be open to all small businesses, the City could consider implementing a program to assist certain businesses with development and growth. As part of such a program, the City could have an application and interview process to select businesses with which to work closely to provide specific support and resources necessary for growth.

d. Networking and outreach. The City currently conducts substantial outreach within the region attending or hosting more than 30 events each year. As opportunities arise, the City should consider broadening its current networking and outreach efforts to build on current

³ California Public Contract Code Section 20104.50 and Section 7107(a).

partnerships with local trade organizations and other public organizations and participate in events more frequently. In addition, the City should consider ways it can better leverage technology with which to network and provide information to businesses throughout the region. The City could consider making use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance, particularly as the COVID-19 pandemic continues. As part of in-depth interviews and public meetings, several business owners and business development organization representatives indicated that the City's outreach efforts are effective for some groups but not others, including Black American-owned businesses and sole proprietorships. The City should consider whether more intentional engagement efforts would further encourage the participation of minority- and woman-owned businesses in its contracting. Potential efforts might include hosting events in community-based facilities such as churches or local business offices or developing advertising specifically targeted to certain geographic locations within the City.

e. Data collection. The City maintains comprehensive data on the prime contracts it awards, and those data are generally well-organized and accessible. The City also collects comprehensive subcontract data on most construction and professional services contracts but does not do so on goods and other services procurements. The City should consider collecting comprehensive data on all subcontracts, regardless of subcontractors' characteristics or whether they are certified as SLBEs or ELBEs, for *all* relevant prime contracts (e.g., construction, professional services, and goods and other services contracts and procurements). Collecting subcontract data on all relevant contracts will help ensure the City monitors the participation of minority- and woman-owned businesses in its work accurately, identifies additional businesses that could become certified as SLBEs or ELBEs, and identifies future subcontracting opportunities for minority- and woman-owned businesses. Collecting the following data on all subcontracts would be appropriate:

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

The City should consider collecting those data as part of bids but also requiring prime contractors to submit payment data on subcontracts as part of the invoicing process for all contracts. The City should train relevant staff to collect and enter subcontract data accurately and consistently. Subcontractor payment information could also be improved by not only recording the payments prime contractors indicate they have made to subcontractors but by regularly following up with subcontractors throughout the life of the contract.

In addition, the City should consider maintaining data on the amount paid to each prime contractor for multiple award construction contracts and job order contracts. Award amounts for those types of contracts are often not-to-exceed values and are not reflective of the actual

amount of work the vendors complete. Collecting information on amounts paid will allow the City to have a better sense of the true sizes of such contracts.

f. Growth monitoring. The City might consider collecting data on the impact the SLBE Program has on the growth of minority- and woman-owned businesses over time. Doing so would require it to collect baseline information on certified SLBEs and ELBEs—such as revenue, number of locations, number of employees, and employee demographics, much of which is already collected for the certification process and the annual SLBE Program report—and then continue to collect that information from each business on an annual or semiannual basis. Such metrics would allow the City to assess whether the program is helping businesses grow and more effectively tailor the measures it uses as part of the SLBE Program.

g. Disparity studies. The City should consider conducting disparity studies on a periodic basis. Many agencies conduct a study every three to five years to understand changes in their marketplace, refine program measures, and ensure up-to-date information on the participation of minority- and woman-owned businesses in their contract and procurement processes.

3. Future considerations. BBC presents additional potential refinements to City policies and programs that might improve outcomes for small businesses. Stakeholders and staff suggested that those changes might require substantial City resources and would likely have less immediate impact than the considerations listed above.

a. Purchases worth less than \$150,000. As part of in-depth interviews and public meetings, several business owners indicated there is no clear way to learn about small projects that are not subject to public bidding, which might be best suited for small business competition. Currently, there are no mandatory advertising requirements for contracts and procurement opportunities worth less than \$150,000, and the City could consider establishing additional advertising requirements for solicitations of that size. For example, the City might require such solicitations to be advertised in newspapers, on its website, or on third-party websites at least 10 days prior to the deadline to submit quotes, as it already does for larger solicitations. Another option might be for the City to advertise solicitations for small projects directly to relevant businesses via PlanetBids' eBlast features.

b. Minimum number of quotes. San Diego Municipal Code Article 2, Division 32 requires that City departments solicit a minimum of one quote for goods and services procurements worth less than \$25,000, two quotes for goods and services procurements worth between \$25,000 and \$50,000, and five quotes for goods and services contracts worth between \$50,000 and \$150,000. In addition, City departments must solicit a minimum of three quotes for construction contracts worth more than \$50,000 but less than \$100,000 and a minimum five quotes for construction contracts worth between \$100,000 and \$150,000.

The City should consider increasing the minimum number of quotes City departments must solicit for goods, services, and construction work worth \$150,000 or less. For example, the City could require City departments to solicit a minimum of three quotes for goods and services procurements worth at least \$10,000 and up to \$25,000, a minimum of five quotes for goods and services procurements worth at least \$25,000 and up to \$50,000, and a minimum of seven quotes for goods and services procurements worth at least \$50,000 and up to \$150,000, and

require that some number of those businesses be certified SLBE or ELBEs. For construction contracts, the City could require City departments to solicit a minimum of five quotes for contracts worth more than \$50,000 but less than \$100,000 and a minimum of seven quotes for construction contracts worth more than \$100,000 but less than \$150,000. The City could also consider requiring that a certain number of those businesses be certified SLBE and ELBEs for projects that have been budgeted in the Annual Capital Improvements Budget.

APPENDIX A.

Definitions of Terms

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the City of San Diego Disparity Study report.

Anecdotal Information

Anecdotal information includes personal qualitative accounts and perceptions of specific incidents—including any incidents of discrimination—shared by individual interviewees, public meeting participants, and other stakeholders in the local marketplace.

Availability Analysis

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

Business

A business is a for-profit enterprise, including sole proprietorships, corporations, professional corporations, limited liability companies, limited partnerships, limited liability partnerships, and any other partnerships. The definition includes the headquarters of the business as well as all its other locations, if applicable.

Business Listing

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

City of San Diego (City)

The City provides myriad services to the people who live and work in the San Diego region, including police and fire protection, road construction and maintenance, and a variety of other social and economic services. As part of providing those services, the City typically spends hundreds of millions of contract and procurement dollars each year to procure various goods and services related to construction, professional services, and goods and other services.

Compelling Governmental Interest

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

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

Consultant

A consultant is a business that performs professional services contracts.

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction contracts.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

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

Disadvantaged Business Enterprise (DBE)

A DBE is a business that is owned and controlled by one or more individuals who are socially and economically disadvantaged according to the guidelines in 49 CFR Part 26 which pertains to the Federal DBE Program. DBEs must be certified as such through the California 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 \$7 million to \$24.1 million depending on subindustry) and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the economic requirements in 49 CFR Part 26.

BBC used information on DBE firms from the California Uniform Certification Program database to augment ownership data on firms in the study. The City of San Diego does not implement the DBE program other than as a pass-through agency for direct recipients of USDOT funds (e.g. Caltrans).

Disparity

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

Disparity Analysis

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

Disparity Index

A disparity index is computed by dividing the actual participation of a specific group of businesses in agency contracting by the estimated availability of the group 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).

Equal Opportunity Contracting (EOC) Program

The City's EOC Program implements the Small Local Business Enterprise (SLBE) Program to help ensure local businesses have an equal opportunity to participate in City contracts and procurements and the City does not perpetuate any discrimination or barriers that exist in the marketplace.

Firm

See *business*.

Industry

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

Inferences of Discrimination

Inferences of discrimination is evidence—usually statistical—of discrimination in the marketplace against particular business groups. Government organizations often use inferences of discrimination as justification for the use of relatively strong measures to address barriers affecting those groups (e.g., race- and gender-conscious measures).

Local Marketplace

See relevant geographic market area.

Locally funded Contract

Locally funded contracts are contracts or projects that are wholly funded by local sources. That is, they do not include any federal funds.

Majority-owned Business

A majority-owned business is a for-profit business that is at least 51 percent owned and controlled by non-Hispanic white men who are neither veterans nor have mental or physical disabilities.

Minority

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

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the following racial/ethnic groups: Asian Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian American, or other non-white race or ethnicity. The study team considered businesses owned by minority men and minority women as minority-owned businesses. A business does not have to be certified to be considered a minority-owned business in this study.

Monte Carlo

BBC used a process that relies on repeated, random simulations to examine the statistical significance of disparity analysis results, which is referred to as a Monte Carlo analysis. For each contract element, the availability analysis provided information on individual businesses available to perform that contract element based on type of work, contractor role, contract size, and other factors. BBC assumed that each available business had an equal chance of winning the contract element, so the odds of a business from a certain group winning it were equal to the number of businesses from that group available for it divided by the total number of businesses available for it. The Monte Carlo simulation was then run 1 million times per contract set,

randomly choosing a business from the pool of available businesses to win the contract element. The combined output from all 1 million simulations represents a probability distribution of the overall participation of minority- and woman-owned businesses if contracts were awarded randomly based only on the availability of relevant businesses working in the local marketplace.

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

Narrow Tailoring

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

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

Participation

See *utilization*.

Prime Consultant

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

Prime Contract

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

Prime Contractor

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

Procurement

See contract.

Project

A project refers to a construction, professional services, or goods and other services endeavor the City 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 specifically designed to increase the participation of minority- and woman-owned businesses in government contracting. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but other businesses might not. Similarly, businesses owned by women might be eligible for such measures but businesses owned by men might not. An example of race- and gender-conscious measures is an organization's use of minority- or woman-owned business participation goals on individual contracts.

Race- and Gender-neutral Measures

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

Rational Basis

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

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which agencies award most of their contracting dollars are located. Case law related to contracting programs and disparity studies requires disparity study analyses to focus on the RGMA. The RGMA for the 2021 San Diego Disparity Study was San Diego County.

Service-disabled Veteran-owned Business

Service-disabled veteran-owned businesses are businesses owned by veterans of the United States military who, due to their service, have a mental or physical disability.

Small Local Business Enterprise (SLBE) Program

The City of San Diego implements the SLBE Program to encourage the participation of small, minority-, woman-, and service-disabled veteran-owned businesses in City contracts and procurements and help ensure local businesses have an equal opportunity to participate in City contracts and procurements and the City does not perpetuate any discrimination or barriers existing in the marketplace. To try to meet the objectives of the program, the City uses various *race- and gender-neutral* program measures to encourage the participation of those businesses in its own contracting. Race- and gender-neutral measures the City currently uses include:

- Establishing overall aspirational goals for SLBE-certified firms to encourage the participation of minority-, woman-, and service-disabled veteran-owned businesses in City contracting;
- Monitoring and reporting the participation of SLBE- and ELBE-certified businesses in City contracts and procurements;
- Facilitating and participating in various network and outreach efforts and events, including workshops, pre-bid conferences, local events, and bid alerts;
- Maintaining a directory of SLBE- and ELBE-certified businesses to increase awareness of those businesses among prime contractors and City staff;
- Requiring prime contractors to submit Equal Opportunity Forms and/or Equal Employment Opportunity (EEO) plans with their bids, quotes, and proposals; and
- Using SLBE/ELBE subcontracting goals and prime set-asides to encourage the participation of small businesses (including many minority-, woman-, and service-disabled veteran-owned businesses) on individual contracts and procurements.

SLBE/ELBE-certified businesses

SLBE/ELBE-certified businesses are all eligible firms, regardless of their status as minority-, woman-, and service-disabled veteran-owned businesses, that are certified as SLBE/ELBEs through the City. Businesses seeking SLBE/ELBE certification are required to submit applications to the EOC Program. The application is available online and requires businesses to submit various information, including business name, contact information, license information, financial information, work specialization, the race/ethnicity and gender of their owners, and, if applicable, proof of certification from other agencies that allow for cross certification, such as certification as a service-disabled veteran-owned business from the California Department of General Services. The EOC Program reviews each application for approval and may conduct site visits to confirm eligibility.

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 could correctly account for the difference).

Strict Scrutiny

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

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

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. The City had to have awarded a contract during the study period for the contract to be included in the study team's analyses. The study period for the disparity study was July 1, 2014 through June 30, 2019.

Subconsultant

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

Subcontract

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

Subcontractor

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

Subindustry

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

Substantial Disparity

A substantial disparity is a disparity index of 80 or less, indicating actual participation of a specific business group is 80 percent or less of the group's estimated availability. Substantial disparities are considered *inferences of discrimination* in the marketplace against particular

business groups. Government organizations often use substantial disparities as justification for the use of relatively strong measures to address barriers affecting those groups.

Utilization

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

Vendor

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

Woman-owned Business

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

APPENDIX B.

Legal Framework and Analysis

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APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases and the legal framework involving local and state government minority and women-owned and disadvantaged-owned business enterprise (“MBE/WBE/DBE”) programs. The appendix also analyzes instructive recent cases regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,¹ and the implementation of the Federal DBE Program by state and local governments. These recent cases involving local and state government MBE/WBE/DBE programs are instructive to the legal framework and analysis for the study and MBE/WBE/DBE programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the City of San Diego.

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.² *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*,³ (“*Adarand I*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and Federal ACDBE Program and their implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. In particular, this analysis reviews in Section D below recent Ninth Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*⁴ and *Western States Paving Co. v. Washington State DOT*,⁵ *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women’s Business Enterprise, U.S. DOT, et al.*⁶ and the recent non-published decision in *Mountain*

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

² *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁴ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013).

⁵ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

⁶ *Orion Insurance Group, a Washington Corporation, Ralph G. Taylor, an individual, Plaintiffs v. Washington State Office of Minority & Woman’s Business Enterprises, United States DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum

*West Holding Co. v. Montana, Montana DOT, et al.*⁷, and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*⁸.

The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study.

In addition, the appendix reviews recent cases from other jurisdictions, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal DBE Program⁹ and the implementation of the Federal DBE Program by local and state governments. The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,¹⁰ and the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence¹¹. In October 2018, Congress passed the FAA Reauthorization Act, which also provides Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence¹². Congress is currently at the time of this report considering legislation (H.R. 2, Section 1101, Moving Forward Act) again to reauthorize the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The analysis reviews in Section F below recent federal cases in jurisdictions other than the Ninth Circuit that have considered the validity of the Federal DBE Program and its implementation by local or state governments and the validity of local and state DBE programs, including: *Dunnet Bay Construction Co. v. Illinois DOT*,¹³ *Northern Contracting, Inc. v. Illinois DOT*,¹⁴ *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*,¹⁵ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁶ *Adarand Constructors, Inc. v. Slater*¹⁷ ("*Adarand VII*"), *Midwest Fence Corp. v.*

opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which is pending.

⁷ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. 2017). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

⁸ *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

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

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

¹¹ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

¹² Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

¹³ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *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. August 19, 2015).

¹⁴ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹⁵ *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

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

¹⁷ *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,¹⁸ *Geod Corporation v. New Jersey Transit Corporation*,¹⁹ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.²⁰

The analyses of these and other recent cases summarized below, including the Ninth Circuit decisions in Section D below, *AGC, SDC v. Cal. DOT, Western States Paving, Mountain West Holding, Inc., M.K. Weeden and Orion Insurance Group*, are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs, the Federal DBE and ACDBE Programs and their implementation by local and state governments receiving U.S. DOT funds, disparity studies, and construing the validity of government programs involving MBE/WBE/DBE/ACDBEs. They also are pertinent in terms of an analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of a narrowly tailored MBE/WBE/DBE Program by a local or state government submitted in compliance with the case law, and if applicable, federal regulations.

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.

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.²¹ 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 26.²² The USDOT’s Guidance provides that recipients should consider evidence of discrimination and its effects.²³

The USDOT’s Guidance is recognized by the federal regulations as “valid, and express the official positions and views of the Department of Transportation”²⁴ for states in the Ninth Circuit.

¹⁸ *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

¹⁹ *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d 642 (D. N.J. 2010).

²⁰ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

²¹ *Questions and Answers Concerning Response to Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter *USDOT Guidance*], available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm; see 49 CFR § 26.9; see, also, 49 CFR Section 26.45.

²² *USDOT Guidance*, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006)

²³ *Id.*

²⁴ *Id.*, 49 CFR § 26.9; See, 49 CFR § 23.13.

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."²⁵ 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.²⁶

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.²⁷ 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.²⁸

There are other recent cases in the Ninth Circuit instructive for the study, including as follows:

In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*²⁹, the Ninth Circuit and the district court applied the decision in *Western States*³⁰, and the decision in *AGC, San Diego v. California DOT*³¹, as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program.³² The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry."³³ The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a

²⁵ *Western States Paving*, 407 F.3d at 996; see also, *Br. for the United States*, at 28 (April 19, 2004).

²⁶ DOT Guidance, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

²⁷ *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).

²⁸ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

²⁹ 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

³⁰ 407 F.3d 983 (9th Cir. 2005)

³¹ 713 F.3d 1187 (9th Cir. 2013)

³² 2014 WL 6686734 at *2 (D. Mont. 2014)

³³ *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. 2017) Memorandum, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.”³⁴

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’”³⁵ Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.”³⁶

The Ninth Circuit reversed the District Court’s grant of summary judgment to Montana based on issues of fact as to the evidence and remanded the case for trial. The *Mountain West* case was settled and voluntarily dismissed by the parties on remand in 2018.

The District Court decision in the Ninth Circuit in Montana, *M.K. Weeden*³⁷, 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.

A recent case in the Ninth Circuit is *Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women’s Business Enterprises, United States DOT, et. al.*³⁸ Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE. Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black and Native American in the Affidavit of Certification.

Orion’s DBE application was denied because there was insufficient evidence that: he was a member of a racial group recognized under the regulations; was regarded by the relevant community as either Black or Native American; or that he held himself out as being a member of either group. OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

The District court held OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because

³⁴ *Mountain West*, 2017 WL 2179120 at *2, Memorandum, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

³⁵ *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99).

³⁶ *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

³⁷ *M.K. Weeden*, 2013 WL 4774517.

³⁸ 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).

there was insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

The District court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause, and the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause. The court found no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

The District court dismissed claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI because Plaintiffs failed to show the State engaged in intentional racial discrimination. The DBE regulations’ requirement that the State make decisions based on race was held constitutional.

On appeal, the Ninth Circuit in affirming the District court held it correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity, Taylor’s discrimination claims under 42 U.S.C. §1983 because the federal defendants did not act “under color or state law,” Taylor’s claims for damages because the United States has not waived its sovereign immunity, and Taylor’s claims for equitable relief under 42 U.S.C. §2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

The Ninth Circuit held OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well-founded reason” to question Taylor’s membership claims, determined that Taylor did not qualify as a “socially and economically disadvantaged individual,” and when it affirmed the state’s decision was supported by substantial evidence and consistent with federal regulations. The court held the USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

Also, in a split in approach with the Ninth Circuit regarding the legal standard, burden and analysis in connection with a state government implementing the Federal DBE Program, the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,³⁹ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,⁴⁰ upheld the implementation of the Federal DBE Program by the Illinois DOT (IDOT).⁴¹ 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 v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.⁴² The Seventh Circuit most recently in *Midwest Fence* also held the Federal DBE Program is facially constitutional, and upheld the implementation of that federal Program by IDOT in its DBE Program following the *Northern Contracting* decision. These cases are reviewed in detail

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

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

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

⁴² *Id.*

below. The Seventh Circuit agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.⁴³

These MBE/WBE/DBE cases throughout the country will be analyzed in more detail in the Appendix below.

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.⁴⁴ 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.”⁴⁵ 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.⁴⁶ The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was “narrowly tailored” for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.⁴⁷

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

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

⁴⁴ 488 U.S. 469 (1989).

⁴⁵ 488 U.S. at 500, 510.

⁴⁶ 488 U.S. at 480, 505.

⁴⁷ 488 U.S. at 507-510.

proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.⁴⁸ 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.”⁴⁹

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.”⁵⁰ “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.”⁵¹

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.”⁵² 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.”⁵³

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.”⁵⁴ “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.”⁵⁵

The Court further found “if the City could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”⁵⁶

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

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

⁵⁰ 488 U.S. at 502.

⁵¹ *Id.*

⁵² 488 U.S. at 509.

⁵³ *Id.*

⁵⁴ 488 U.S. at 509.

⁵⁵ *Id.*

⁵⁶ 488 U.S. at 492.

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

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

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

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

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local MBE/WBE/DBE programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program, and its implementation by state and local government DBE programs, are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, and an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by local government recipients of federal financial assistance (U.S. DOT funds) based on 49 CFR Part 26 and 49 CFR Part 23.

1. Strict scrutiny analysis. A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁵⁷ 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.⁵⁸

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.⁵⁹ 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.⁶⁰ 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.⁶¹

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.⁶² The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to

⁵⁷ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁵⁸ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁵⁹ *Id.*

⁶⁰ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁶¹ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁶² *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and affirming, 84 F. Supp. 3d 705, 2015 WL 1396376.

justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).⁶³

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁶⁴ 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).⁶⁵ The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.⁶⁶
- **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

⁶³ *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting, Sherbrooke Turf, Adarand VII, and Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (*The Compelling Interest*, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf, Adarand VII, and Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. see, also, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 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.

⁶⁴ *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

⁶⁵ See, *e.g.*, *Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁶⁶ *Adarand VII*, 228 F.3d at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

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.⁶⁷

- **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.⁶⁸
- **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.⁶⁹
- **F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets," in "federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal ACDBE Program and the Federal DBE Program.⁷⁰ Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal ACDBE Program and the Federal DBE Program.⁷¹

The Federal DBE Program Implemented By State and Local Governments. It is instructive to analyze the Federal DBE Program and its implementation by state and local governments because the Program on its face and as applied by state and local governments has survived challenges to its constitutionality, concerned application of the strict scrutiny standard, considered findings as to disparities, discrimination and barriers to MBE/WBE/DBEs, examined narrow tailoring by local and state governments of their DBE program implementing the federal program, and involved consideration of disparity studies. The cases involving the Program and its implementation by state and local governments are informative, recent and applicable to the legal framework regarding MBE/WBE/DBE state and local government programs and disparity studies.

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation

⁶⁷ *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

⁶⁸ *Id.* at 1172-74 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁶⁹ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); see, *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

⁷⁰ *Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.*

⁷¹ *Id. at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).*

contracting industry for federally-funded contracts.⁷² Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁷³ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁷⁴ Most recently, in October 2018, Congress passed the FAA Reauthorization Act⁷⁵. At the present time, pending in Congress is legislation (H.R. 2, Section 1101, Moving Forward Act) to reauthorize the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The Federal DBE Program provides requirements for state and local government federal aid recipients and how recipients of federal funds implement the Federal DBE Program for federally-assisted contracts. The federal government and Congress have determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual local and state government 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.⁷⁶

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient’s DBE programs. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45. These regulations, and their interpretation by court decisions are instructive to local and state governments for many reasons, including if they are considering the development and implementation of MBE/WBE/DBE programs that satisfy the strict scrutiny standard and are narrowly tailored to remedying specific identified findings of discrimination in their marketplace.

Provided in 49 CFR § 26.45 are regulations regarding how local and state governments as recipients of federal funds should set the overall goals for their DBE programs, which are instructive to local and state government MBE/WBW/DBE programs. In summary, the state or

⁷² *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*.

⁷³ *Pub. L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat. 405.*

⁷⁴ *Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.*

⁷⁵ *Pub. L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat. 3186.*

⁷⁶ *49 CFR § 26.51; see 49 CFR § 23.25.*

local government establishes a base figure for relative availability of DBEs.⁷⁷ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁷⁸ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁷⁹ 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.⁸⁰ 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.⁸¹

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁸² A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁸³

State and local governments are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁸⁴

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

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁸⁵ If the government

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

⁷⁸ *Id.*

⁷⁹ *Id.* at § 26.45(d); *Id.* at § 23.51(d).

⁸⁰ *Id.*

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

⁸² 49 CFR § 26.51; 49 CFR § 23.51(a).

⁸³ 49 CFR § 26.51(b); 49 CFR § 23.25.

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

⁸⁵ See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater ("Adarand VII")*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092;

makes its initial showing, the burden shifts to the challenger to rebut that showing.⁸⁶ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁸⁷

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.⁸⁸ It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.⁸⁹ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁹⁰

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."⁹¹ "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.'"⁹² Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁹³

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁹⁴ Once the governmental entity has

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).

⁸⁶ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸⁷ *See, e.g., Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *see also Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸⁸ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; *See also Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁸⁹ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); *see, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁹⁰ *Croson*, 488 U.S. at 500; *see, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁹¹ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); *see also, Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁹² *See e.g., H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁹³ *Croson*, 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁹⁴ *Adarand Constructors, Inc. v. Pena*, ("Adarand III"), 515 U.S. 200 at 235 (1995); *see, e.g., Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*,

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.⁹⁵ 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.⁹⁶

To successfully rebut the government's evidence, the courts hold that a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence for the necessity of remedial action.⁹⁷ This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.⁹⁸ Conjecture and unsupported criticisms of the government's methodology are insufficient.⁹⁹ 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.¹⁰⁰

The courts have stated that "it is insufficient to show that 'data was susceptible to multiple interpretations,' instead, plaintiffs must 'present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.'"¹⁰¹ The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers "both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself."¹⁰²

91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

⁹⁵ *Majeske*, 218 F.3d at 820; see, e.g., *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

⁹⁶ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁹⁷ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁹⁸ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

⁹⁹ *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹⁰⁰ *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰¹ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

¹⁰² *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

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.”¹⁰³ The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.¹⁰⁴ 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.¹⁰⁵ It has been further held by the courts that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹⁰⁶

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”¹⁰⁷ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”¹⁰⁸

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.¹⁰⁹

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.¹¹⁰ “Where gross statistical disparities can be shown,

¹⁰³ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹⁰⁴ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003);, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹⁰⁵ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹⁰⁶ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁷ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

¹⁰⁸ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

¹⁰⁹ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

¹¹⁰ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”¹¹¹

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.¹¹² 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.¹¹³ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹¹⁴

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹¹⁵ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹¹⁶ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹¹⁷

¹¹¹ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹¹² *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3^d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹³ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3^d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁴ *Western States Paving*, 407 F.3d at 1001.

¹¹⁵ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3^d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁶ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3^d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁷ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3^d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹¹⁸
- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹¹⁹ 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.”¹²⁰
- **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.¹²¹

In terms of statistical evidence, the courts, including the Ninth Circuit, have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹²²

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.¹²³ The court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.¹²⁴ 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

¹¹⁸ See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹¹⁹ *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3^d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹²⁰ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹²¹ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

¹²² *H. B. Rowe, 615 F.3d 233 at 241, citing Croson, 488 U.S. at 509 (plurality opinion), and citing Concrete Works, 321 F.3d at 958; see, e.g., Croson, 488 U.S. at 509; Midwest Fence, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); AGC, SDC v. Caltrans, 713 F.3d at 1191-1197; H. B. Rowe v. NCDOT, 615 F.3d 233, 241-244 (4th Cir. 2010); Rothe, 545 F.3d at 1041; Concrete Works II, 321 F.3d at 970; W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206, 217-218 (5th Cir. 1999); Contractors Ass’n of E. Pa. v. City of Philadelphia, 91 F.3d 586, 596-605; Concrete Works, 36 F.3d at 1529 (10th Cir. 1994); Contractors Ass’n of E. Pa. v. City of Philadelphia, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also Western States Paving, 407 F.3d at 1001; Kossman Contracting, 2016 WL 1104363 (S.D. Tex. 2016).*

¹²³ *Id.* at 973.

¹²⁴ *Id.*

specifically identified in its area.”¹²⁵ 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.”¹²⁶

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.¹²⁷ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹²⁸

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.¹²⁹ Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹³⁰

The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.¹³¹ 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.¹³²

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹³³ (“[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.*”¹³⁴ Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”¹³⁵ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹³⁶

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public

¹²⁵ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹²⁶ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹²⁷ *Id.* at 973.

¹²⁸ *Id.*

¹²⁹ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹³⁰ *Id.*

¹³¹ *Id.* at 974.

¹³² *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹³³ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹³⁴ *Id.* (emphasis added).

¹³⁵ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹³⁶ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.”¹³⁷ The Tenth Circuit ruled that the local government can demonstrate that it is a “passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹³⁸

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹³⁹

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality’s showing that it indirectly participates in industry discrimination.¹⁴⁰

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.”¹⁴¹

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹⁴²

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.¹⁴³ But

¹³⁷ *Id.*

¹³⁸ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹³⁹ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹⁴⁰ *Id.* at 977.

¹⁴¹ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹⁴² *Id.* at 979-80.

¹⁴³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 924-25; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d. Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹⁴⁴ It has been held that anecdotal evidence of a local or state government’s institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is “potent.”¹⁴⁵

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.¹⁴⁶

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.¹⁴⁷

b. The Narrow Tailoring Requirement. The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be “narrowly tailored” to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Ninth Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;

¹⁴⁴ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass’n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁵ *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹⁴⁶ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng’g Contractors Ass’n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹⁴⁷ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng’g Contractors Ass’n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff’d* 473 F.3d 715 (7th Cir. 2007).

- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹⁴⁸

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁴⁹

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.”¹⁵⁰ 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.”¹⁵¹

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.’”¹⁵²

¹⁴⁸ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁴⁹ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁵⁰ *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).

¹⁵¹ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

¹⁵² *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁵³ 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.”¹⁵⁴ The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

Implementation of the Federal DBE Program: Narrow tailoring. The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.¹⁵⁵ 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.¹⁵⁶ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁵⁷

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.¹⁵⁸

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”¹⁵⁹ The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of

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

¹⁵⁴ 551 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).

¹⁵⁵ *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; *see, e.g., Midwest Fence*, 840 F.3d 932, 949-953.

¹⁵⁶ *Western States Paving*, 407 F.3d at 997-98, 1002-03; *see AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁵⁷ *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.

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

¹⁵⁹ 473 F.3d at 722.

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.¹⁶⁰ 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.¹⁶¹ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁶² Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁶³

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁶⁴ 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.¹⁶⁵ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁶⁶ In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.¹⁶⁷

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.¹⁶⁸ And the courts have held

¹⁶⁰ *Id.* at 722.

¹⁶¹ *Id.* at 723-24.

¹⁶² *Id.*

¹⁶³ *Id.*; *See, e.g., Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp.2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

¹⁶⁴ *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁶⁵ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁶⁶ *Id.*

¹⁶⁷ 840 F.3d 932 (7th Cir. 2016).

¹⁶⁸ *See, e.g., Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

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.¹⁶⁹

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.”¹⁷⁰

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.¹⁷¹

¹⁶⁹ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁷⁰ *Croson*, 488 U.S. at 509-510.

¹⁷¹ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

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.”¹⁷²

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.¹⁷³ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁷⁴ (2) good faith efforts provisions;¹⁷⁵ (3) waiver provisions;¹⁷⁶ (4) a rational basis for goals;¹⁷⁷ (5) graduation provisions;¹⁷⁸ (6) remedies only for groups for which there were findings of discrimination;¹⁷⁹ (7) sunset provisions;¹⁸⁰ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁸¹

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.¹⁸²

¹⁷² *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁷³ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁷⁴ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality (“AGC of Ca.”)*, 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

¹⁷⁵ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁷⁶ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁷⁷ *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

¹⁸⁰ See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

¹⁸¹ *Coral Constr.*, 941 F.2d at 925.

¹⁸² See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁸³ The Ninth Circuit has applied “intermediate scrutiny” to classifications based on gender.¹⁸⁴ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁸⁵

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁸⁶

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.¹⁸⁷

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.¹⁸⁸ The measure of evidence required to satisfy intermediate

¹⁸³ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally, Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

¹⁸⁴ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see generally, Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also, Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*quoting Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259 (1978)).

¹⁸⁵ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993).

¹⁸⁶ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see, e.g., Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3^d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

¹⁸⁷ *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*.

¹⁸⁸ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83

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.¹⁸⁹

The Tenth Circuit in *Concrete Works*, stated with regard evidence as to woman-owned business enterprises as follows:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. See *Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”). Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁹⁰

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”¹⁹¹ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.¹⁹² The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.¹⁹³

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.¹⁹⁴ Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal

F.Supp 2d 613, 619-620 (2000); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”)

¹⁸⁹ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁹⁰ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

¹⁹¹ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁹² *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁹³ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁹⁴ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

evidence to establish gender discrimination necessary to support the Ordinance.¹⁹⁵ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁹⁶ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.¹⁹⁷ This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis. Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.¹⁹⁸ When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.¹⁹⁹

Courts in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”²⁰⁰ So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.²⁰¹

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”²⁰²

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

¹⁹⁹ See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3^d Cir. 1993); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²⁰⁰ See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²⁰¹ *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²⁰² *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *People v.*

Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality”.²⁰³

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”²⁰⁴ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”²⁰⁵

Under the federal standard of review a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”²⁰⁶

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”)²⁰⁷.

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged

Chatman, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²⁰³ *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²⁰⁴ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²⁰⁵ *Id.*

²⁰⁶ *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (*O’Connor, J., concurring*); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²⁰⁷ 2012 WL 5939228 (Fed. Cl. 2012).

business[:] 14.5%; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”²⁰⁸

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.²⁰⁹ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²¹⁰

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors....” Consequently, the court held one rational method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.²¹¹ The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns...the maximum practicable opportunity to participate as subcontractors....”²¹²

4. Pending cases (at the time of this report). There are pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and that may potentially impact and be instructive to the study, including the following:

- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.**, U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.

This is a challenge to the Shelby County, Tennessee “MWBE” Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.*, the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, 1983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The case at the time of this report is in the middle of discovery. The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

In addition, Plaintiffs on February 17, 2020 filed with the District Court in Tennessee a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District), issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020, compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County's ability to present proof at trial due to the non-party MTA's failure to meet its discovery obligations, that nothing in the record attributes MTA's failure to meet its discovery obligations to the County, and that MTA's efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA's appeal to the Ninth Circuit. The district court in Tennessee stated in a footnote: "Now that the Ninth Circuit has dismissed MTA's appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose."

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September.

The parties filed on September 25, 2020 with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission. The County advises that the Commission will vote on this matter on October 26, 2020. If approved by the County, the parties will then submit a proposed Order of Settlement to the court to conclude the matter.

Thus, at the time of this report the case in federal court in Tennessee remains pending until and if the settlement is approved. Trial had been scheduled for December 14, 2020, which is subject to change given the status of the litigation.

- **Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.**, Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida.

In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also denied a motion by AGC to be elevated to party status and to conduct discovery. The court held a Case Management Conference on August 17, 2020, and ordered that MTA's Motion to Dismiss be scheduled for a hearing at a date mutually agreeable to the parties.

The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether the documents at issue that have been provided by MTA to the court for in-camera inspection are exempted from the Public Records Act.

The court also ordered that MTA and the County file a discovery briefing schedule, and Intervenor the AGC may file a discovery brief. The court also stated that if there is limited discovery, the AGC may participate in depositions and file a motion for discovery. If the parties agree to limited discovery, then that discovery deadline is October 30, 2020.

CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege that this cause of action arises from Defendant's Minority and Women's Business Enterprise Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis.

Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation.

Plaintiffs claim the NORTHERN CHEROKEE NATION is an American Indian Tribe with contacts in what is now known as the State of Missouri since 1721.

Plaintiff alleges the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiff alleges the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs.

The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors to the Equal Protection of Laws in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification and Compliance Rules.

Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

As a result of the City's deliberate indifference to their rights under the Fourteenth Amendment, Plaintiffs claim they have suffered loss of business, loss of standing in their community, and damage to their reputation by the City's decision to decertify the MBE status of these companies, and incurred attorney's fees and costs.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition a Minority Group Member under its policy and rewrite it in a non-discriminatory manner, reinstate the MBE

certification of each Plaintiffs, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

At the time of this report, the court has issued a Memorandum and Order, dated July 27, 2020, which provides the the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August 2020 and reply briefs are due in September 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020. The court on September 14, 2020 issued an order over the opposition of the parties referring the case to mediation “immediately,” with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

■ **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.**, U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep’t of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants have filed a Motion to Dismiss asserting *inter alia* that the court does not have jurisdiction, which is pending. The parties are to complete filing briefs by September 2020. Plaintiff has filed written discovery, which is pending, as defendants have filed a motion to stay discovery pending the outcome of the Motion to Dismiss.

- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award fifteen percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the

legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found persuasive courts that have held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling."

The only evidence clearly considered by the legislature prior to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians, and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio's MBE program. The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence,

the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could find this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to government procurement contracts only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts before enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires fifteen percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the fifteen percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a fifteen percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the fifteen percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

The court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lack of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence

for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court found R.C. §3796.09(C) is unconstitutional on its face.

The case at the time of this report is on appeal in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954.

This list of pending cases is not exhaustive, but in addition to the cases cited previously may potentially have an impact on the study and implementation of MBE/WBE/DBE and the Federal DBE/ACDBE Programs.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, the Federal DBE and ACDBE Programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

SUMMARIES OF RECENT DECISIONS

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

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019).

Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with

racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor’s discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor’s claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017).

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray,

identified as a “Negro,” who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, “the presumption of disadvantage has been rebutted,” and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) “Discrimination under 42 U.S.C. § 1983” (reference is made to Equal Protection), (C) “Discrimination under 42 U.S.C. § 2000d,” (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: (“[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE,” and a declaration the “definitions of ‘Black American’ and ‘Native American’ in 49 C.F.R. § 26.5 to be void as impermissibly vague,”) and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d

932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff’s application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs’ remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their “class of one” equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal

Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of “Black American” and both the definition of “Native American” that was applied to Plaintiffs and a new definition of “Native American” are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness “doctrine is a poor fit.” *Id.* at *14, *citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of “Black American” and of “Native American” in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a “well founded” question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of “socially and economically disadvantaged individual” as a “citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities,” the court determined, gives further meaning to the definitions of “Black American” and “Native American” here. *Id.* at *14. “Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity.” *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, *citing*, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional

muster in the Ninth Circuit. *Id.* at *16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at *17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

3. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

Note: The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana's DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-

CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana’s DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in

order to achieve 3.27 percentage points of Montana’s overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West’s claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West’s claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana’s DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court’s threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court’s denial of the State’s motion to strike an expert report submitted in support of Mountain West’s motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West’s appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court’s determination that Mountain West has a private right to enforce Title VI, affirmed the district court’s decision to consider the disputed expert report by Mountain West’s expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West’s claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West’s Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy

violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting, Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, U.S. Dep't of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) ("In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.").

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."); and quoting, *Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to *Mountain West's* case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand was voluntarily dismissed by stipulation of parties (March 14, 2018).

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that

even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

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

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

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

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

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

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

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

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm’s findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

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

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

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

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

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

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

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

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

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

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

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).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a “significant statistical disparity” could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring “the cold numbers convincingly to life.” *Id.* (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT’s DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington’s data “did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state.” *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC’s contention that Caltrans’ evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of

gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States*." *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

Consideration of race-neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral

alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mixed-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.*

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of

race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, quoting *Western States Paving*, 407 F.3d at 991, citing *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the

Western States Paving case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id.* at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

6. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49

CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only

81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance,

Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id., citing Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, *citing Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *reasonable* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

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 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id.* at 1183.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id.* at 1185. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id.* at 1186. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id.* at 1186. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id.* at 1187. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id.* at 1186.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id.* at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id.* at 1187.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

This case out of the Ninth Circuit struck down a state’s implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington’s implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Equity Act for the 21st Century (“TEA-21”). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all

small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of

discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) ("DOT's regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id.* The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id.* (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In

Monterey Mechanical, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT’s program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau’s Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent “to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period].” *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State’s transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action’s component. *Id.* The court found that the State’s methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the

court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State’s argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress’s compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court’s grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State’s liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

9. Western States Paving Co. v. Washington DOT, USDOT & FHWA, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit’s remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff’s claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff’s claim for injunctive relief as moot. The court found “it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*,” and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving’s claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT’s unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the “State defendants.” Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification “who averred that they had been subject to ‘general societal discrimination.’”

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

10. Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme ‘[did] not involve racial or gender quotas, set-asides or preferences,’” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University’s trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff’s motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court’s finding, such a difference was not *de minimis*. *Id.*

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

11. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin

enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to

MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a

disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

12. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be

required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of

summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

13. Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000)

In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court held the City of San Jose's Nondiscrimination/Nonpreferential Treatment Program Applicable to Construction Contracts in Excess of \$50,000 (the "Program"), a goals-oriented program requiring utilization of minority and women subcontractors or documentation of best efforts at utilization, violated Article I, Section 31 of the California Constitution as amended by Proposition 209.

The Program at issue was adopted after the passage of Proposition 209 and sought to clarify the City's earlier goals-oriented program that was enacted after the City commissioned a disparity study in 1990 that reported a disparity in as to the amount of contract dollars awarded to MBE subcontractors. The Program required contractors to fulfill an outreach or a participation requirement and applied to all contractors, including MBEs and WBEs and those not planning to subcontract out any portion of the contract. Hi-Voltage bid on a contract and because it intended to perform all of the work itself and not hire any subcontractors, it did not comply with the terms of the Program and was deemed a non-responsive bidder. Upon challenge thereto, the trial court held the Program violated Article I, Section 31; the court of appeals affirmed.

In affirming the lower courts and holding the Program unconstitutional, the California Supreme Court looked specifically to Title VII of the Civil Rights Act ("Title VII") and found that Article I, Section 31 "closely parallels this provision in both language and purpose;" the Court thus examined U.S. Supreme Court cases interpreting Title VII.

The Court found the Supreme Court's decision in *Steelworkers v. Weber*, 443 U.S. 193 (1979) marked a substantial modification in the interpretation and application of Title VII. In *Weber* and its progeny, the Supreme Court "interpreted Title VII to permit race-conscious action whenever the job category in question is traditionally segregated." 12 P.3d at 1077 (internal quotations omitted). The Court determined its own jurisprudence indicated a "fundamental shift from a staunch anti-discrimination jurisprudence to approval, sometimes endorsement, of remedial race- and sex- conscious government decision making." *Id.* at 1081.

In 1996, voters approved Proposition 209, adding Section 31 to Article I of the California Constitution and providing as follows:

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The Court found the language of the amendment was clear and found nothing in the ballot arguments or legislative analysis to indicate "discriminate" or "preferential treatment" should have any special meaning. The Court determined the intent of Proposition 209 was to "reinstitute the interpretation of the Civil Rights Act and equal protection that predated Weber." The Court concluded the Program violated Proposition 209 inasmuch as the participation component is discriminatory against non-M/WBE's and the outreach component grants preferential treatment to M/WBE's. Specifically, the Court found the outreach component "requires contractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-MBE's/WBE's." *Id.* at 1068. The Court did note however that not all outreach efforts are unlawful; rather the Court found "voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." *Id.* The Court expressed no opinion regarding the scope of such efforts.

In light of the analysis of Proposition 209 contained in the ballot pamphlet, it is clear that the voters reasonably would have believed that an outreach program targeted to specific individuals or groups on the basis of their race or gender would be considered a program that grants preferential treatment within the meaning of article I, section 31. Interpreting the language of article I, section 31, to effectuate the voters' intent, we must conclude that an outreach program directed to an audience on the basis of its members' race or gender constitutes a program that grants preferential treatment for purposes of article I, section 31. In view of this conclusion, it is clear that the Documentation of Outreach component that is challenged in this case violates the newly enacted constitutional provision. As noted, the outreach component in question places an obligation on prime contractors to solicit bids from, and make follow-up contacts to, a specified number of MBE or WBE subcontractors, but the provision places no similar obligation on prime contractors to undertake outreach efforts to non-MBE or non-WBE subcontractors. This aspect of the outreach component in itself grants preferential treatment to subcontractors on the basis of race and gender. Moreover, the city's outreach component contains an additional feature that requires a prime contractor to negotiate in good faith with and to justify any rejection of an offer made by any one of the MBE/WBE subcontractors that expresses an interest in participating in the project, while the provision places no similar requirements upon a prime contractor with regard to proposals made by a non-MBE or non-WBE subcontractor. These additional features of the outreach component similarly grant preferential treatment to subcontractors on the basis of race or gender, and indeed, as a practical matter, may well create a significant incentive for a prime contractor to grant preferential treatment to an MBE/WBE subcontractor that expresses interest in participating in the project, in order to avoid a claim that the contractor's negotiation or justification for rejection was inadequate.

Finally, the Court also found that federal law did not require a different result as the "federal courts have held Proposition 209 does not conflict with Titles VI, VII, or IX of the Civil Rights Act of 1964."

14. Connerly v. State Personnel Board, 92 Cal. App. 4th 16 (2001)

In *Connerly v. State Personnel Board*, the Governor of California and a taxpayer challenged the constitutionality of affirmative action programs applicable to the State Lottery Commission (Government Code section 8880.56). Importantly, the court of appeals held that "under the equal protection guarantee of California's Constitution, gender is a suspect classification subject to strict scrutiny review." 92 Cal. App. 4th 16, 39 (2001), citing *Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985). The court then quoted *Hi-Voltage Wire Works, Inc. v. City of San Jose*, extensively regarding the constitutionality of various outreach measures. The court found that Proposition 209 overlaps with the principles of equal protection, however, "[t]o the extent the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action." *Id.* at 46.

The court determined that targeted outreach programs to women and minorities violate Proposition 209. The court found that in this regard, outreach programs "designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden." *Id.* at 46. Moreover, monitoring programs that collect and report data concerning participation of minorities and women are permissible under principles of equal protection. The court reasoned that "[a]ccurate and up-to-date information is the sine qua non of intelligent, appropriate legislative and administrative action." *Id.*

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

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

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the

practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 *quoting Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those

objectives.” *Id.*, quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id.* at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id.* at 242, quoting *Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 quoting *Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 quoting *Hogan*, 458 U.S. at 726.

Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The

consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors’ underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they

were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm’s gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms’ gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners’ years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm’s gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff’s expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff’s expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study’s availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state’s evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff’s argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state’s response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function

of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned

firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified African American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of

discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [] ... every conceivable race-neutral alternative." 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these "persistent disparities indicate the necessity of a race-conscious remedy." 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program's inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the

discriminatory impact has been eliminated. *Id.* at 253, citing *Adarand Constructors v. Slater*, 228 F.3d at 1179 (quoting *United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program’s goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State’s compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

Women-owned businesses overutilized. The study’s public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women

subcontractors in the general construction industry statewide and in the Asheville, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was “the result of mere chance.” *Id.* at 255. The Court found troubling the “evidentiary gap” that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program “must always tie private discrimination to public action.” 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data’s probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program’s current inclusion of women subcontractors in setting participation goals. *Id.*

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme’s flexibility and responsiveness to the realities of the marketplace, and given the State’s strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State’s application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court’s judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus

remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

2. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006)

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an

independent assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties’ dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that “§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate.”

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex

discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

4. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.'" *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious ... policies must be limited in time.” *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

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

This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification

and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices

were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who

responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that

minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, *citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court's erroneous

legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does

not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court’s criticism did not undermine the study’s reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took “judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court’s conclusion that the business formation studies could not be used to justify the 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 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 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 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups

“favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by

not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

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, Mississippi, 199 F.3d 206 (5th Cir. 1999)

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5% of all city contracts. 199 F.3d at 208. *Id.* The 5% goal was not based on any objective data. *Id.* at 209. Instead, it was a "guess" that was adopted by the City. *Id.* The goal

was later increased to 15% because it was found that 10% of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program's adoption, the City's Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15% participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5% participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20% of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City's adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15%. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15% MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5% WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1%. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City's Financial Legal Departments, approved Scott's bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15% minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id.* at 211. The district court found

that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15% DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15% of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* at 218, n.11. The sufficiency of a municipality’s findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study’s findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City’s Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City’s construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City’s construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City’s 15% DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott’s low bid because Scott failed to meet the Special Notice’s DBE-participation goal, not because Scott’s bid exceeded the City’s budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

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 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals:

(1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate

'share' ... when the bidder percentages are used as the baseline." *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were "decidedly mixed" as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating "disparity indices" for each program and classification of construction contract. The Eleventh Circuit explained:

"[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent."

Id. at 914. "The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts." *Id.*

The Eleventh Circuit found that "[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination." *Id.* The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination." *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. "The standard deviation figure describes the probability that the measured disparity is the result of mere chance." *Id.* The Eleventh Circuit had previously recognized "[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Id.*

The statistics presented by the County indicated "statistically significant underutilization of BBEs in County construction contracting." *Id.* at 916. The results were "less dramatic" for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

"[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the

plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE

participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of

support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County's subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), "the study compared the proportion of the designated group that filed a subcontractor's release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period." *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor's release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm." *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing “the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau's Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and "complete[ly] fail[ed]" to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: "(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms." *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a "letter of unavailability" for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit

flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and

neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

11. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming*, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51% owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of*

Philadelphia, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City

Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id. citing*, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance’s preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training,

and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a

court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff’s theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue. *Id.*

The Court held the district court’s opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited

record evidence as a whole, and concluded that the “strong basis in evidence” for the City’s position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have “passively participated” in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City’s theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O’Connor observed in *Croson*: if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City’s expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, “I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting.” *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be “cursory,” Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City’s Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer’s log. The court found Mr. Macklin’s testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin’s testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to

determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City’s “standard requirements warn [would-be prime contractors] that discrimination will be deemed a ‘substantial breach’ of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due.” Like the Supreme Court in *Croson*, the Court stated the district court found significant the City’s inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin’s conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court’s conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of “extremely low” membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must “link [low MBE membership] to the number of local MBEs eligible for membership.” *Id.* at 601.

The City’s expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations,

however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all

construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court’s suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City’s Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market "was a close call." *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the "fit" between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made "necessary" by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City's program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a "sheltered market" basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated "[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms." *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests

that racial discrimination had occurred, suggested discrimination by the City's Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia's program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race-neutral or less burdensome to non-minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Crososon* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed

by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or

less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a “strong basis in evidence for its conclusion that [the] remedial action was necessary.” *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not “merely the product of unthinking stereotypes or a form of racial politics.” *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

12. Contractor’s Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993)

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the [contractors 739 F.Supp. 227](#), and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17-503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to

diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17-501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 citing, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors' equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co., 488 U.S. 469 \(1989\)](#), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id.* at 995, quoting, [735 F.Supp. at 1295-98](#). The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298-99](#). The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 citing, [735 F.Supp. at 1299-1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand

summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged. *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under [*Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, *citing*, [Hogan 458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, [Coral Constr. Co. v. King County, 941 F.2d 910, 930 \(9th Cir.1991\)](#), *cert. denied*, [502 U.S. 1033 \(1992\)](#); [Michigan Road Builders Ass’n, Inc. v. Milliken, 834 F.2d 583, 595 \(6th Cir.1987\)](#), *aff’d mem.*, [489 U.S. 1061\(1989\)](#); [Associated General Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922, 942 \(9th Cir.1987\)](#); [Main Line Paving Co. v. Board of Educ., 725 F.Supp. 1349, 1362 \(E.D.Pa.1989\)](#).

Application of intermediate scrutiny to the Ordinance’s gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. [Cone Corp. v. Hillsborough County, 908 F.2d 908 \(11th Cir.\)](#), *cert. denied*, [498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 \(1990\)](#). *Id.* at 1000-1001. The Court agreed with the district court’s choice of intermediate scrutiny to review the Ordinance’s gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* [735 F.Supp. at 1307](#). That standard validates the classification if it is “rationally related to a legitimate governmental purpose.”*Id.* at 1001, *citing* [Cleburne, 473 U.S. at 445](#). The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, *quoting*, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” [Id. at 1002, quoting, 488 U.S. at 492.](#)

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. [Id. at 1002, citing 488 U.S. at 502.](#)

Ruling the Philadelphia Ordinance’s racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance “possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan,” *Id.* at 1002, *quoting*, [735 F.Supp. at 1298](#). As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia’s population, the Ordinance’s declaration it was remedial, and “conclusory” testimony of

witnesses regarding discrimination in the Philadelphia construction industry. [Id. at 1002, quoting, 1295–98.](#)

In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. [735 F.Supp. at 1295.](#) The Court said this reading overlooked the statement in *Croson* that a City can be a “*passive participant*” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, [quoting, 488 U.S. at 492.](#)

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, [quoting, 488 U.S. at 480.](#)

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, [quoting, 735 F.Supp. at 1296.](#)

The Third Circuit held, however, given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, [quoting, Coral Constr., 941 F.2d at 919](#) (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” [Coral Constr., 941 F.2d at 919.](#) the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre–Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia.

The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post–Enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [Cone Corp., 908 F.2d at 916 \(10.78 disparity index\)](#); [AGC of California, 950 F.2d at 1414 \(22.4 disparity index\)](#); [Concrete Works, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [Stuart, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [O’Donnell, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in

City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson*’s reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian–American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian–American, Pacific–Islander, and “other” minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the “significant statistical disparity” . *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian–American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, quoting, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian–American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian–American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the

City's prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses "to ensure adequate competition and an expectation of reasonable prices on bids or proposals," and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after "a good faith effort to comply with the goals for DBE participation." *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City's program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs "within the Philadelphia Standard Metropolitan Statistical Area." *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance's fifteen percent goal. The City's data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond's 30 percent goal inappropriately assumed "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." *Id.*, quoting, [488 U.S. at 507.](#)

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance's showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was "narrowly tailored." *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was "substantially related to an important governmental objective." *Id.* at 1009.

The City contended the gender preference was aimed at the "important government objective" of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that "[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one." *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [Heller v. Doe, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court’s grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court’s grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian–American, or Native American persons or women, and remanded [the case](#) for further proceedings and a trial in accordance with the opinion.

13. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city’s bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The

court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San

Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited

in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

14. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994)

The court considered whether the City and County of Denver’s race- and gender-conscious public contract award program complied with the Fourteenth Amendment’s guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. (“Concrete Works”) appealed the district court’s summary judgment order upholding the constitutionality of Denver’s public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance (“Ordinance”) to enable certified racial minority business enterprises (“MBEs”)¹ and women-owned business enterprises (“WBEs”) to participate in public works projects “to an extent approximating the level of [their] availability and capacity.” *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC’s findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver’s summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver’s program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

Standing. At the outset, the Tenth Circuit on appeal considered Denver’s contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance’s constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated “injury in fact” because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance’s requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating “injury in fact,” Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver’s race- and gender-conscious contract program. *Id.*

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance’s race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated

under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id. citing, Croson* at 492.

A. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works (“DPW”) construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body’s strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver’s contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id.* at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

B. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors’ experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver’s construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id.* at 1520, quoting, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

C. Post-Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity before [it] may use race-conscious relief." *Id.* at 1521, quoting, *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

D. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, citing, *Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments "must identify that discrimination ... with some specificity before they may use race-conscious relief." *Id.*, citing *Croson*, at 504. The court said that the Supreme Court's benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation was whether there exists a "strong basis in evidence for [the government's] conclusion that remedial action was necessary." *Id.*, quoting, *Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a “strong basis in evidence” that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, *citing, Wygant*, 476 U.S. at 292 (O’Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, *citing, Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

E. Evidentiary Predicate Underlying Denver’s Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid-1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive

pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id.* In sum, the

court found the federal agency reports of discrimination in Denver’s contract awards supported Denver’s contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

(b) Denver’s Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW “Major Bond Projects Final Report,” which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report’s description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained “no information about the number of minority or women owned firms that were used” on these bond projects. *Id.* at 1525. However, the court concluded the Report’s description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver’s data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore “tainted” and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. “non-goals public projects.” *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services (“DGS”) contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in

1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. Nevertheless, the court concluded Denver’s data indicated significant WBE underutilization such that the Ordinance’s gender classification arose from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

Empirical data. The third evidentiary item supporting Denver’s contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver’s program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver’s empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver’s argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver’s data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted *Croson* impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion or request for a preliminary injunction. *Id.* at 1527 citing, *Contractors Ass’n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the “percentage of [MBE] availability or composition in the ‘population’ of Philadelphia area construction firms”); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented “detailed findings of prior discrimination”); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between “the total percentage of minorities involved in construction and the work going to minorities” shows that “the racial classification in the County plan [was] necessary”).

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstated “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms.” *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm’s precise “capacity” at a given moment in time belied quantification due to the industry’s highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, “although almost all firms contacted indicated that they were interested in City work.” *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id.* at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from “financ[ing] the evil of private prejudice.” *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and WBEs, which the

court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

15. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of

discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing *Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored

program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been

discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

16. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their

respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a “front” to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a “commercially useful function” on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC’s principal was paid a relatively nominal “fixed-fee” for permitting use of WMCC’s name on each of these subcontracts. *Id.* at 744.

Defendant’s contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the “defraud clause” of [18 U.S.C. § 371](#), in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, [49 C.F.R. § 26.55\(c\)](#), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of “commercially useful function” set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States’ Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation (“PennDOT”) and the Pennsylvania Turnpike Commission (“PTC”) receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT’s and PTC’s DBE program and WMCC was paid a total of \$1.89 million.” *Id.* at 746. These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT’s program, the entire amount of WMCC’s subcontract

with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

Motion to Dismiss—challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that [49 C.F.R. § 26.55\(c\)](#) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, *citing*, [49 C.F.R. § 26.55\(c\)](#). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, see [Midwest Fence Corp. v. United States Dep't of Transp.](#), 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to [49 C.F.R. § 26.53\(a\)](#) and "good faith efforts" language), and criminal matters, [United States v. Maxwell](#), 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in [§ 26.55\(c\)\(1\)](#); and, (2) are beyond the scope of the definition of that phrase in [§ 26.55\(c\)\(2\)](#). *Id.* at 755, *citing*, [49 C.F.R. §§ 26.55\(c\)\(1\)-\(2\)](#). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are

utilized in a sentence describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, citing, [49 C.F.R. § 26.55\(c\)](#).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by [§ 26.55\(c\)\(2\)](#), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, quoting, [49 C.F.R. § 26.55\(c\)](#).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in [United States v. Maxwell](#). *Id.* at 756. The court noted that in [Maxwell](#), the defendant argued in a post-trial motion that [§ 26.55\(c\)](#) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, quoting, [United States v. Maxwell, 579 F.3d 1282, 1302 \(11th Cir. 2009\)](#). The defendant in [Maxwell](#), the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. [49 C.F.R. § 26.55\(c\)\(2\)](#). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

Id. at 756, quoting, [United States v. Maxwell, 579 F.3d 1282, 1302 \(11th Cir. 2009\)](#).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in [Maxwell](#) found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, [49 U.S.C. § 322\(a\)](#) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); [23 U.S.C. § 304](#) (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); [23 U.S.C. § 315](#) (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, [Midwest Fence Corp., 840 F.3d at 942](#) (citing [Western States Paving Co. v. Washington State Dep’t of Transportation, 407 F.3d 983, 993 \(9th Cir. 2005\)](#); [Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation, 345 F.3d 964, 973 \(8th Cir. 2003\)](#); [Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1155 \(10th Cir. 2000\)](#)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant’s motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

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

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston’s Minority and Women Owned Business Enterprise (“MWBE”) program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston’s construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE

program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded. The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the

information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge’s observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge’s conclusion that the MWBE program is nearly tailored.

Native-American-owned businesses. The study found that Native-American-owned businesses were utilized at a higher rate in Houston’s construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston’s construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge’s recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston consultant’s opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a “hypothetical non-existence” of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge’s recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston’s construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston’s motion to exclude the Kossman’s proposed expert witness is granted; Kossman’s motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects;

Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman's proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study

defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the

numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not

eliminated the discrimination. *Id.* at 61. The MJ found Houston’s race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court’s opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

18. H. B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al., 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* (“Rowe”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent

WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the

plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines “minority” as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants’ Motion to Dismiss Claim for Mootness as to plaintiff’s suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff’s pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff’s and the defendants’ Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women’s Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff’s rights under the federal law and the United States

Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A § 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there

remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

19. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the

plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

20. 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.

21. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs

every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the

County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of

proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit,

and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

22. 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.

23. 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).

24. 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.

25. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of

presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, *citing to Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority

businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenor's evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenor did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id.* The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned

businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croscon* 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.

26. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000)

Plaintiff Associated Utility Contractors of Maryland, Inc. (“AUC”) filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance (“the Ordinance”). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. (“MMCA”) opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment (“the December injunction”). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City's 1999 numerical set-aside goals for Minority-and Women-Owned Business Enterprises (“MWBES”), which had been established at 20% and 3%, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff's facial attack on the constitutionality of the Ordinance, concluding that there existed “a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action.” *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

Facts and Procedural History. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20% of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3% to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises....” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and

“contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20% MBE and 3% WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20% MBE and 3% WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20% and 3% goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “ ‘injury in fact’ is the inability to compete on an equal footing in the bidding process ...” *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 quoting, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City’s set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City's set-aside goals required AUC members to "select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors" in order to bid successfully on City public works contracts for work exceeding \$25,000 ("City public works contracts"). *Id.* at 618. AUC claimed, therefore, that the City's set-aside goals violated the Fourteenth Amendment's guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 619, quoting *Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id.* citing *Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, quoting *Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, citing *Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 619, quoting *Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a "two step analysis for evaluating a race-conscious remedy." *Id.* at 619 citing *Maryland Troopers Ass'n*, 993 F.2d at 1076. "First, the [government] must have a 'strong basis in evidence for its conclusion that remedial action [is] necessary....' 'Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Id.* at 619, quoting *Maryland Troopers Ass'n*, 993 F.2d at 1076 (citing *Croson*).

The second step in the Croson analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 quoting *Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, quoting *Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying Croson’s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, quoting *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

Preenactment versus postenactment evidence. In evaluating the first step of the Croson test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court

found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, quoting *Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE participation in City construction subcontracts, and for analogous reasons, the 3% WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* “strong basis in evidence.” *Id.* at 621, n.6, citing *Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), cert. denied, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), cert. denied, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case, the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20% for MBEs and 3% for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20% preference is not supported by a

“strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3% preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20% MBE and 3% WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

Holding. The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

27. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors*

Association case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County’s standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that “[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that

problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity ... *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County’s argument that its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program’s gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present “sufficient probative evidence” of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County’s M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court’s opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

28. 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.

29. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments

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

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT’s implementation of it, and the Tollway’s own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT’s implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway’s program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had relet the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 citing *Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at *7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. *Id.* at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, *citing* 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence “mismatch” argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “only on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs’ ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need

definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all,

with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at *13. The study found that DBEs made up 25.55% of prime contractors in the construction field, received 9.13% of prime contracts valued below \$500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5% of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

Tollway program. Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway's historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically

significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector.” *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01% across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence’s criticisms. Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at *15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence's argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence's strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, an

d that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic underutilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined

the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts

that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely “theoretical.” *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract’s DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence “had presented evidence rather than theory on this point, the result might be different.” *Id.* at *18. “Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting.” *Id.* at *18. The court concluded that Midwest Fence “has shown how the Illinois program *could* yield that result but not that it actually does so.” *Id.*

In light of the IDOT and Tollway programs’ mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the “theoretical possibility of a ‘mismatch’ could be a problem, but we have no evidence that it actually is.” *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* “So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination”, according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact “on this point.” *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

2. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016).

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014

WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the

ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years

preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and

eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court’s grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation’s (“IDOT”) DBE Program. Plaintiff Northern Contracting Inc. (“NCI”) was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT’s Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT’s DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT’s program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet’s Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT’s “zero goal” experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT’s DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government’s compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained

that “[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.” *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT’s DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit’s opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law “when the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI’s collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid.

Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through

race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state’s failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court’s narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.)

5. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari “as improvidently granted” without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court’s vacation of the Tenth Circuit’s dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government’s challenge to the district court’s grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause (“SCC”), which employs race-conscious presumptions designed to favor minority enterprises and other “disadvantaged business enterprises” (“DBEs”). The court’s evaluation of the SCC program utilizes the “strict scrutiny” standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id.* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

“Compelling Interest” in race-conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O’Connor explicitly states: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that “remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions” (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that “the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry’ by allowing tax dollars ‘to finance the evil of private prejudice.’” *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as “remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups.” *Id.*

Evidence required to show compelling interest. While the government’s articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The “benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation [i]s whether there exists a ‘strong basis in evidence for [the government’s] conclusion that remedial action was necessary.’” *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, *citing Concrete Works*, 36 F.3d at 1520–21.

After the government’s initial showing, the burden shifted to *Adarand* to rebut that showing: “Notwithstanding the burden of initial production that rests” with the government, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* at 1166, *quoting Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, *citing Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166–67 *citing Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O’Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program.

Id. at 1167, quoting, *Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government’s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government’s evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to “old boy” networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors' unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government's evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government's evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 1172.

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government's evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court's decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government's review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." *Id.* quoting, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

The court said that it was mindful that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 1172, quoting, *Croson* at 501–02. But the court found that here, it was unaware of such “special qualifications” aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, citing, *Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, quoting, *Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, quoting, *Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, citing, *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Adarand’s rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand’s contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* “Race” the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.” *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct.

1842 (O'Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government's initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court's finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, quoting, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, "the availability of waiver" is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.*, quoting, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers'*, 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)). In that context, a "rigid numerical quota," the court noted particularly deserves the cause of narrow tailoring. *Id.* at 1177, citing, *Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." 476 U.S. at 280-81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O'Connor's majority opinion in *Croson* added a further factor to the court's analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding

the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, quoting *Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, quoting *Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. *Id.* at 1185-1186.

The court stated that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” *Id.* The court found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination

based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” *Id.*

Holding. Mindful of the Supreme Court’s mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III*’s strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id.* at 1178.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff *Adarand* “conceded that its challenge in the instant case is to ‘the federal program, implemented by federal officials,’ and not to the letting of federally-funded construction contracts by state agencies.” 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT’s implementation of race-conscious policies. *Id.* at 1187-1188. Therefore, the court did not address the constitutionality of an as applied attack on the implementation of the federal program by the Colorado DOT or other local or state governments implementing the Federal DBE Program.

The court thus reversed the district court and remanded the case.

Recent District Court Decisions

6. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).²¹³

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

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

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 *Crosby*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing

a national program. *Id.* at 727, *citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal

regulations. *Id.* The court stated the 2004 study employed a seven-step “custom census” approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT’s DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT’s data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government’s determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT’s implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest’s main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT’s disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest’s argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account “all measurable variables” to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest’s criticisms insufficient to rebut IDOT’s evidence of discrimination or discredit IDOT’s methods of calculating DBE availability. *Id.* at 733. First, the court said, the “evidence” offered by Midwest’s expert reports “is speculative at best.” *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with “credible, particularized evidence” of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT’s method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. *Id.* at 733, *citing to Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT’s evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies’ result. *Id.*

The court pointed out that although Midwest’s expert’s reports “cast doubt on the validity of IDOT’s methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias.” *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT’s availability calculations. *Id.*

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program’s burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT’s determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants,

the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court

already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

Notice of Appeal. Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is discussed above in the Seventh Circuit decision in 2016.

7. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE

Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of “correcting discrimination”, while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets

created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based

impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.

The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971-73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

2. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to

avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying

particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

1. Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

2. Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

3. Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for

such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

8. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district,

and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of pass discrimination in the national construction market." *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*." *Id.* at *26. Therefore, the Court

concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The “no-waiver” policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT’s decision rejecting Dunnet Bay’s bid was consistent with the regulations and did not exceed IDOT’s authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay’s argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay’s bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT’s authority under federal law, the Court held Dunnet Bay’s claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT’s rejection of Dunnet Bay’s bid nor the decision to rebid was based on the race of Dunnet Bay’s owners or any class-based animus. *Id.* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the “injury in fact” in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged “no-waiver” policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a “no-waiver” policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court

held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

9. 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.

10. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT

Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government’s compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT’s DBE program was narrowly tailored to further that compelling interest in

accordance with “its grant of authority under federal law.” *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that “a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state’s program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation “exceeded its grant of authority under federal law.” *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit’s analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit’s discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, “only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge.” *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT’s DBE program was constitutionally defective, the district court focused on the basis of plaintiffs’ argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs’ arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT’s use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT

Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT’s list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT’s division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only “when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal.” *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT’s DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655.

Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must “undertake an as-applied inquiry into whether [the state’s] DBE program is narrowly tailored.” *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs’ argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff’s expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant’s determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs’ argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT’s expert identified “prime contracting” as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the “relationship of the numerical goals to the relevant labor market.” *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well

as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

11. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on

continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral

means. The district court concluded that “critically,” plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT’s DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT’s adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff’s Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff’s claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT’s Motion for Summary Judgment was granted as to that claim.

12. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County’s implementation of the Federal DBE Program and Broward County’s issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court’s consideration of the merits of plaintiffs’ claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, “whether compliance with the federal regulations is all that is required of Defendant Broward County.” *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the

County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: *Milwaukee County* and *Northern Contracting*. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible

collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

13. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007)

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;

2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes

such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at *16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at *19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.’

Id. at *21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “plausible lower-bound estimate’

of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff’d* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater “Adarand VII”*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

14. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government

contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require “serious, good faith consideration of workable race-neutral alternatives.” 2004 WL422704 at *36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual’s personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court’s assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners’ personal net worth exceed \$750,000.00 are excluded. 49

CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

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.

16. Sherbrooke Turf, Inc. v. Minnesota DOT, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), affirmed 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in

connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part,

by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff’s claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson’s* strict scrutiny standard. The court held that the “Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program.” *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, “relieves the state of any burden to independently carry the strict scrutiny burden.” *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

17. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR’s proposed DBE goals for fiscal year 2001, pending completion of USDOT’s review of those goals. Significantly,

however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist “in the construction industry” and that racial and gender discrimination “within the construction industry” is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently “narrowly tailored” to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* *2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court’s discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the

agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id.* at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id.* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id.* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id.* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id.* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id.* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id.* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id.* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id.* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id.* *16. In the view of the dissenting opinion the

statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

2. *Rothe Development Corp. v. U.S. Dept. of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting

bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the

government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and

must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The

court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, citing to *Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, quoting *Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 quoting *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a

disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it.

545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, quoting *W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016).

Plaintiff *Rothe Development, Inc.* is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that *Rothe* brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. See *DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. See *DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic’s* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff *Rothe* and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other’s expert witnesses. The court concludes that Defendants’ experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff *Rothe’s* motion to exclude Defendants’ expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff’s experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants’ motions to exclude plaintiff’s expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. See 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, citing *DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-

owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible

as his preferred methodology for conducting disparity studies “appears to be well outside of the mainstream in this particular field.” *Id.* at *14. The expert’s methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe’s invitation to depart from the *DynaLantic* court’s conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government’s initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have

proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

4. DynaLantic Corp. v. United States Dept. of Defense, et al., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at *3-4; 13 CFR 124.501(b).

Plaintiff’s business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at *5.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at *9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at *9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at *11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies

submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also

found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court

rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government

would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.

Quantitative Analyses of Marketplace Conditions

APPENDIX C.

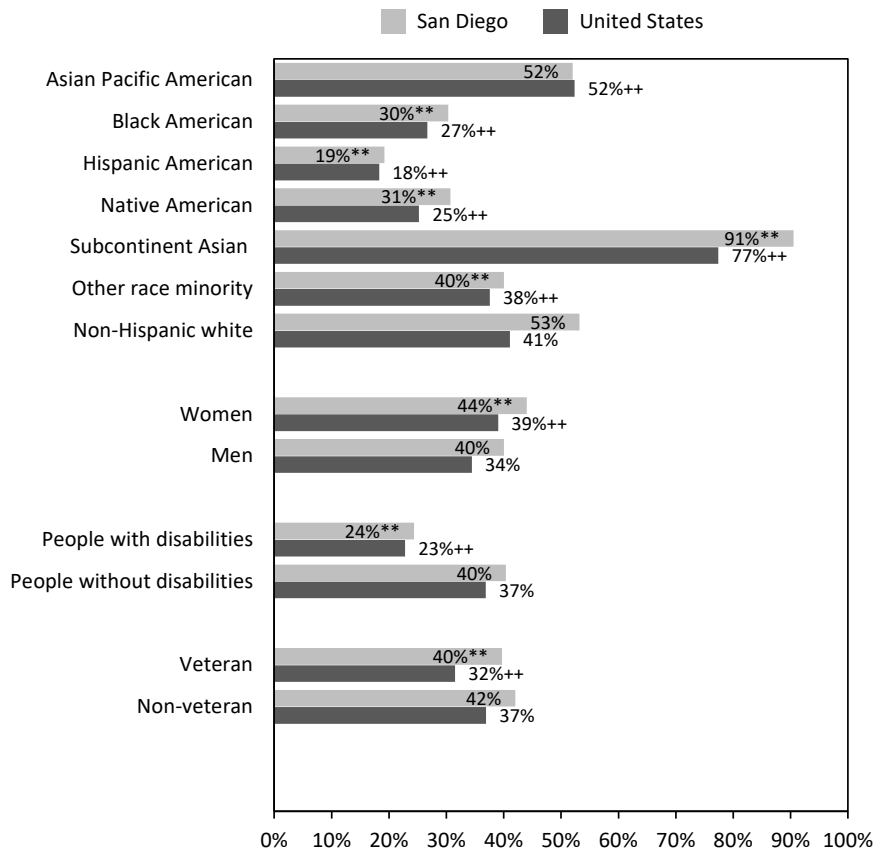
Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted extensive quantitative analyses of marketplace conditions in San Diego to assess whether minorities, women, people with disabilities, veterans, and the businesses they own face any barriers in the local construction, professional services, and goods and other services industries. The study team examined local marketplace conditions in four primary areas:

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

Appendix C presents a series of figures that show results from those analyses. Key results along with information from secondary research are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a
four-year degree in San Diego and the United States, 2014-2018

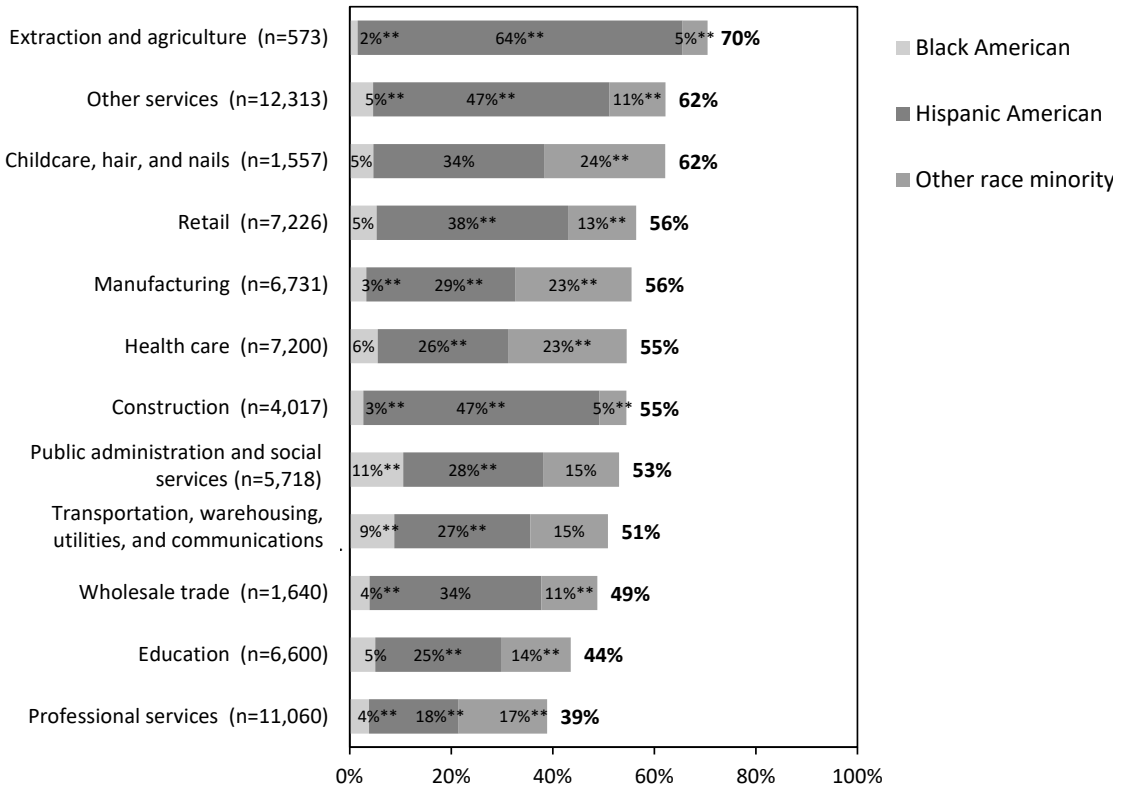


Note: **, ++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men, people with and without disabilities, or veterans and non-veterans) is statistically significant at the 95% confidence level for San Diego and the United States, respectively.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-1 indicates that, smaller percentages of Black American, Hispanic American, Native American, and other race minority workers have four-year college degrees. In addition, a smaller percentage of people with disabilities than people without disabilities have college degrees, and a smaller percentage of veterans than non-veterans have college degrees.

Figure C-2.
Percent representation of minorities in various San Diego industries



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.

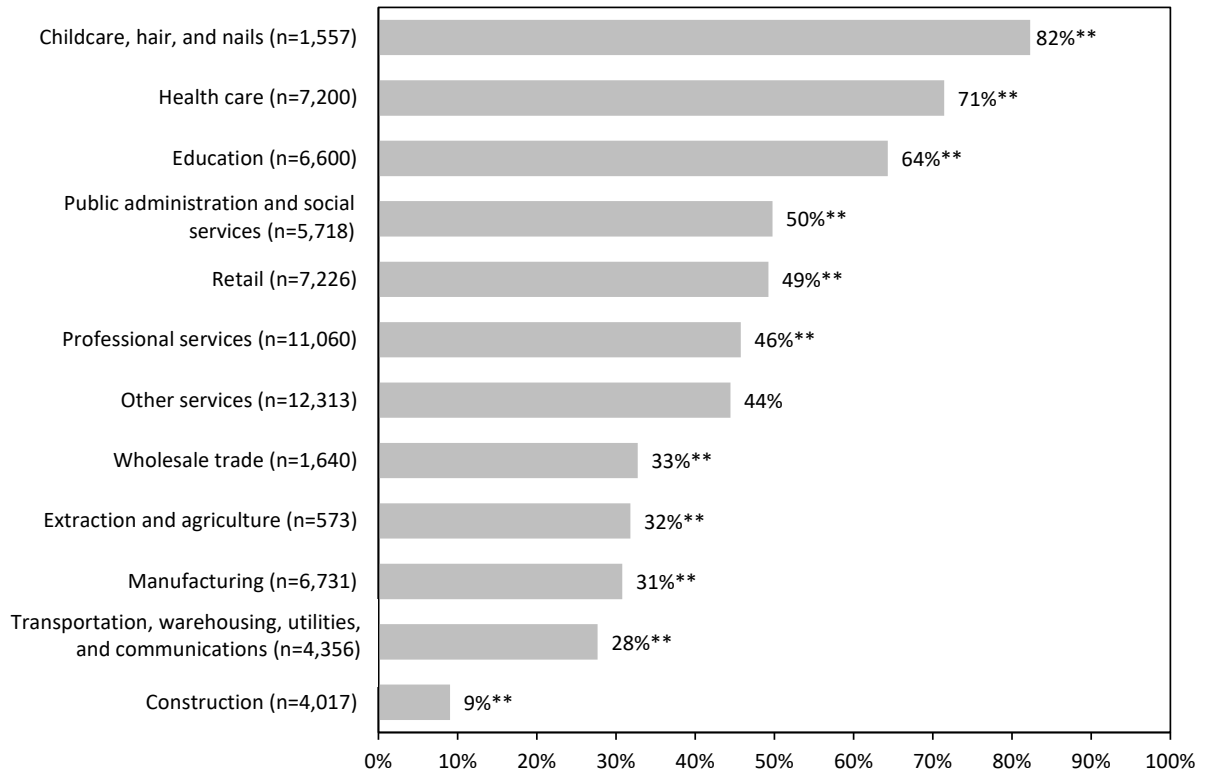
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, 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.

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

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-2 indicates that the San Diego industries with the highest representations of minority workers are extraction and agriculture; other services; and childcare, hair, and nails. The San Diego industries with the lowest representations of minority workers are wholesale trade, education, and professional services.

Figure C-3.
Percent representation of women in various San Diego industries



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.

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 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-3 indicates that the San Diego industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The industries with the lowest representations of women are manufacturing; transportation, warehousing, utilities, and communications; and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and all industries in San Diego and the United States, 2014-2018

San Diego	All Industries (n= 75,691)	Construction (n= 4,017)	Professional Services (n= 3,843)	Goods & Other Services (n=2,142)
Race/ethnicity				
Asian Pacific American	12.4 %	4.0 % **	14.0 % **	7.5 % **
Black American	5.5 %	2.7 % **	3.4 % **	7.1 % **
Hispanic American	32.0 %	46.5 % **	13.0 % **	44.7 % **
Native American	1.0 %	1.2 %	0.7 %	0.4 % **
Subcontinent Asian American	1.3 %	0.1 % **	5.2 % **	2.4 % **
Other race minority	0.2 %	0.0 % **	0.2 %	0.1 % *
Total minority	52.4 %	54.5 %	36.4 %	62.1 %
Non-Hispanic white	47.6 %	45.5 % **	63.6 % **	37.9 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	44.7 %	9.0 % **	29.6 % **	31.5 % **
Men	55.3 %	91.0 % **	70.4 % **	68.5 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Disability Status				
People with disabilities	4.2 %	4.6 %	3.8 %	4.6 %
All Others	95.8 %	95.4 %	96.2 %	95.4 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	7.1 %	6.6 %	10.6 % **	9.5 % **
Non-veteran	92.9 %	93.4 %	89.4 % **	90.5 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
United States	All Industries (n= 7,743,859)	Construction (n= 472,930)	Professional Services (n= 291,865)	Goods & Other Services (n= 201,419)
Race/ethnicity				
Asian Pacific American	4.9 %	1.8 % **	7.2 % **	2.7 % **
Black American	12.5 %	5.9 % **	6.8 % **	14.2 % **
Hispanic American	17.0 %	28.0 % **	7.9 % **	25.2 % **
Native American	1.2 %	1.3 % **	0.7 % **	1.0 % **
Subcontinent Asian American	1.5 %	0.3 % **	7.6 % **	0.6 % **
Other race minority	0.2 %	0.2 %	0.3 %	0.3 % **
Total minority	37.3 %	37.6 %	30.4 %	44.1 %
Non-Hispanic white	62.7 %	62.4 % **	69.6 % **	55.9 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.2 %	9.4 % **	31.0 % **	33.3 % **
Men	52.8 %	90.6 % **	69.0 % **	66.7 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Disability Status				
People with disabilities	6.1 %	6.1 % **	4.2 % **	7.5 % **
All Others	93.9 %	93.9 % **	95.8 % **	92.5 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Veteran Status				
Veteran	5.3 %	6.3 % **	7.5 % **	7.7 % **
Non-veteran	94.7 %	93.7 % **	92.5 % **	92.3 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %

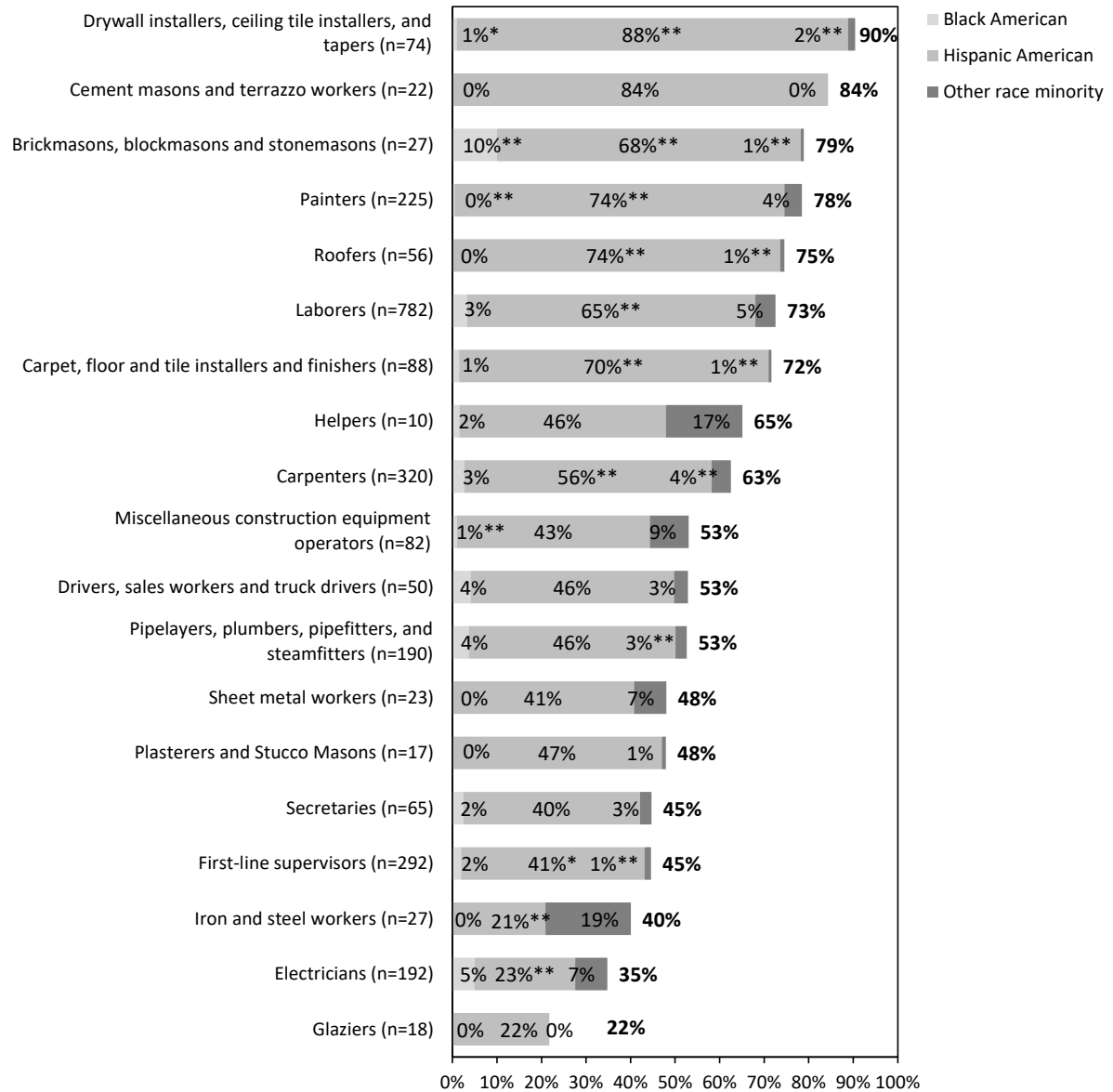
Note: *, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries considered together is statistically significant at the 90% or 95% confidence level, respectively.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, other race minorities, and women work in the San Diego construction industry.
- Smaller percentages of Black Americans, Hispanic Americans, and women work in the San Diego professional services industry;
- Smaller percentages of Asian Pacific Americans, Black Americans, Native Americans, other race minorities, and women work in the San Diego goods and other services industry.

Figure C-5.
Percent representation of minorities in selected construction occupations in San Diego, 2014-2018



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 San Diego construction workers is 3% for Black American, 47% for Hispanic Americans, 5% for other minorities, and 55% for all minorities considered together.

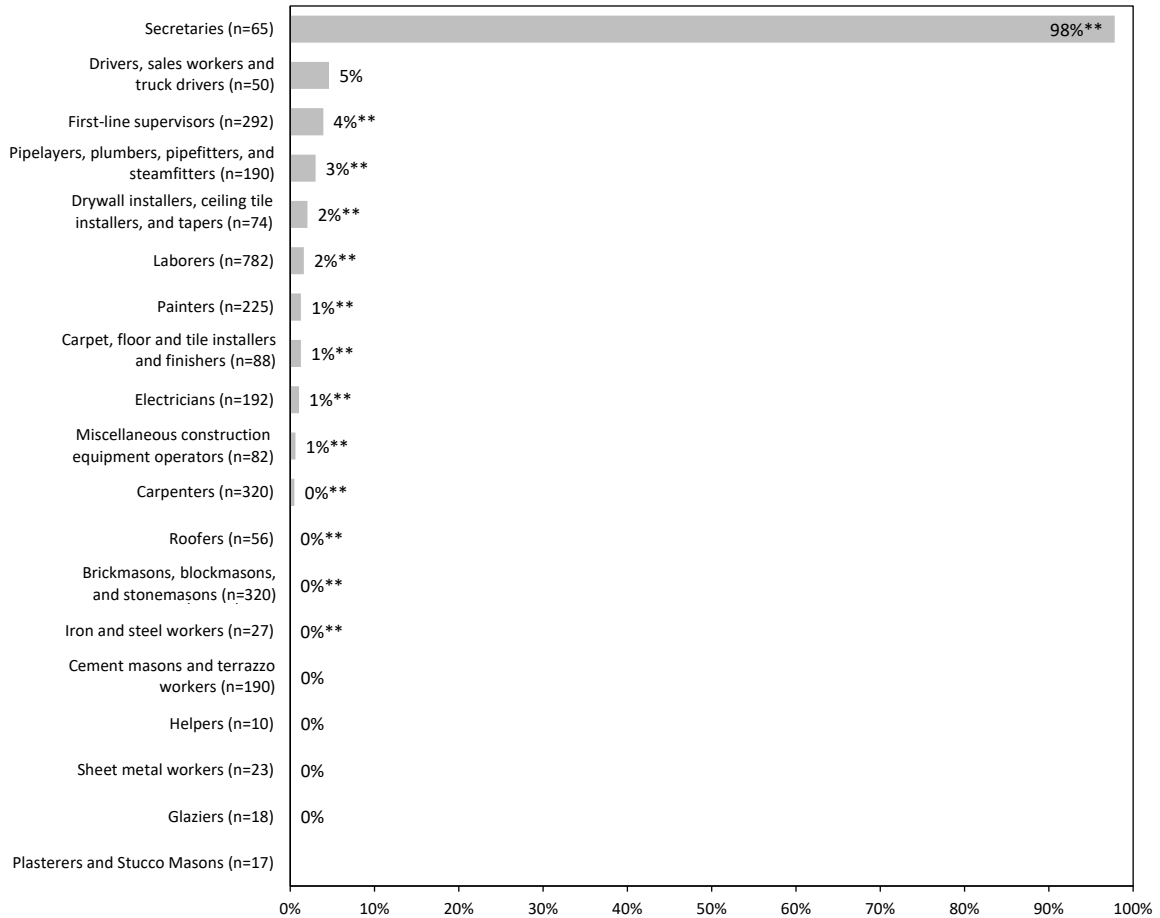
"Other race minority" includes Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and other races.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators

Source: BBC Research & Consulting from 2014-2018 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-5 indicates that the construction occupations with the highest representations of minority workers in San Diego are drywallers, ceiling installers, and tapers; cement masons and terrazzo workers; and brickmasons, blockmasons, and stonemasons. The construction occupations with the lowest representations of minority workers are iron and steel workers, electricians, and glaziers.

Figure C-6.
Percent representation of women in selected construction occupations in San Diego, 2014-2018



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.

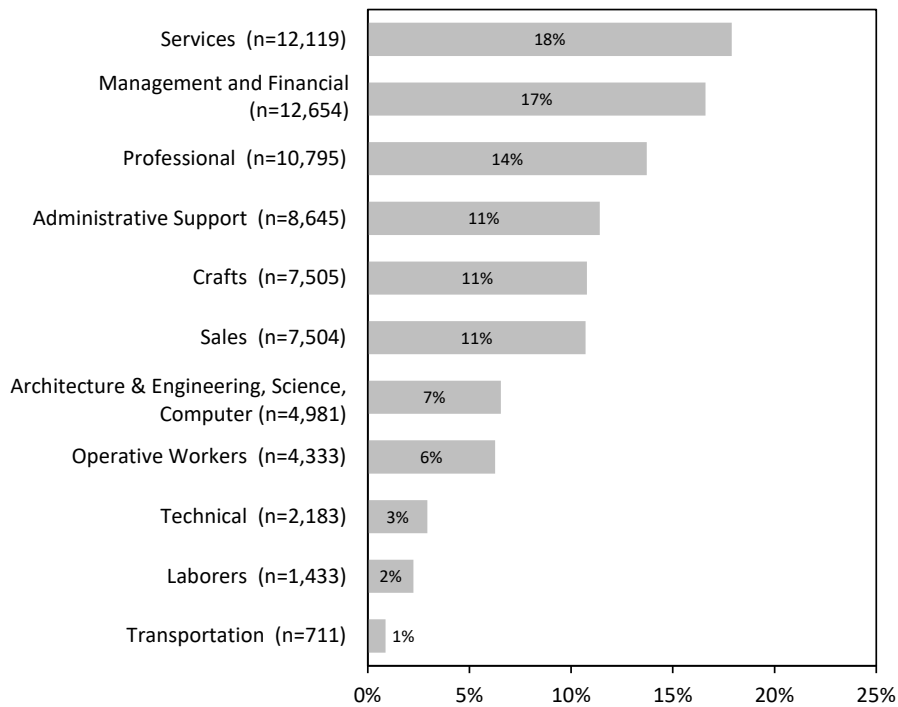
The representation of women among all San Diego construction workers is 9%.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators

Source: BBC Research & Consulting from 2014-2018 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that the construction occupations in San Diego with the highest representations of women workers are secretaries; drivers, sales workers, and truck drivers; and first-line supervisors. The construction occupations with the lowest representations of women workers are sheet metal workers, glaziers, and plasterers and stucco masons.

Figure C-7.
Representation of minorities and women as workers in industries
relevant to the Equal Employment Opportunity Outreach Program



Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>

Figure C-7 indicates that the industries relevant to the City of San Diego’s (the City’s) Equal Employment Opportunity Outreach Program with the largest representations of minority and woman workers are services (18%), management and financial (17%), and professional (14%). The industries with the lowest representations of minority and woman workers are technical (3%), laborers (2%), and transportation (1%).

**Figure C-8.
Predictors of working in the
management and finance
industry, 2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-2.7980 **
Age	0.0520 **
Age-squared	-0.0005 **
Married	0.1069 **
Disabled	-0.0825 **
Military experience	0.0026
Number of children in household	0.0445 **
Number of people over 65 in household	0.0085
Number of people in household	-0.0889 **
Owns home	-0.0891 **
Home value (\$000s)	0.0000 **
Monthly mortgage payment (\$000s)	0.0001 **
Interest and dividend income (\$000s)	0.0000 **
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.5221 **
Less than high school education	-0.3806 **
Some college	0.2103 **
Four-year degree	0.6383 **
Advanced degree	0.4629 **
Asian Pacific American	-0.1867 **
Black American	-0.0582
Hispanic American	-0.0844 **
Native American	-0.0212
Subcontinent Asian American	-0.0875
Other minority group	-0.1256
Women	-0.0566 **

Figure C-8 indicates that, compared to being non-Hispanic white in San Diego, being Hispanic American is related to a lower likelihood of working in the management and finance industry, even after accounting for various other business and personal characteristics. Similarly, compared to being a man, being a woman is related to a lower likelihood of working in the management and finance industry.

**Figure C-9.
Predictors of working in the
professional industry, 2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-2.2792 **
Age	-0.0094 **
Age-squared	0.0001 **
Married	0.0085
Disabled	-0.0479
Military experience	-0.0610 *
Number of children in household	0.0397 **
Number of people over 65 in household	0.0540 **
Number of people in household	-0.0221 **
Owns home	0.0363
Home value (\$000s)	0.0000 **
Monthly mortgage payment (\$000s)	0.0000
Interest and dividend income (\$000s)	0.0000 **
Income of spouse or partner (\$000s)	0.0000 **
Speaks English well	0.3372 **
Less than high school education	-0.0867
Some college	0.4884 **
Four-year degree	1.0457 **
Advanced degree	1.8404 **
Asian Pacific American	-0.0383
Black American	0.0027
Hispanic American	-0.0902 **
Native American	-0.0313
Subcontinent Asian American	-0.6463 **
Other minority group	0.2741
Women	0.4055 **

Figure C-9 indicates that, compared to being non-Hispanic white in San Diego, being Hispanic American or Subcontinent Asian American is related to a lower likelihood of working in the professional industry, even after accounting for various other business and personal characteristics.

**Figure C-10.
Predictors of working in the
architectural and engineering,
science, and computer industry,
2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-2.8831 **
Age	0.0250 **
Age-squared	-0.0003 **
Married	0.0793 **
Disabled	-0.1241 **
Military experience	0.0924 **
Number of children in household	0.0317 *
Number of people over 65 in household	-0.0764 **
Number of people in household	-0.0831 **
Owns home	0.1709 **
Home value (\$000s)	0.0000 **
Monthly mortgage payment (\$000s)	0.0000
Interest and dividend income (\$000s)	0.0000 **
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.5918 **
Less than high school education	-0.2476
Some college	0.4644 **
Four-year degree	1.1256 **
Advanced degree	1.1240 **
Asian Pacific American	0.2916 **
Black American	-0.0299
Hispanic American	-0.2064 **
Native American	-0.0388
Subcontinent Asian American	1.0802 **
Other minority group	0.0954
Women	-0.7033 **

Figure C-10 indicates that, compared to being non-Hispanic white in San Diego, being Hispanic American is related to a lower likelihood of working in the architectural and engineering, science, and computer industry, even after accounting for various other business and personal characteristics. Similarly, compared to being a man, being a woman is related to a lower likelihood of working in the architectural and engineering, science, and computer industry.

**Figure C-11.
Predictors of working in the
technical industry, 2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-2.3032 **
Age	0.0032
Age-squared	-0.0001 *
Married	0.0411
Disabled	0.0226
Military experience	0.2417 **
Number of children in household	0.0155
Number of people over 65 in household	0.0626 **
Number of people in household	-0.0262 **
Owns home	0.1631 **
Home value (\$000s)	0.0000
Monthly mortgage payment (\$000s)	0.0000
Interest and dividend income (\$000s)	0.0000
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.2855 **
Less than high school education	-0.5599 **
Some college	0.2625 **
Four-year degree	0.1052 **
Advanced degree	-0.2465 **
Asian Pacific American	0.2614 **
Black American	-0.0867
Hispanic American	-0.0798 **
Native American	-0.2834 *
Subcontinent Asian American	0.0479
Other minority group	-0.7468 *
Women	0.1138 **

Figure C-11 indicates that, compared to being non-Hispanic white in San Diego, being Hispanic American, Native American, or other minority is related to a lower likelihood of working in the technical industry, even after accounting for various other business and personal characteristics.

**Figure C-12.
Predictors of working in the
services industry, 2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-0.0747
Age	-0.0219 **
Age-squared	0.0002 **
Married	-0.1548 **
Disabled	-0.0352
Military experience	0.1094 **
Number of children in household	-0.0166 *
Number of people over 65 in household	0.0102
Number of people in household	0.0353 **
Owns home	-0.0405
Home value (\$000s)	0.0000
Monthly mortgage payment (\$000s)	0.0000 *
Interest and dividend income (\$000s)	0.0000
Income of spouse or partner (\$000s)	0.0000 **
Speaks English well	-0.4285 **
Less than high school education	0.1688 **
Some college	-0.0452 *
Four-year degree	-0.5418 **
Advanced degree	-1.0191 **
Asian Pacific American	0.1636 **
Black American	0.1227 **
Hispanic American	0.1057 **
Native American	0.0556
Subcontinent Asian American	-0.3498 **
Other minority group	-0.2806
Women	0.3544 **

Figure C-12 indicates that, compared to being non-Hispanic white in San Diego, being Subcontinent Asian American is related to a lower likelihood of working in the services industry, even after accounting for various other business and personal characteristics. Similarly, compared to being a man, being a woman is related to a lower likelihood of working in the services industry.

**Figure C-13.
Predictors of working in the
laborers industry, 2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-1.6707 **
Age	0.0059
Age-squared	0.0000
Married	-0.0433
Disabled	-0.0753
Military experience	-0.2567 **
Number of children in household	-0.0062
Number of people over 65 in household	0.0167
Number of people in household	0.0454 **
Owns home	-0.1161 **
Home value (\$000s)	0.0000 **
Monthly mortgage payment (\$000s)	0.0000 *
Interest and dividend income (\$000s)	0.0000
Income of spouse or partner (\$000s)	0.0000
Speaks English well	-0.4497 **
Less than high school education	0.3508 **
Some college	-0.2551 **
Four-year degree	-0.4065 **
Advanced degree	-0.8843 **
Asian Pacific American	-0.5295 **
Black American	-0.2179
Hispanic American	0.1557 **
Native American	-0.1837
Subcontinent Asian American	0.0000 †
Other minority group	-0.0852
Women	-0.4911 **

Figure C-13 indicates that, compared to being a man, being a woman is related to a lower likelihood of working in the laborers industry.

Figure C-14.
Predictors of working in the sales industry, 2014-2018

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-0.7659 **
Age	-0.0325 **
Age-squared	0.0004 **
Married	-0.0961 **
Disabled	-0.0020
Military experience	-0.2476 **
Number of children in household	-0.0018
Number of people over 65 in household	0.0027
Number of people in household	0.0169 **
Owns home	-0.0561 *
Home value (\$000s)	0.0000 **
Monthly mortgage payment (\$000s)	0.0000
Interest and dividend income (\$000s)	0.0000
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.2667 **
Less than high school education	-0.2221 **
Some college	0.0225
Four-year degree	-0.0736 **
Advanced degree	-0.5235 **
Asian Pacific American	-0.1902 **
Black American	-0.1990 **
Hispanic American	-0.0722 **
Native American	-0.0129
Subcontinent Asian American	-0.1919 **
Other minority group	-0.1125
Women	0.0904 **

Figure C-14 indicates that, compared to being non-Hispanic white in San Diego, being Asian Pacific American, Black American, or Hispanic American is related to a lower likelihood of working in the sales industry, even after accounting for various other business and personal characteristics.

**Figure C-15.
Predictors of working in the
administrative support industry,
2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-2.3642 **
Age	0.0096 **
Age-squared	-0.0001 **
Married	-0.0113
Disabled	0.1054 **
Military experience	0.0780 **
Number of children in household	-0.0148
Number of people over 65 in household	0.0486 **
Number of people in household	-0.0019
Owns home	0.1375 **
Home value (\$000s)	0.0000 *
Monthly mortgage payment (\$000s)	0.0000 **
Interest and dividend income (\$000s)	0.0000 *
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.6124 **
Less than high school education	-0.4122 **
Some college	0.1151 **
Four-year degree	-0.1374 **
Advanced degree	-0.6177 **
Asian Pacific American	0.0497 *
Black American	0.1313 **
Hispanic American	0.0838 **
Native American	0.0576
Subcontinent Asian American	-0.2657 **
Other minority group	-0.0646
Women	0.6404 **

Figure C-15 indicates that, compared to being non-Hispanic white in San Diego, being Subcontinent Asian American is related to a lower likelihood of working in the administrative support industry, even after accounting for various other business and personal characteristics.

**Figure C-16.
Predictors of working in the
operative workers industry,
2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-2.3642 **
Age	0.0096 **
Age-squared	-0.0001 **
Married	-0.0113
Disabled	0.1054 **
Military experience	0.0780 **
Number of children in household	-0.0148
Number of people over 65 in household	0.0486 **
Number of people in household	-0.0019
Owns home	0.1375 **
Home value (\$000s)	0.0000 *
Monthly mortgage payment (\$000s)	0.0000 **
Interest and dividend income (\$000s)	0.0000 *
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.6124 **
Less than high school education	-0.4122 **
Some college	0.1151 **
Four-year degree	-0.1374 **
Advanced degree	-0.6177 **
Asian Pacific American	0.0497 *
Black American	0.1313 **
Hispanic American	0.0838 **
Native American	0.0576
Subcontinent Asian American	-0.2657 **
Other minority group	-0.0646
Women	0.6404 **

Figure C-16 indicates that, compared to being non-Hispanic white in San Diego, being Subcontinent Asian American is related to a lower likelihood of working in the operative workers industry, even after accounting for various other business and personal characteristics.

**Figure C-17.
Predictors of working in the
crafts industry, 2014-2018**

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-1.1302 **
Age	0.0265 **
Age-squared	-0.0003 **
Married	0.0650 **
Disabled	0.0274
Military experience	0.0924 **
Number of children in household	0.0135
Number of people over 65 in household	-0.0120
Number of people in household	-0.0004
Owns home	0.1345 **
Home value (\$000s)	0.0000 **
Monthly mortgage payment (\$000s)	-0.0001 **
Interest and dividend income (\$000s)	0.0000
Income of spouse or partner (\$000s)	0.0000 **
Speaks English well	0.0348
Less than high school education	0.0736 **
Some college	-0.2911 **
Four-year degree	-1.0281 **
Advanced degree	-1.5557 **
Asian Pacific American	-0.1419 **
Black American	-0.1869 **
Hispanic American	0.0323
Native American	0.0631
Subcontinent Asian American	-1.0283 **
Other minority group	-0.0778
Women	-1.0821 **

Figure C-17 indicates that, compared to being non-Hispanic white in San Diego, being Asian Pacific American, Black American, or Subcontinent Asian American is related to a lower likelihood of working in the crafts industry, even after accounting for various other business and personal characteristics. Similarly, compared to being a man, being a woman is related to a lower likelihood of working in the crafts industry.

Figure C-18.
Predictors of working in the
transportation industry,
2014-2018

Notes:

The regression included 62,102 observations.

*, ** 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.

Source:

BBC Research & Consulting from 2014-2018 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	-2.2457 **
Age	-0.0085
Age-squared	0.0000
Married	0.1411 **
Disabled	-0.1109
Military experience	0.3941 **
Number of children in household	-0.0301
Number of people over 65 in household	0.0258
Number of people in household	-0.0487 **
Owns home	-0.0453
Home value (\$000s)	0.0000
Monthly mortgage payment (\$000s)	0.0001 **
Interest and dividend income (\$000s)	0.0000
Income of spouse or partner (\$000s)	0.0000
Speaks English well	0.3411 **
Less than high school education	-0.1480
Some college	-0.0406
Four-year degree	0.0642
Advanced degree	-0.4359 **
Asian Pacific American	-0.1938 **
Black American	-0.1143
Hispanic American	-0.1484 **
Native American	-0.0511
Subcontinent Asian American	-0.5792
Other minority group	0.0000 †
Women	-0.3207 **

Figure C-18 indicates that, compared to being non-Hispanic white in San Diego, being Hispanic American is related to a lower likelihood of working in the transportation industry, even after accounting for various other business and personal characteristics. Similarly, compared to being a man, being a woman is related to a lower likelihood of working in the transportation industry.

Figure C-19.
Percentage of workers who worked as a manager in study-related industries in San Diego and the United States, 2014-2018

	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	11.6 %	5.1 %	0.6 % **
Black American	4.3 % **	3.8 % *	0.0 % **
Hispanic American	4.1 % **	4.5 % **	0.9 % **
Native American	4.8 % **	9.7 %	0.0 % †
Subcontinent Asian American	0.0 % †	6.8 %	0.0 %
Other race minority	0.0 % †	0.0 % †	0.0 % †
Non-Hispanic white	14.6 %	7.8 %	3.3 %
Gender			
Women	9.3 %	5.1 % **	1.2 %
Men	9.1 %	7.5 %	1.9 %
Disability Status			
People with disabilities	8.6 %	5.8 %	1.6 %
People without disabilities	9.2 %	6.9 %	1.7 %
Veteran Status			
Veteran	8.7 %	7.8 %	1.1 %
Non-veteran	9.2 %	6.7 %	1.7 %
All individuals	9.1 %	6.8 %	1.7 %
United States			
	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	9.3 % *	5.4 % **	2.4 % **
Black American	4.4 % **	4.6 % **	0.6 % **
Hispanic American	3.2 % **	5.0 % **	0.7 % **
Native American	5.4 % **	7.2 %	1.4 % **
Subcontinent Asian American	11.8 % *	8.0 % **	2.5 %
Other race minority	5.5 % **	6.0 %	2.7 %
Non-Hispanic white	9.9 %	7.1 %	2.9 %
Gender			
Women	6.9 % **	5.2 % **	1.1 % **
Men	7.7 %	7.4 %	2.4 %
Disability Status			
People with disabilities	7.1 % **	5.6 % **	1.2 % **
All Others	7.6 %	6.7 %	2.0 %
Veteran Status			
Veteran	9.7 % **	7.3 % **	2.4 % **
Non-veteran	7.5 %	6.6 %	1.9 %
All individuals	7.6 %	6.7 %	2.0 %

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 90% and 95% confidence level, respectively.

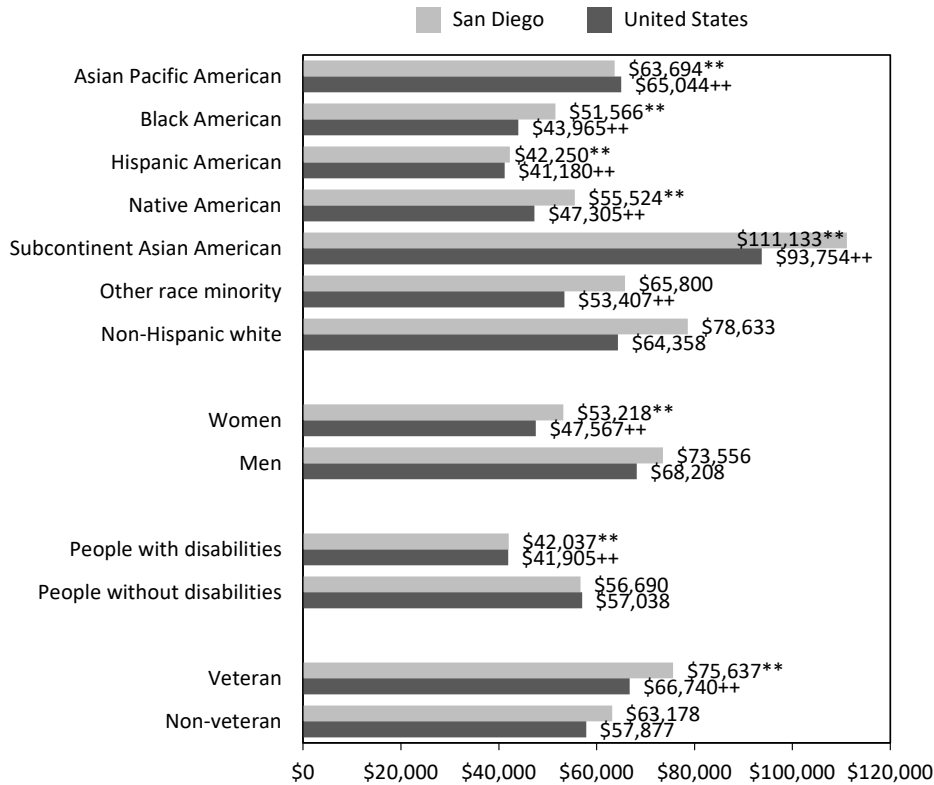
† Denotes that significant differences in proportions were not reported due to small sample size.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample.
The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Figure C-19 indicates that:

- Compared to non-Hispanic whites, smaller percentages of Black Americans, Hispanic Americans, and Native Americans work as managers in the construction industry.
- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the professional services industry. In addition, compared to men, a smaller percentage of women work as managers in the professional services industry.
- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, and Hispanic Americans work as managers in the goods and other services industry.

Figure C-20.
Mean annual wages in San Diego and the United States, 2014-2018



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) and from men (for women).

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-20 indicates that, compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans in San Diego earn substantially less in wages. In addition, compared to men, women earn less in wages, and compared to people without disabilities, people with disabilities earn less in wages.

**Figure C-21.
Predictors of annual wages
in San Diego, 2014-2018**

Notes:

The regression includes 36,832 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	8215.822 **
Asian Pacific American	0.855 **
Black American	0.822 **
Hispanic American	0.849 **
Native American	0.941
Subcontinent Asian American	1.028
Other minority group	0.984
Women	0.810 **
Less than high school education	0.900 **
Some college	1.197 **
Four-year degree	1.633 **
Advanced degree	2.211 **
Disabled	0.824 **
Military experience	1.001
Speaks English well	1.321 **
Age	1.063 **
Age-squared	0.999 **
Married	1.126 **
Children	1.004
Number of people over 65 in household	0.903 **
Public sector worker	1.173 **
Manager	1.267 **
Part time worker	0.359 **
Extraction and agriculture	0.725 **
Construction	0.895 **
Wholesale trade	0.950 *
Retail trade	0.726 **
Transportation, warehouse, & information	0.970
Professional services	1.034 **
Education	0.648 **
Health care	0.990
Other services	0.715 **
Public administration and social services	0.780 **

Figure C-21 indicates that, compared to being a non-Hispanic white American in San Diego, being Asian Pacific American, Black American, or Hispanic American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.82 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, compared to being a man, being a woman is related to lower annual wages, and compared to not having a disability, having a disability is related to lower annual wages.

Figure C-22.
Home ownership rates in San Diego and the United States, 2014-2018

Note:

The sample universe is all households.

** , ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for San Diego and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

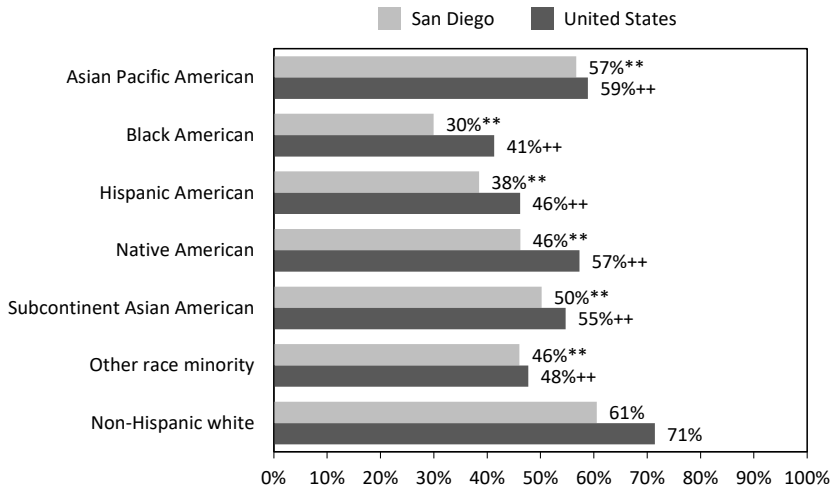
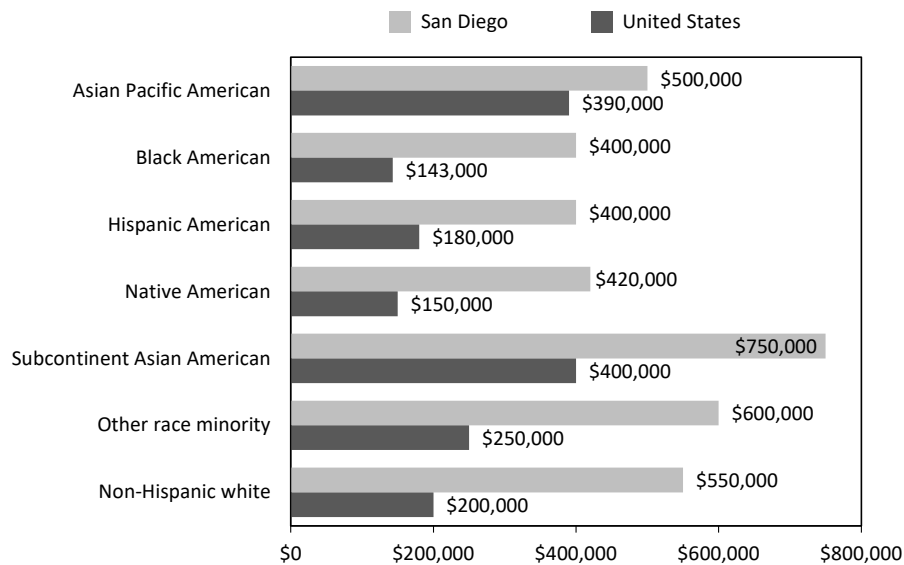


Figure C-22 indicates that all relevant minority groups in San Diego exhibit homeownership rates that are lower than that of non-Hispanic whites.

Figure C-23.
Median home values in San Diego and the United States, 2014-2018



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

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-23 indicates that homeowners that identify with certain minority groups—Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans—own homes that, on average, are worth less than those of non-Hispanic whites.

Figure C-24.
Denial rates of conventional
purchase loans for high-income
households in San Diego

Note:

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

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

Source:

FFIEC HMDA data 2017. The raw data was obtained from Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.

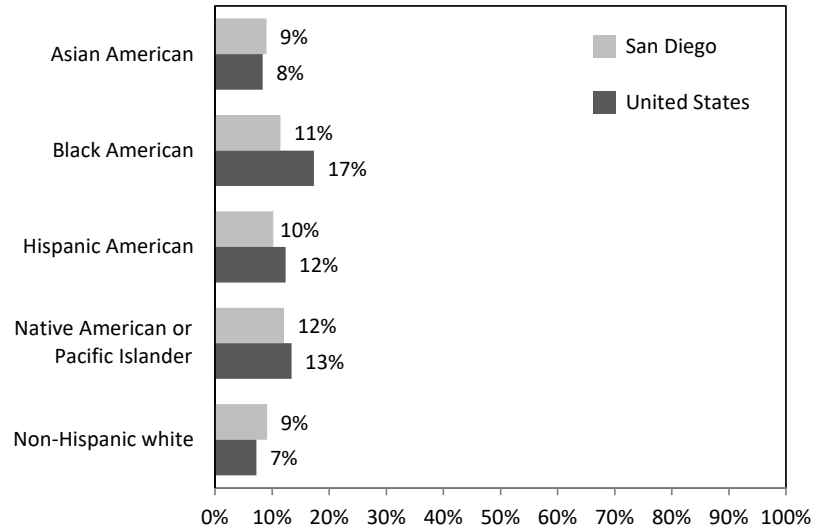


Figure C-24 indicates that Black Americans and Native Americans or Other Pacific Islanders in San Diego are denied home loans at higher rates than non-Hispanic whites.

Figure C-25.
Percent of
conventional home
purchase loans that
were subprime in
San Diego and the
United States, 2017

Source:

FFIEC HMDA data 2017. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool:
<http://www.consumerfinance.gov/hmda/explore>.

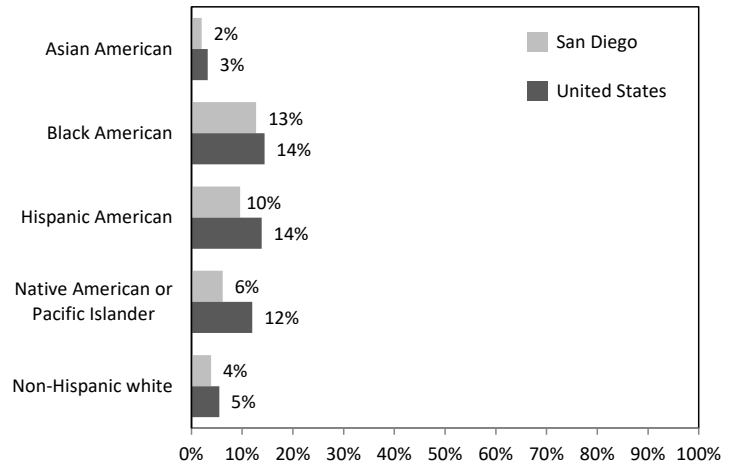


Figure C-25 indicates that Black Americans, Hispanic Americans, and Native American or Pacific Islanders in San Diego are awarded subprime conventional home purchase loans at greater rates than non-Hispanic whites.

**Figure C-26.
Business loan denial
rates in the Pacific
Division and the
United States, 2003**

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

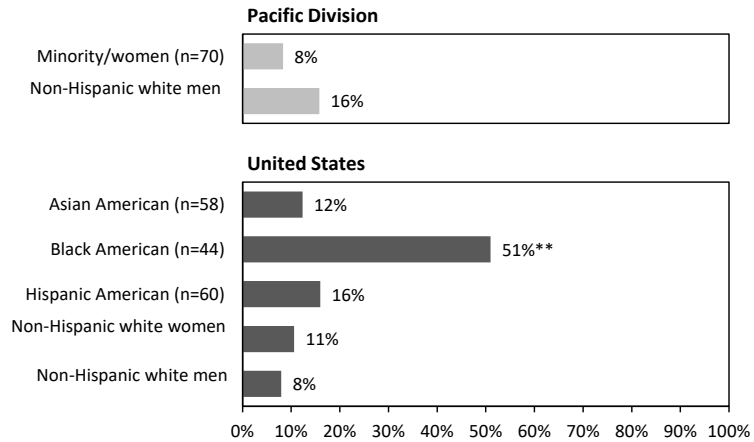


Figure C-26 indicates that, in the United States as a whole, Black American-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

Figure C-27.
Businesses that did not apply for loans due to fear of denial in the Pacific Division and the United States, 2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

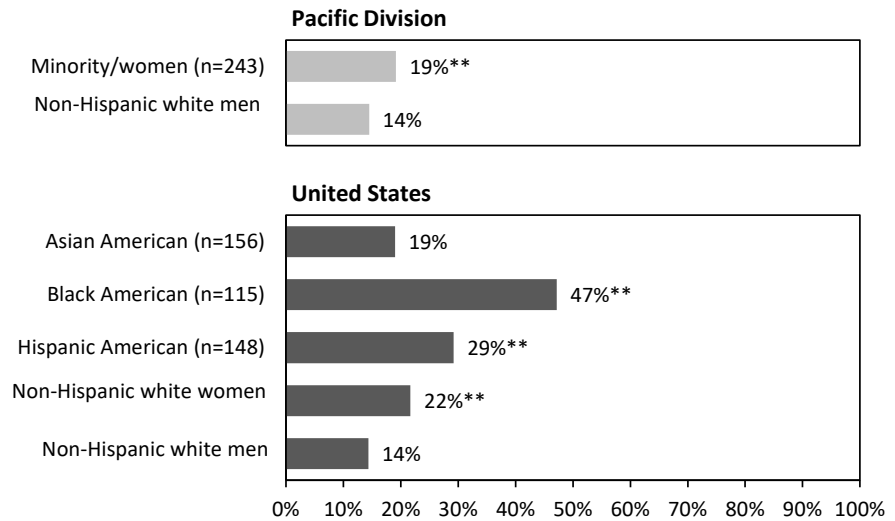


Figure C-27 indicates that in 2003, minority- and woman-owned businesses in the Pacific Division were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial. In addition, Black American-owned businesses, Hispanic American-owned businesses, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-28.
Mean values of approved
business loans, Pacific
Division and the United
States, 2003

Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

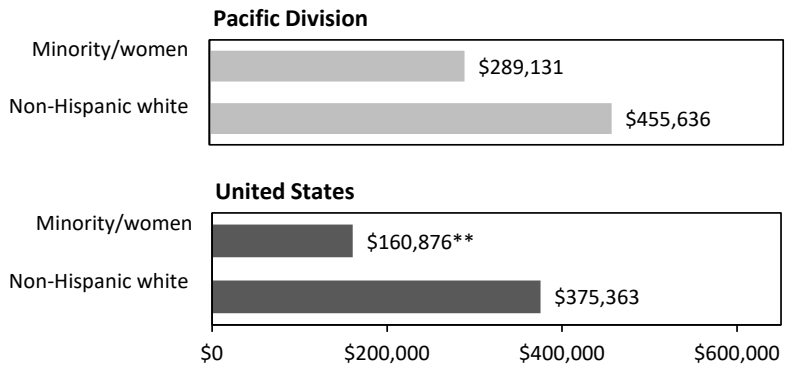


Figure C-28 indicates that, in 2003, minority- and woman-owned businesses in the Pacific Division and the United States who received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

Figure C-29.
Business ownership rates in study-related industries in San Diego
and the United States, 2014-2018

San Diego	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	24.5 %	12.3 % **	3.5 % **
Black American	15.8 % **	8.9 % **	7.0 % **
Hispanic American	19.3 % **	18.8 %	14.2 %
Native American	13.5 % **	20.8 %	0.0 % †
Subcontinent Asian American	0.0 % †	5.6 % **	0.0 % **
Other minority group	0.0 % †	3.5 % †	0.0 % †
Non-Hispanic white	26.7 %	22.2 %	15.6 %
Gender			
Women	11.8 % **	17.3 %	17.2 % **
Men	23.8 %	19.7 %	11.1 %
Disability Status			
People with disabilities	32.4 % **	13.2 % **	11.2 %
All Others	22.2 %	19.7 %	13.2 %
Veteran Status			
Veteran	22.3 %	23.1 %	13.9 %
Non-veteran	22.7 %	18.8 %	13.0 %
All individuals	22.7 %	19.0 %	13.0 %
United States			
	Construction	Professional Services	Goods & Services
Race/ethnicity			
Asian Pacific American	22.7 % **	9.9 % **	9.9 % **
Black American	16.9 % **	13.2 % **	7.1 % **
Hispanic American	17.8 % **	13.2 % **	14.2 % **
Native American	18.8 % **	17.6 %	12.6 % **
Subcontinent Asian American	21.2 % **	6.4 % **	7.7 % **
Other minority group	24.9 %	11.0 % **	23.0 % **
Non-Hispanic white	25.6 %	18.3 %	14.8 %
Gender			
Women	16.2 % **	15.2 % **	18.6 % **
Men	23.4 %	16.4 %	10.8 %
Disability Status			
People with disabilities	27.9 % **	23.9 % **	14.2 % **
All Others	22.4 %	15.7 %	13.3 %
Veteran Status			
Veteran	26.2 % **	18.0 % **	11.3 % **
Non-veteran	22.5 %	15.8 %	13.6 %
All individuals	22.7 %	16.0 %	13.4 %

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

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

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-29 indicates that:

- Compared to non-Hispanic whites, Black Americans, Hispanic Americans, and Native Americans working in the San Diego construction industry own businesses at a lower rate. In addition, compared to men, women working in the San Diego construction industry own businesses at a lower rate.
- Compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, and Subcontinent Asian Americans working in the San Diego professional services industry own businesses at a lower rate. In addition, compared to people without disabilities, people with disabilities working in the San Diego professional services industry own businesses at a lower rate.
- Compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, and Subcontinent Asian Americans working in the San Diego goods and other services industry own businesses at a lower rate.

**Figure C-30.
Predictors of business ownership in
construction in San Diego, 2014-2018**

Note:

The regression included 3,462 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

† Denotes that Subcontinent Asian American and Other minority group omitted from the regression due to small sample size.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2014-2018 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	-2.1307 **
Age	0.0352 **
Age-squared	-0.0001
Married	0.1048
Disabled	0.1171
Number of children in household	-0.0126
Number of people over 65 in household	0.0508
Owens home	-0.2566 **
Home value (\$000s)	0.0002 *
Monthly mortgage payment (\$000s)	0.0134
Interest and dividend income (\$000s)	0.0038 **
Income of spouse or partner (\$000s)	0.0006
Speaks English well	0.0750
Less than high school education	0.0270
Some college	0.0075
Four-year degree	0.0171
Advanced degree	-0.1540
Asian Pacific American	0.0289
Black American	-0.2234
Hispanic American	-0.1174
Native American	-0.2820
Subcontinent Asian American	0.0000 †
Other minority group	0.0000 †
Women	-0.5545 **
Veteran	-0.3737 **

Figure C-30 indicates that being a woman is associated with a lower likelihood of owning a construction business in San Diego compared to being a man, and being a veteran is associated with a lower likelihood of owning a construction business compared to being a non-veteran.

Figure C-31.
Simulated business ownership rates for San Diego construction workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	11.3%	30.5%	37
Veteran	22.0%	32.1%	69

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-31 indicates that women own construction businesses in San Diego at a rate that is 37 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics). In addition, veterans own construction businesses in San Diego at a rate that is 69 percent that of similarly situated non-veterans.

**Figure C-32.
Predictors of business
ownership in professional
services in San Diego,
2014-2018**

Note:

The regression included 3,445 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

† Denotes that Other minority group omitted from the regression due to small sample size.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2014-2018 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	-2.6949 **
Age	0.0524 **
Age-squared	-0.0002
Married	-0.0733
Disabled	-0.0610
Number of children in household	0.0156
Number of people over 65 in household	0.2201 **
Owns home	-0.4357 **
Home value (\$000s)	0.0002 **
Monthly mortgage payment (\$000s)	0.0581 **
Interest and dividend income (\$000s)	0.0005
Income of spouse or partner (\$000s)	0.0009 *
Speaks English well	-0.1719
Less than high school education	-0.3501
Some college	0.2144
Four-year degree	0.1671
Advanced degree	0.1860
Asian Pacific American	-0.3726 **
Black American	-0.3625 *
Hispanic American	0.0158
Native American	-0.0598
Subcontinent Asian American	-0.7329 **
Other minority group	0.0000 †
Women	-0.1182
Veteran	-0.6533 **

Figure C-32 indicates that being Asian Pacific American, Black American, or Subcontinent Asian American is associated with a lower likelihood of owning a professional services business in San Diego compared to being a man, and being a veteran is associated with a lower likelihood of owning a professional services business compared to being a non-veteran.

Figure C-33.
Simulated business ownership rates for San Diego professional services workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	11.2%	19.2%	58
Black American	7.9%	13.8%	57
Subcontinent Asian American	4.6%	15.8%	29
Veteran	11.5%	25.9%	44

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-33 indicates that:

- Asian Pacific Americans own professional services businesses in San Diego at a rate that is 58 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Black Americans own professional services businesses in San Diego at a rate that is 57 percent that of similarly situated non-Hispanic white men.
- Subcontinent Asian Americans own professional services businesses in San Diego at a rate that is 29 percent that of similarly situated non-Hispanic white men.
- Veterans own construction businesses in San Diego at a rate that is 44 percent that of similarly situated non-veterans.

**Figure C-34.
Predictors of business
ownership in goods and
other services in San
Diego, 2014-2018**

Note:

The regression included 1,824 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

† Denotes that Native American, Subcontinent Asian American, and Other minority group omitted from the regression due to small sample size.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2014-2018 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	-2.9583 **
Age	0.0671 **
Age-squared	-0.0005 *
Married	0.1197
Disabled	-0.1018
Number of children in household	0.0094
Number of people over 65 in household	0.1381 *
Owens home	-0.1607
Home value (\$000s)	0.0002
Monthly mortgage payment (\$000s)	0.0424
Interest and dividend income (\$000s)	-0.0079 **
Income of spouse or partner (\$000s)	0.0006
Speaks English well	-0.1524
Less than high school education	0.2453
Some college	0.0533
Four-year degree	-0.0428
Advanced degree	-0.5692 **
Asian Pacific American	-0.8096 **
Black American	-0.4668 **
Hispanic American	-0.1973
Native American	0.0000 †
Subcontinent Asian American	0.0000 †
Other minority group	0.0000 †
Women	0.1489
Veteran	-0.2375

Figure C-34 indicates that being Asian Pacific American or Black American is associated with a lower likelihood of owning a goods and other services business compared to being a man.

Figure C-35.
Disparities in business ownership rates for San Diego goods and other services workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	3.6%	13.8%	26
Black American	6.3%	12.9%	49

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-35 indicates that Asian Pacific Americans own goods and other services businesses in San Diego at a rate that is 26 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics), and Black Americans own goods and other services businesses in San Diego at a rate that is 49 percent that of similarly situated non-Hispanic white men.

Figure C-36.
Rates of business
closure and expansion,
California and the
United States, 2002-
2006

Note:

Data include only non-publicly held businesses.

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

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

Source:

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

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

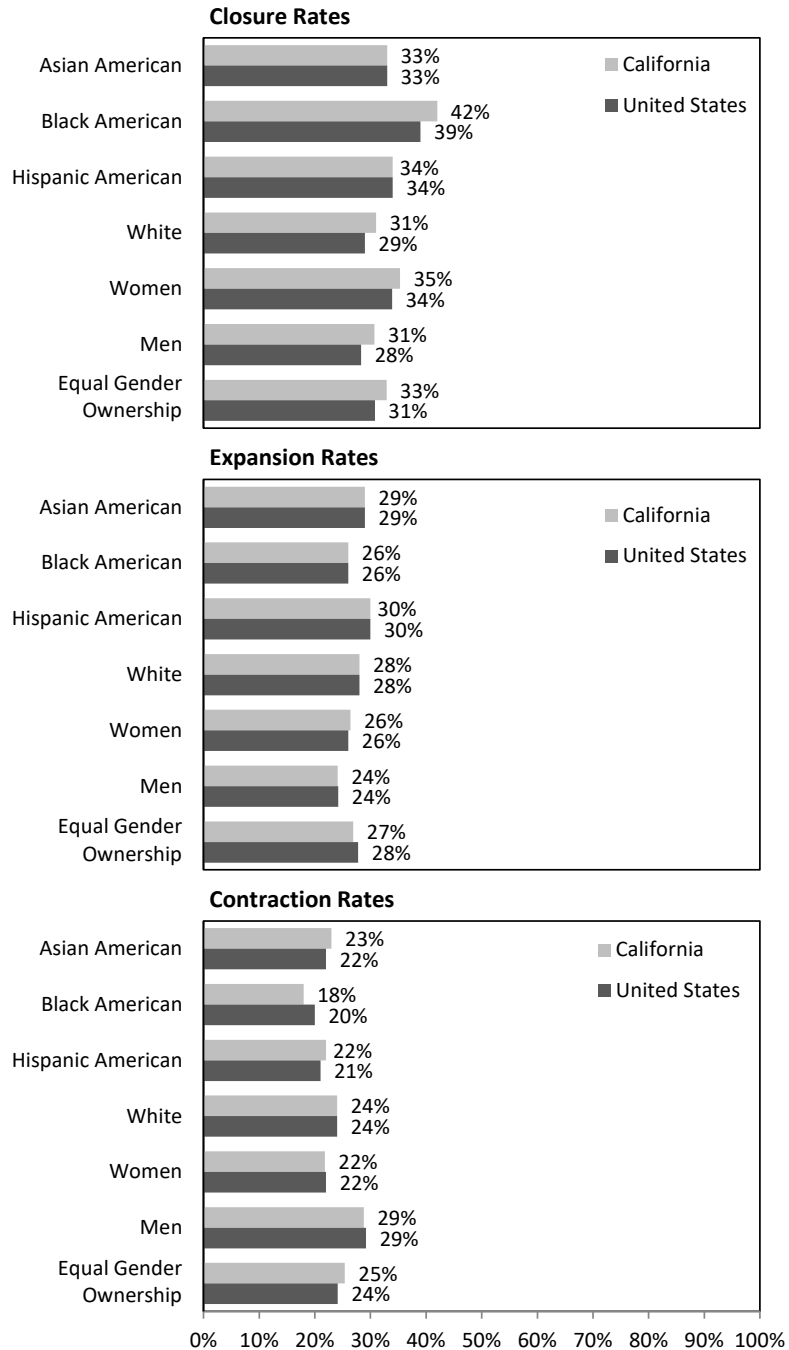
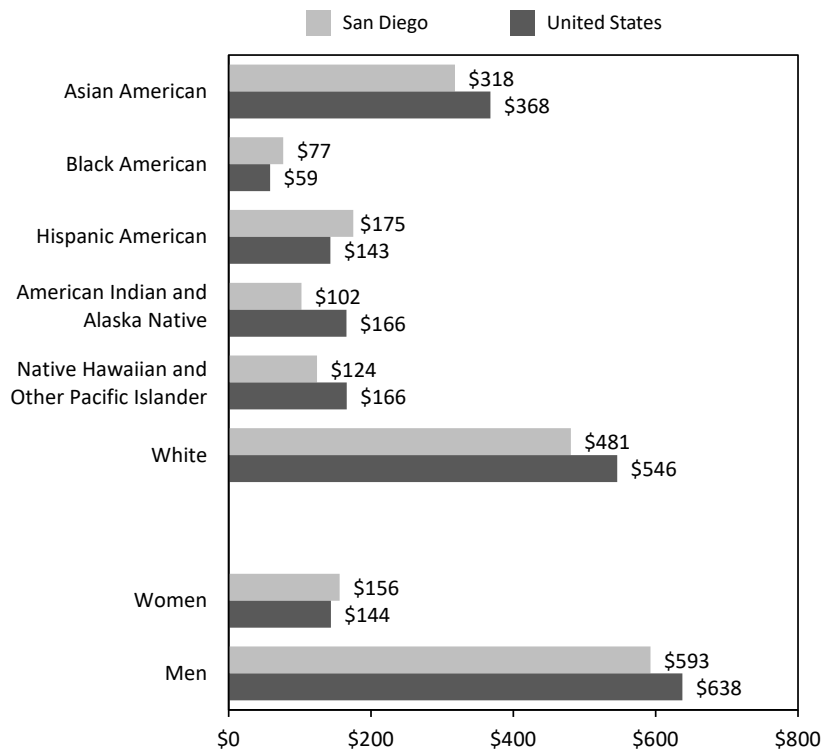


Figure C-36 indicates that Black American- and Hispanic American-owned businesses in California appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men. With regard to expansion rates, Black American-owned businesses in California appear to expand at lower rates than non-Hispanic white-owned businesses. With regard to contraction rates, Black American-owned businesses in California appear to contract at lower rates than non-Hispanic white-owned businesses, and woman-owned businesses appear to contract at lower rates than businesses owned by men.

Figure C-37.
Mean annual business receipts (in thousands)
in San Diego and the United States, 2012

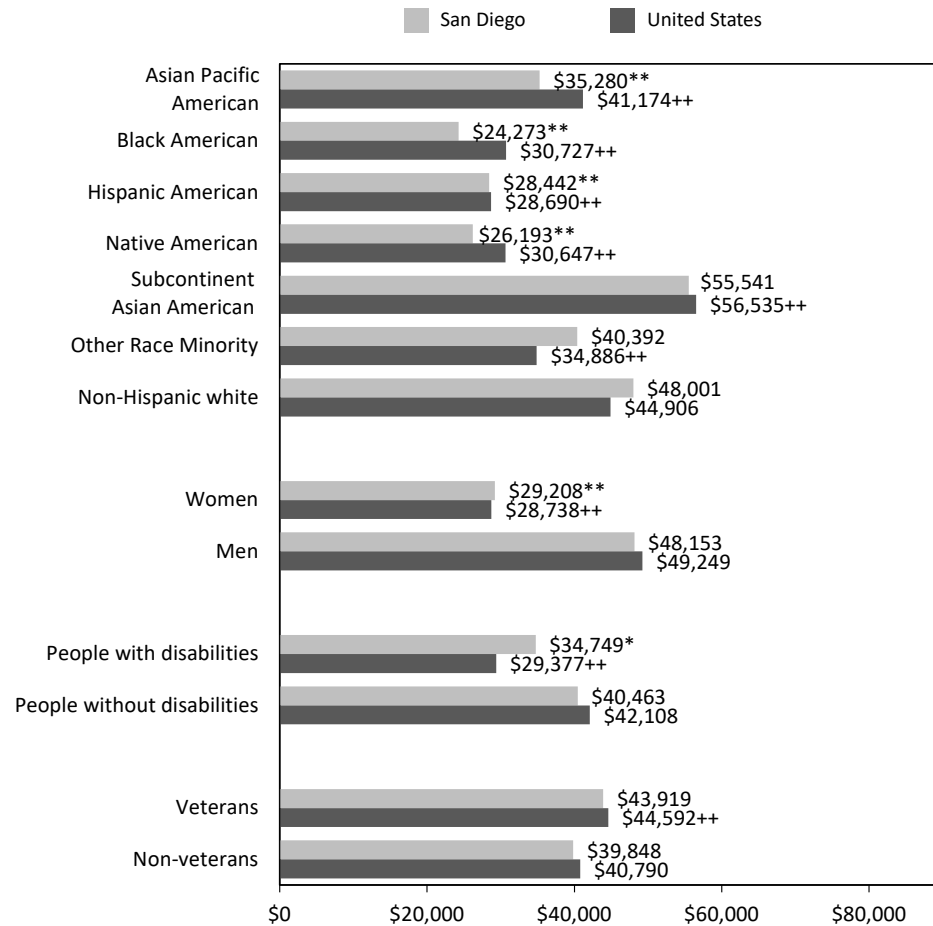


Note: Includes employer and non-employer firms.
 Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.

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

Figure C-37 indicates that in 2012, all relevant minority groups in San Diego showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses in San Diego showed lower mean annual business receipts than businesses owned by men.

Figure C-38.
Mean annual business owner earnings in San Diego and the United States, 2014-2018



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

** , ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), from people without disabilities (for people with disabilities), and from non-veterans (for veterans) at the 95% confidence level for Indiana and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-38 indicates that the owners of Asian Pacific-, Black American-, Hispanic American-, Native American-owned businesses in San Diego earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in San Diego earn less on average than businesses owned by men, and the owners of disabled-owned businesses earn less on average than businesses owned by people without disabilities.

**Figure C-39.
Predictors of business owner
earnings in San Diego,
2014-2018**

Notes:

The regression includes 5,278 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC Research & Consulting from 2014-2018 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	1,069.864 **
Age	1.120 **
Age-squared	0.999 **
Married	1.229 **
Speaks English well	1.290 **
Disabled	0.795 **
Less than high school	0.829 **
Some college	1.008
Four-year degree	1.262 **
Advanced degree	1.654 **
Asian Pacific American	0.887
Black American	0.697 **
Hispanic American	1.019
Native American	0.557 **
Subcontinent Asian American	1.050
Other Race Minority	0.367
Women	0.591 **
Veteran	0.827 *

Figure C-39 indicates that, compared to being the owner of a non-Hispanic white owned business in San Diego, being the owner of a Black American- or Native American-owned business is related to lower business earnings, even after accounting for various other business and personal characteristics. Similarly, compared to being the owner of a business owned by men, being the owner of a woman-owned business is related to lower business earnings. In addition, compared to being the owner of a businesses owned by non-veterans, being the owner of a veteran-owned business is related to lower business earnings.

APPENDIX D.

Anecdotal Information about Marketplace Conditions

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Anecdotal Information about Marketplace Conditions

Appendix D describes the public engagement process used in the City of San Diego (the City) Disparity Study and presents the qualitative information that the study team collected and analyzed as part of the public engagement process. In total, more than 40 business owners and representatives provided written or spoken comments for Appendix D. Appendix D summarizes the key themes that developed from these narrative responses. This chapter is divided into the following sections:

- A. **Introduction** describes the process for gathering and analyzing the qualitative information summarized in Appendix D;
- B. **Background on the construction, professional services, and goods and other services industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;
- C. **Workforce and personnel** presents information regarding business size, staffing, hiring and employment practices;
- D. **Ownership and certification** presents information about businesses' statuses as minority- and woman-owned businesses, certification processes, and business owners' experiences with City of San Diego's and the State of California's certification programs;
- E. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;
- F. **Doing business as a prime contractor or subcontractor** summarizes information about the mix of businesses' prime contract and subcontract work, how they obtain that work and experience working with minority- and woman-owned businesses;
- G. **Doing business with public agencies** describes business owners' experiences working with or attempting to work with the City and local agencies and identifies potential barriers to doing work for public agencies;
- H. **Marketplace conditions** presents information about business owners' and representatives' current perceptions of economic condition in the San Diego area and what it takes for firms to be successful;
- I. **Barriers to starting, growing, or staying in business** describes the barriers and challenges to business development;
- J. **Information regarding effects of race and gender** presents information about any experiences business owners or representatives have with discrimination in the local marketplace, and how this behavior affects minority-, woman-, and service-disabled veteran-owned firms;

- K. Insights regarding business assistance programs** describes business owners' and representatives' awareness of, and opinions about, business assistance programs and other steps to remove barriers for businesses in the San Diego area;
- L. Insights regarding race-, ethnicity-, gender-, and service-disabled veteran-based measures** includes business owners' comments about current or potential race- or gender-based programs; and
- M. Other Insights and Recommendations** presents additional comments and recommendation for the City of San Diego to consider.

A. Introduction

During the study business owners and representatives had the opportunity to discuss their experiences working in the San Diego area and provide public testimony. The qualitative data were collected through participating in one of the following channels:

- Providing oral or written testimony during a public meeting (n=7);
- Participating in an in-depth interview (n=40);
- Participating in an availability survey (n=103);
- Participating in a focus group (n=24); and
- Submitting written testimony via fax or email (n=4).

From May through December 2020, the study team used a variety of public engagement methods to gather comments and participated in several public engagement events. The study team's public engagement strategy consisted of the following:

1. Public forums. The City of San Diego and the study team solicited written and verbal testimony at five virtual public meetings conducted via Zoom. The meetings were held on August 19th, September 2nd, October 7th, November 10th, and November 19th. The study team reviewed and analyzed all public comments from the five meetings and included many of those comments in Appendix D. The comments chosen for Appendix D highlight key themes from the public testimony. Public meeting comments are denoted by the prefix "PT" throughout Appendix D.

2. In-depth interviews. From May through December 2020, the study team conducted 40 unique in-depth interviews with owners and representatives of 40 businesses in the San Diego area. The interviews included discussions about interviewee's perceptions of and experiences with the local contracting industry; City of San Diego's certification program; State of California's certification program; the Federal DBE Program; and businesses' experiences working or attempting to work with other public agencies in the San Diego area. Interviews were conducted by Action Research – a California-based research firm.

Interviewees included individuals representing construction businesses, professional services firms, and goods and services suppliers. The study team identified interview participants primarily from a random sample of businesses stratified by business type; location; and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. Some of the businesses

that the study team interviewed indicated that they work exclusively as prime contractors or subcontractors, some indicated that they work as both, and a few stated they are typically brought in to work on a project after award to a prime contractor. All businesses that participated in the interviews conduct work in the San Diego area. All interviews were conducted via virtual platform due to the COVID-19 pandemic.

All interviewees are identified in Appendix D by interviewee numbers (i.e., #1, #2, #3, etc.). To protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. Before the start of each interview, the interviewer explicitly stated, “Our conversation today is confidential and any identifying information will be removed from your remarks before they are included in the study.”

In addition, the study team indicates whether each interviewee represents a small business enterprise (SBE), a Small Local Business Enterprise (SLBE), an Emerging Local Business Enterprise (ELBE), a Disadvantaged Business Enterprise (DBE), Woman-owned Business Enterprise (WBE), Minority-owned Business Enterprise (MBE), Disabled-owned Business Enterprise (DOBE-), Disabled Veteran-owned Business Enterprise (DVBE), Veteran-owned Business Enterprise (VBE) or other certified business and reports the race/ethnicity and gender of the business owner.

3. Availability surveys. The study team conducted availability surveys for the disparity study from July through October 2020. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the San Diego marketplace. A total of 103 businesses provided comments. The study team then analyzed those responses and included illustrative examples of the different comment types and themes in Appendix D. Availability survey comments are indicated throughout Appendix D by the prefix “AV.”

4. Focus groups. The study team conducted five virtual focus groups via Zoom. Thirteen business organizations were contacted via telephone and email to participate in the focus groups. During the focus groups the study team asked participants to share their individual experiences working in the San Diego marketplace, barriers to contracting with the city and other agencies. The groups were conducted with civil rights, equality community organizations, and chambers of commerce on October 28th, October 29th, October 30th, November 18th, and December 4th. Comments from the focus group are included in Appendix D and denoted by the prefix “FG.”

5. Written testimony. Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or email. All written testimony received by email or fax (4 responses) were then analyzed by the study team and exemplary quotes are included in Appendix D. Written testimony is indicated by the prefix “WT.”

B. Background on the Construction, Professional Services, and Goods and Other Services Industries

Part B describes the firms interviewed and includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Growth of the firm; and
5. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, they were from well-established firms to newly established firms, and worked on small-to-large contracts in the San Diego marketplace.

Industry. Interviewees described the types of work that their firm performs. The study team interviewed 15 construction firms, 12 firms providing professional services, and 13 firms supplying goods and services.

15 firms worked in the construction industry [#101, #108, #227, #230, #231, #235, #306, #318, #324, #369, #396, #405, #416, #417, # 423]. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “General engineering contractor. I would say underground utilities is our primary specialty.” [#101]
- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “[We do] structural engineering.” [#202]
- The non-Hispanic white male owner/CEO of a technology construction firm stated, “[We do] off grid energy and water services.” [#230]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “We do commercial construction, mainly renovation work.” [#231]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “We’re a general contractor and we specialize in commercial modular buildings.” [#306]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “We just do demolition, grading and wet utilities.” [#324]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “We design and install fire alarm systems and other low voltage systems.” [#340]

12 firms worked in the engineering and professional services industry [#201, #202, #212, #218, #302, #322, #357, #406, #407, #410, #418, #426]. For example:

- The Black American female owner of a professional services firm reported, “I work with youth organization leaders and educators to strategize, innovate, and implement STEAM education programs and STEAM stands for Science, Technology, Engineering, Arts, and Math. Also, a part of the company is podcasts of interviews, presentations, and workshops as well.” [#201]

- The non-Hispanic white male owner of a software development firm stated, “My business is software development.” [#212]
- The Black American female owner of a towing service firm stated, “[We provide] towing and transportation services.” [#302]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “We're a construction management firm. We provide professional services such as scheduling, reviews. We provide staff as construction managers, office engineers, resident engineers, assistant resident engineers, office engineers. So, we provide professional staff to administer public works contracts.” [#318]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “CEQA [California Environmental Quality Act] and permitting is mostly what I do.” [#322]
- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, “Lawn care, but it's unique because I specialize in one service and that's aerating.” [#346]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “Any development the city would do for itself, there's a state law attached to it, and they have to do certain mitigation measures to offset the impacts that they do. We're a part of that. And so, we offer certain services in the environmental industry, which would be archeology, Native American monitoring, and paleontology.” [#357]

13 firms worked in the goods and services industry [#111, #308, #311, #335, #340, #346, #347, #352, #387, #395, #398, #411, #427]. For example:

- The Hispanic American female owner of a human resources consulting firm noted, “[We provide] HR services and workplace investigations.” [#308]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “[We provide] HR, payroll, and recruiting services.” [#311]
- The non-Hispanic white female owner of a consulting firm stated, “Training trainers and ... First off management skills, so communication, problem solving, decision making. Parts of that have included special efforts on mission, vision goals and objectives, or just going in and helping with the health of the organization. I have done a lot of cross-cultural training especially with Japanese American companies, and a lot of pre-departure training for people who are being sent by their companies overseas.” [#335]
- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, “The end goal is helping small businesses and creating business opportunities for small businesses, in San Diego or whatever city I'm working in.” [#347]
- The non-Hispanic white male owner of a professional services consulting firm noted, “[We do] marketing and public relations consulting.” [#352]

Years in business. 40 businesses reported their date of establishment. The majority of firms (25 out of 40) reported that they were well-established businesses and had been in business for more than ten years. About one-fourth of firms (11 out of 40) had been in business for five to nine years.

A few firms (4 out of 40) were newly established, having been in business for fewer than four years.

4 firms reported they had been in business for fewer than four years [#212, #322, #347, #398]. For example:

- The non-Hispanic white male owner of a software development firm stated, “About three years now.” [#212]
- The non-Hispanic white male owner of a consulting and recruiting firm reported, “About a year.” [#398]

11 firms reported they had been in business for five to nine years [#111, #201, #230, #231, #302, #311, #396, #406, #410, #411, #427]. For example:

- The Black American female owner of a professional services firm reported, “We’ve been a business under different names, but it’s been a business since 2014.” [#201]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “Seven years.” [#231]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “I started in February 2015.” [#396]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, “I’ve been doing this for seven years.” [#411]

11 firms reported they had been in business for ten to fourteen years [#306, #318, #324, #340, #352, #357, #387, #395, #416, #418, #426]. For example:

- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “Since October 2008.” [#306]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “I started the company in 2007.” [#340]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “14 years.” [#357]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “Since 2007.” [#416]

12 firms reported they had been in business for 15 to 50 years [#101, #108, #202, #218, #227, #308, #335, #346, #405, #407, #417, #423]. For example:

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “Since 1984.” [#202]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “This company was started in October 1980.” [#227]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, “Since 2006.” [#405]

- The non-Hispanic white male president at a specialty construction firm reported, “It was founded in Oregon [44 years ago], and it was just my father had started... He had different companies, and this one, he started... they were doing mostly concrete structures and buildings and stuff, and now we're primarily more in piping, pipe infrastructure, kind of stuff now.” [#423]

Two firms reported being in business for over 150 years [#235, #369]. For example:

- The non-Hispanic white male supervisor at a lighting contracting firm stated, “I think it's 162 [years old].” [#235]
- The non-Hispanic white female small business coordinator at a large construction firm stated, “We just celebrated our 160th [anniversary].” [#369]

2. Business formation and establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Most business owners and founders had worked in the industry or a related industry before starting their own businesses. This experience helped founders build up industry contacts and expertise. They were often motivated to start their own firms by the prospects of self-sufficiency and business improvement [#101, #108, #202, #230, #231, #308, #322, #346, #418]. Here are some of the founder stories from interviews:

- The non-Hispanic white male owner of a general engineering firm reported, “My mother and father started the company back in 1977, but I've been physically working here for approximately 25 years.” [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “I'm a registered engineer in California, Arizona, Nevada. I've been in the industry since 1977. So, basically, I became a principal engineer based on my experience and my years of service throughout the industry.” [#108]
- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “I graduated from school and after doing engineering work for private companies I obtained my civil and structural license and I started practicing. [I have been] designing custom homes, designing site retaining walls, designing commercial buildings, analyzing and going to construction site, resolving construction issues. And I've done that for 36 years.” [#202]
- The non-Hispanic white male owner/CEO of a technology construction firm stated, “The company that I was working for previously was getting out of that sector, and I felt that those customers still needed to be supported.” [#230]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “I didn't want to work for anybody else.” [#231]
- The Hispanic American female owner of a human resources consulting firm noted, “I spent 20 years with corporate human resources leadership positions, and I really wanted to spin off into a consulting firm so that I could work with different companies and broaden my experience.” [#308]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “I was working for many years for larger AME companies... And my major key mentor for my whole career who you may or may not be interviewing as part of this, she started her own consulting company in 2014 or 2015 or maybe earlier. And like you do with mentors and role models, I watched her, and I learned from her and I decided to start my own business a few years later.” [#322]
- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, “Well, when I was 16 years old, I got a job at a lawn care company as a salesman. And I was really good at it, selling lawn aeration door-to-door. So, I saved all my money, and there wasn't much to it, so I just bought a truck and a machine and started doing it myself. I've been doing it ever since.” [#346]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “[Came from New Zealand, worked 13 years in business development, became disenchanted by corporate America.] And so, I just thought, well I can't change the system but what I can do is go out and work for myself and keep the money I make as a direct result of my efforts for myself.” [#387]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “Well, I've been in this industry for almost 25 years. The last job I had was VP of a practice similar to what I do now for a larger company, and I decided to do it on my own, so I had the freedom to decide who I wanted to work with and also how I wanted to keep the relationship with the customers, more fairness with the customers. So, I just pulled my laptop and started the company.” [#418]

Other motivations. There were also other reasons and motivations for the establishment of interviewees' businesses [#201, #212, #306, #335, #340, #357, #405]. For example:

- The Black American female owner of a professional services firm reported, “I started as a math tutoring company to help students become the best student in class. And so not just academically, but also learning the applications of math and learning how to study, and then they could be the best student.” [#201]
- The non-Hispanic white male owner of a software development firm stated, “Well, I'm in software development, and I wanted to isolate my personal assets from any liability, so that's, that's why the company was founded.” [#212]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “I have been in the corporate world for many years and the company that I was working for was having difficulties and I just decided it was time to start my own.” [#306]
- The non-Hispanic white female owner of a consulting firm stated, “There was a company here called [Company ABC]. They were doing a lot of workshops all over the country for trainers and consultants. I had done an internship with them and I had worked with them on a contract basis, but they brought me out to be with them, to basically be working full-time with them to train trainers... Soon after I came out... suddenly the bottom fell out of the economy... Suddenly I was out here with all these skills... Somebody suggested, ‘Well, why don't you just go out on your own.’ The City of San Diego was one of the first clients I had... They asked me to come and present to the top-level executives of the city, basically to present a seminar on leadership... Then they started sending some contracts my way.” [#335]

- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “Basically, I'd been in the industry for over 20 years and been working with a lot of the bigger companies and decided that I wasn't really happy and there's no other one I thought about going to. So, I figured at my age, if I was ever going to try it, I'd start my own company. So, I applied and got my electrical license.” [#340]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “So the industries that I'm in, the environmental industries, they are very low paying, relative to the education you have to get. I was never going to make a more than \$25, maybe someday \$30 an hour. Going into my own business, it's just a lot more.” [#357]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, “I was in the real estate arena... in 2008, when the market tanked... I relocated to San Diego... I lost everything. And so, when I came to San Diego, the only thing I saw going on was a lot of construction... I started just showing up in meetings, listening, trying to observe... And when me and a couple of guys from Parsons, at the time, that was contracting with the Navy, they said, You're a woman. You're a minority. You have certifications. They should be giving you contracts.’ But I knew that was further from the truth. And so, we [bid] for the airport contract. Didn't win... I was sitting in my office, and the State of Tennessee had sent me an urgent notice... We need women and minorities to apply for these contracts... I recognized that staffing agencies are utilized on construction projects... And I certified my business in 25 different states... that's what brought me into the construction arena, all of the construction projects that were taking place here in California, from San Diego up to Sacramento.” [#405]

3. Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

Businesses reported working on contracts as small as \$1,000 to contracts of several million. However, most firms reported an upper threshold for contracts at around \$1 million or less [#201, #202, #212, #227, #303, #308, #322, #324, #340, #352, #357, #387, #396, #410, #426, #427]. For example:

- The Black American female owner of a professional services firm reported, “Usually about \$1,000 to \$2,000 range.” [#201]
- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “I've done small projects. I think that retaining wall was a couple of hundred thousand dollars. Not multimillion dollar jobs, no, but couple of hundred thousand.” [#202]
- The non-Hispanic white male owner of a software development firm stated, “So, I haven't done any government contracts whether that be local or state, or federal. I just, I did contracts for just private business owners and they range from say a thousand to ten thousand dollars.” [#212]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “We try to, for the most part, we try to stay at a half million or lower, but some of them are a little bit higher than that.” [#227]

- The Black American female owner of a towing service firm stated, “I’ve had as large as probably \$300,000.” [#302]
- The Hispanic American female owner of a human resources consulting firm noted, “So the range is really wide. Not per client, but per project, maybe 20,000 dollars.” [#308]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “[Contracts between] \$50,000 and \$75,000.” [#322]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “Probably about 200,000 dollars, anywhere between 150,000 dollars to 300,000, 450,000.” [#324]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “And our contracts usually range minimum of 15,000 up to 200,000.” [#340]
- The non-Hispanic white male owner of a professional services consulting firm noted, “I would say between 125,000 dollars and 200,000, dollars annually.” [#352]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “They range greatly like... We might bid on a sewer line and the sewer line overall; the whole project might be 10,000,000 dollars. We might be 10,000 dollars of that. We might be 100,000 dollars of that. It just depends on what they’re doing.” [#357]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “We go after the small stuff. Anywhere between say, one and 10 thousand is a good number for us in terms of dollars.” [#387]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “Average size is about 250,000 dollars.” [#396]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Fifteen thousand typically, largest was around two-hundred thousand.” [#410]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “So, it’s not the size of the project, it’s more size of I guess, annual budget. Most of them are, either between the 500 to a million dollars a year, some a little bit more.” [#426]
- The Native American male owner of an MBE-certified metal working firm stated, “There’s no set size. I mean, any size we just primarily, the customers that we have are just recurring business. So, it’s generally not like, a one-time customer or one-time project. We have customers that are, every week or every day they’re sending us requisitions for new material or new items.” [#427]

Some firms reported contracts or projects well over a million dollars [#101, #108, #230, #231, #235, #306, #318, #347, #406, #417, #418, #423]. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “It’s a wide variety, but from anywhere from \$500,000 contract to a \$50 million contract. Our sweet spot is probably five to 10 million.” [#101]

- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “They can be a small, \$10,000 project for geotechnical study, all the way up to multimillion dollar projects that we work on.” [#108]
- The non-Hispanic white male owner/CEO of a technology construction firm stated, “They go from \$200 to \$2 million.” [#230]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “Anywhere from 200 thousand to 4 million. Average is in the one to two range probably, 1 to 2 million.” [#231]
- The non-Hispanic white male supervisor at a lighting contracting firm stated, “Well, we get all sorts of different sizes, we get some contracts for \$100,000. We get multimillion dollar contracts, for streetlight retrofit projects.” [#235]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “Probably I would say average is about a million to a million five.” [#306]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “I would say our contracts range from 20,000 dollars to a million dollars plus.” [#318]
- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, “So if I can help [small businesses] get into an airport, then I get a percentage. So, a lot of it done on percentages as well. But my largest contract to date is probably going to be about that \$5 million [over 5 years] contract.” [#347]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “We bid on contracts that are usually... I want to say, if it means a new client, then we'll do 500,000 and up. But typically, we are aiming for three million-dollar contracts and up. And have bid on opportunities that are about 30 million dollars.” [#406]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “Our bonding company will let us go up to, I think he told me the other day, 8 million dollars, but we don't have any desire to do that. So, we try to stay 2-3 million dollars and so we're happy.” [#417]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “I would say from one to 10 million.” [#418]
- The non-Hispanic white male president at a specialty construction firm reported, “Anywhere from 20,000 up to maybe 3 or 4 million dollars.” [#423]

Many firms reported working only on contracts in California. Some firms worked in San Diego and neighboring counties, while others did business state-wide [#212, #227, #308, #318, #322, #346, #387, #410, #411, #417, #427, #426]. For example:

- The non-Hispanic white male owner of a software development firm stated, “Just do southern California.” [#212]
- The Hispanic American female owner of a human resources consulting firm noted, “Well, primarily San Diego, but there are exceptions.” [#308]

- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “We try to stay local, but regardless we end up getting work in the adjacent counties, Imperial, Orange, LA, Riverside and San Bernardino.” [#357]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “We generally focus on Southern California.” [#410]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, “Up to a 25-mile radius [from San Diego].” [#411]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Typically, we look at opportunities within San Diego County, but we have been looking out in Orange County, Los Angeles County, and the Inland Empire as well, but generally, local or at least regional.” [#426]
- The Native American male owner of an MBE-certified metal working firm stated, “We do outside of San Diego work, but the bulk of it's localized.” [#427]

Several firms reported working in the San Diego marketplace and with clients statewide [#202, #231, #302, #311, #357, #407]. For example:

- The Black American female owner of a towing service firm stated, “Currently, we're just working in the California area.” [#302]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “[We work] primarily San Diego County, but [do some work] statewide.” [#311]

Some firms reported working in the San Diego marketplace and with clients nationwide [#108, #201, #306, #324, #340, #347, #369, #396, #405, #406, #418, #423]. For example:

- The Black American female owner of a professional services firm reported, “Mostly San Diego and San Diego County, but some out of state.” [#201]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “We go all the way up north to northern California, and we're all the way out to New Mexico right now.” [#324]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “We've worked all over the state of California and we've gone into Arizona.” [#340]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “Up to Sacramento, San Francisco area, and down to the border and over to Arizona.” [#396]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “We're national. But recently I've had more in California. So, majority of the ones I have left are in California, but we're usually [national]. We used to be international and I stopped doing that and focusing only [on] the U.S.” [#418]
- The non-Hispanic white male president at a specialty construction firm reported, “We have licenses in Oregon, Washington, California, Hawaii, Nevada, Arizona.” [#423]

A few firms reported working internationally. [#218, #230, #352, #427] For example:

- The non-Hispanic white male owner of a professional services consulting firm noted, “We have clients all over the country. Even I've had clients over in Asia before. So pretty much anywhere.” [#352]
- The Native American male owner of an MBE-certified metal working firm stated, “The bulk of our customers, they have different branches all over the country. And we also deal with the military... We deliver most of our material except for the ones that are out of state, or when we send it to Japan, we send it to the Air Force Base, and they'll ship it from there. So, we do outside of San Diego work, but the bulk of it's [local].” [#427]

4. Growth of the firm. Business owners and managers mentioned the growth of the firm over time.

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “Because this company has had highs and lows over the years... over the last 18 months, we have had significant growth, more so than our competitors. I would say the biggest one is we are bidding more jobs, so we're, we're actually attempting to take on more work... The fact that before the company would only bid, get a job, work a job, close a job, bid the next one, and then work that one. We tried to turn this more into a constantly bid.” [#227]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “[Our growth is] way above average... when I first looked at the market and decided which aspect of it I wanted to get into, I found that all my competitors are very focused on price and not so much on the quality of the product... And saw that as the opportunity to get into the business... that sort of separates me from the herd if you like.” [#387]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Then last year was really tough again, 2019. There was some cashflow issues. There [were] some issues with payments, delayed payment, which was a tough year... 2020 is looking better... I was a little concerned at the beginning of the year because a few of the projects that looked like they're about ready to contract kind of got delayed and I was thinking, oh no, with the COVID and all . . . but altogether this year, it looks like it's going to be more positive.” [#410]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “I should imagine it's probably the same as other firms. Our industry is fairly small. A lot of the growth opportunities are driven by new contracts or opportunities, long term prospects, so it's just all our growth has been sped on by new clients. A lot of our work is continual work with existing clients so that there's provided stability at the same time. So, I'd say [our growth is] probably not different but the same as other firms in the industry.” [#426]

5. Marketing. Most firms stated that building strong relationships is their best marketing tool. They stated they gain business through word of mouth and professional business organizations, and a few by bidding or direct marketing.

- The non-Hispanic white male owner of a general engineering firm reported, “I mean, it's based on previous relationships. We market [ourselves] through the Associated General Contractors Association by attending mixers and events and various contracting organizations and associations in San Diego County. We use a lot of those to meet clients and meet new clients. We find jobs online and then bid them, find them through various bidding agencies or through whatever device, whatever program that those various entities use to put their projects out on the street.” [#101]
- The Black American female owner of a professional services firm reported, “I would say the National Society of Black Engineers, in through the Central San Diego Black Chamber of Commerce.” [#201]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “It's all against the public bids. There's really no marketing. We simply provide our quotes to the primes, or sometimes we are the prime. We just provide it and some of them pick it up and maybe some of them don't and that's okay.” [#227]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “Early on, we had put together collateral materials... that's initially how we grew the business. Since that time, we rely more on relationship-based business development...” [#318]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “I do have a website for my company, which needs some love right now. I built it a while ago and I haven't spent a lot of time updating it because I haven't been doing that much marketing... I participate in professional societies where I network and meet people that way... I'm not really seeking to grow that much and because I get enough work word of mouth, I don't really need to do that much marketing.” [#322]
- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, “I market directly, I've got over 20,000 people in my database file, and I have folks who live here that call on our customers when they need the service done again once or twice a year. The type of service I perform is like carpet cleaning. I only see my customer once or twice a year, but I have a big database file. And the way I market new customers is I have the reps that go out and they market door-to-door. They leave estimates, hang flyers, and if they see a customer, they sell it door-to-door. So, with the [COVID-19] virus, that cut that part of the marketing force out because nobody's going to open the door to anybody they don't know.” [#346]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “It's evolved over the years. I started doing direct-mailers 15 years ago. And then advertising in those little magazines that go out to homeowners, like *Home Concepts*, *Get 1 Free*, that kind of thing. And you can pick and select the audience that you want in various regional areas for a price... now with the advent of the internet, we simply do it and then pay a promoter... to push our name out there in the search engine world.” [#387]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “There's also some small business groups that I'm involved with and that's helpful because like I said earlier on, sometimes we're a sub-consultant to an architect or civil engineer, and so really it's all about building

relationships with those firms. Then otherwise, I keep an eye on projects that are coming out from the agencies and jurisdictions.” [#410]

- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “Mainly reputation and word of mouth and also when I go to conferences. And then prospects. Networking.” [#418]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “We're very involved with industry associations regionally, as well as it's kind of a small world in San Diego, and it's just getting to know the clients and having the clients get to know you. Prospective clients, I should say. It's a long-term business development [of] relationships.” [#426]
- The Native American male owner of an MBE-certified metal working firm stated, “We don't do a whole lot of marketing... mostly it's people through word of mouth, or they just hear about us through other vendors and they'll reach out to us. And primarily it's with businesses.” [#427]

C. Workforce and Personnel

Business owners and managers discussed their workforce and hiring practices. This section captures their comments on the following topics:

1. Employment size of business;
2. Hiring practices;
3. Diversity in the workplace; and
4. Workforce development.

1. Employment size of businesses. The study team asked business owners about the number of people that they employed and if firm size fluctuated. All but one firm provided employee numbers with over half, 24/39, having 10 or fewer employees and 11 having only one employee. The study team reviewed official size standards for small businesses but decided on the categories listed below because they are more reflective of the small businesses we interviewed for this study.

24 firms reported they had 10 or fewer employees [#201, #202, #212, #218, #230, #302, #306, #308, #322, #335, #340, #346, #347, #352, #387, #395, #396, #398, #405, #407, #410, #411, #418, #427]. For example:

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “It's just us, the two of us.” [#202]
- The non-Hispanic white female owner [at an DBE- and WBE-certified engineering consulting firm reported, “I don't have any employees. I don't even pay myself as an employee.” [#407]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “There's nine of us, including me.” [#396]

10 firms reported they had 11 to 50 employees [#227, #231, #311, #318, #324, #357, #416, #417, #423, #426].

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “I’m at 26. That includes myself.” [#227]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “We’re at 13 employees and growing. We’re actually placing a new ad tonight or tomorrow for our next employee.” [#311]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “Everybody we have is full time. So, let’s say, I got three in the office, four in the office, four superintendents. So that’s eight, I guess I got 12 people.” [#417]

5 firms reported they had over 50 employees [#101, #108, #235, #369, #404]. For example:

- The non-Hispanic white female small business coordinator at a large construction firm stated, “[There are over] 2,500 [employees].” [#369]

2. Hiring practices. Business owners and managers discussed their hiring practices, describing how they advertise for positions and the barriers they experience during the hiring process.

Owners and managers reported where they advertise for open positions. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “We use all the standard websites, Indeed and Craigslist and the EGC, shoot, I don’t know what the names of all of them.” [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “LinkedIn, Craigslist, and various associations APWA (American Public Works Association)… Open positions are placed online, various sites, and our own website.” [#108]
- The Black American female owner of a professional services firm reported, “I’m in a business accelerator program, Connect All at the Jacobs Center… so when I am ready to hire an intern or a full-time employee, the plan is that they can help with that… I wouldn’t know exactly where to start other than going to Connect All at the Jacobs Center and starting there.” [#201]
- The non-Hispanic white male owner of a consulting firm stated, “I use the [my] network. Yes [use LinkedIn]… [uses a professional organization] called IMAPS, I-M-A-P-S.” [#218]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “We always start by telling all of our employees that, ‘Hey, we’re looking for somebody’, and we give them the basic rundown as to what we’re looking for. Then from there, if nobody shows up based on that, we’ll market it on Indeed, the most common place to post that seems to have a pretty high success.” [#227]
- The non-Hispanic white male owner/CEO of a technology construction firm stated, “Just through people I knew… I think actually the guy that I ended up hiring was through Indeed.” [#230]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “Usually through Indeed.” [#231]

- The Black American female owner of a towing service firm stated, “There's a magazine called Tow Times and in Tow Times... I can advertise in Ramona, which is a California based magazine and a car and truck show.” [#302]
- The Hispanic American female owner of a human resources consulting firm noted, “I reach out to my diverse network and ask who they may know, and usually I know of the person, and then I just go by the quality of work and the values really, the relationship orientation, the integrity, flexibility... I'm really conscious when I reach out that I don't always retain talent from the same source. And so, I'm conscious of it, but I just want to make sure that I can rely on the person's values.” [#308]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “All the networking in different groups we have through LinkedIn, and our pool of people that we've known over the years and, worse comes to worst, advertising. But we look for a very specific skillset. So, I think the people who advertise it, they find me the people who apply, they typically have that background, or it's, like I said, referrals and word of mouth.” [#311]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “Well, we've used public, whatever, public media type, recruiting ads. We've actually hired recruiters to look for folks for us.” [#318]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “A lot of it again, it's word of mouth. I can't really advertise it because there's lulls in our work because again, the majority of our work is long production schedules from the design to the development, to the actual installs... it's hard to advertise because by the time I get decent people, either we don't have enough work or I can't get them qualified, I can't get them in the fold...it's a weird business.” [#340]
- The non-Hispanic white male owner of a professional services consulting firm noted, “We have used the recruiting agency in the past, but that was a long time ago, and it's just too expensive for us. Our process is pretty simple. We'll post the job [online].” [#352]
- The non-Hispanic white female small business coordinator at a large construction firm stated, “Well, it's on our website and then our teams go to universities to recruit interns. We do internships and then our HR people. Our corporate office is in Arizona and that's where our human resources is. And they use to outsource it to organizations that can find people.” [#369]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “We have our payroll and Workers' Comp through a company called BBSI. They also have a labor department or labor outreach, I guess. So, we do it through that, and we also do it through LinkedIn, and some classified ads.” [#396]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “We have our postings on ZipRecruiter, Indeed, LinkedIn. We post them on our website. We also post some of our opportunities to sites like the LGBT Chamber here in San Diego, San Diego Equality Business Association... the trade organization, BuildOUT California. Which is an LGBT-focused trade organization in the areas of construction, engineering, architecture, and commercial real

estate development. We are currently working on partnering with the UC system. Specifically, any of their construction management programs. But in the past, no, we have not specifically partnered with any of the schools in San Diego.” [#406]

- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, “Craigslist or Indeed.” [#411]

Owners and managers explained their application and hiring practices. For example:

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “They’ll send in a resume. Some people will walk in, through friends or whatever, they’ll walk in off the streets so to speak. Our building’s hard to find ... So, if you show up here, it’s because somebody told you. If they walk in, we’ll give them an application, they’ll fill it out, talk to them, we’ll do an interview. If they’ve sent the resume, we’ll review a resume. The ones that look interesting are the ones that we would end up [pursuing] ... Yeah. We at least give them a phone call or what not and then we’d go from there. We always do a drug screen and physical pre-employment physical because our jobs are demanding. We know that there’s a liability piece, so we want to try and screen out if they have a physical, something that limits them physically. We need to know about it. We need to talk about it and work out accommodations ahead of time not after the fact that.” [#227]
- The non-Hispanic white male owner/CEO of a technology construction firm stated, “Standard hiring process. Just look through the resume and do a phone interview, do a face-to-face interview, check background and references, and make an offer.” [#230]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “It’s usually a phone interview or it’s just an in-person interview. If it’s for a management position obviously it’s more involved. Usually, we need somebody to fill a role and we need that person quickly.” [#231]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “[They] submit an application, it’s free. It’s pretty simple... it’s listed on our website. And when we advertise for a job, we provide those links to the resumes or to the application.” [#318]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “Typically we ask for a resume or an application where they fill out where they worked, and we also call up a couple of references, and then we will give them a 30- to 60-day grace period to see how they work. And if they don’t work out within those first 30 or 60 days, then we move on to the next one.” [#324]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “So [for] the most part, we try to find people that seem like they want to work. And then ideally, we try testing them in town on some of our smaller, quicker fire alarm only work just to see how they are. And then the other thing is there’s so many safety standards now. The projects we work, the private construction’s a lot different than military because the military has dedicated safety officers, they have dedicated quality officers, their own safety standards. So, you have to be really conscious of the safety standards too, that you have to get trained on and certified on.” [#340]

- The non-Hispanic white male owner of a professional services consulting firm noted, “Our process is pretty simple. We’ll post the job [online], and we usually list a kind of a careers email address and tell people to email their resume and a cover letter to that email address. Then internally, we go through them and shortlist who we think are the best candidates to interview and start the interview process that way, and then whittle it down based on interviews in terms of who we think is the best fit.” [#352]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “I’ll only respond to people that send a résumé. If you just say... Or you just come to me with questions, or what have you, I just ignore them. Because first thing is you got to be able to read and write. So, that’s the first thing I want to see, that you can actually put something like that together. And there’s quite a range of sophistication. You can see some people have paid people that write them and make them quite elaborate, totally unnecessary. And then others just via fax, which is fine. And then within that then I grade them according to do you have any experience, do you look like the sort of center of the people that I know that have done this and enjoyed it, and what have you... I whittle them down from that and get... maybe make eight to ten phone calls, select about four initially for interviews. We do an initial interview where they then fill out a job application as well and bring it back. And then I talk to them again on the phone. And then bring them in for one last time to say are they sure they want to do this, and what have you. And then we hire them.” [#387]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “We have done them [interviews] in person. We have done them online more recently, and then we also do it through BBSI and their labor assist. Our management positions are well set. They’re people that are excellent and have been with me for a while now. The field department, a lot of times it’s friends of the people that already work for us that would reach out. The only way to tell with the field department is, we give them a very clear idea of what the responsibilities are and what the physical exertion is like, but the bottom line is they have to go out in the field and see if they can do it.” [#396]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “So applications and the opportunities are available through ZipRecruiter, Indeed and LinkedIn. We list out the job description there and we have qualifying questions that go along with that opportunity. And a lot of the time it’s a click of the button to submit your resume. On our end, we review all of the candidates that come through to see what their qualifications are. We do pre-screening over the phone. And then depending on whether they’re a good fit, we will invite them to do an interview. If the interview goes well then, sometimes because we’re consultants, and we’re providing services to our clients, our clients will also want to meet them before bringing them on as part of their team. There will be a client intro and then the job offer...We look for experience. We don’t always lean too much on education. Because in our industry, having a lot of experience in a software program is not something that you’re going to learn in school. The other thing that we look for is maybe a little bit of construction experience so that they can speak the language. But beyond that, we are looking for individuals that are emotionally intelligent, that communicate articulately, that exude our company’s core values, and that seems as if they will be a good asset to the team that they’re going to be joining. We think that it’s important that not only are the people that we hire, a part of what we’re trying to be as a company, promoting diversity and inclusivity. But also, that the employees we already have

on board are being sought of and looked after, when we're bringing on new team members. So that they all kind of mesh together and are able to work collaboratively." [#406]

Some firms have encountered difficulties looking for qualified staff or managers. For example:

- The non-Hispanic white male owner of a general engineering firm reported, "We have difficulty all the time finding, primarily, laborers, operators, pipe layers, that kind of thing. There's quite a high rate of turnover... I think the whole industry, the construction industry, right now has a tough time finding good employees. Even our professional positions, our project managers and estimators and stuff like that, it's very difficult to find people that want to work in this industry." [#101]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, "In San Diego County right now, there's a resource shortage due to several of the large programs going on, pure water, being a big program, taking a big demand on resources. SANDAG has taken a big demand on local resources. So, it's been difficult to identify, recruit, and hire qualified people... many of the local clients here are... prejudice against people who haven't worked or [don't] have current work experience here in San Diego... even though they may have 40 years of construction management experience... their perception is it takes their training time to bring that person up to speed." [#318]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, "And then the quality workforce that's out there and available is just not there to do any type of labor or equipment operating unless you want to pay top dollar. And unfortunately, when you're a small business such as us, you can't afford that top dollar." [#324]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, "There's a ton of people that say they know what they're doing, but they don't... And then over and beyond that, we have to get background checks and get badging, and get a lot of things where, especially in today's age, a lot of people have extracurricular activities and stuff which may be legal in California, but they're not legal on a federal base." [#340]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, "There is one thing that's really specific to City of San Diego... the only problem we have finding staff ever... is that City of San Diego, as compared to everywhere else in the world, has an extremely stringent requirement, of sort of a policing on who's allowed to do their work... People have to get qualified onto that list and it takes several years. So, all archeology firms inevitably run out of staff that can be qualified for City jobs... I think our entire industry has problems finding staff because the city restricts the staff you can use to a level where it's almost unreasonable." [#357]
- The non-Hispanic white male co-owner of a specialty construction firm noted, "I guess primarily it's the field department that we have trouble getting new people with. It's a very, very strenuous physical job in the field and, frankly, not a lot of people like to do it, so we will get people that will come to work for us for about a day and say, 'Nope, I'm not going to do that.'" [#396]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “One of the things that is a bit of a difficulty, honestly, is that there are no landscape architecture accredited programs here in San Diego. So, when we're trying to find really skilled young professionals, we have no good source here.” [#410]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “Looking for qualified people, it seems that right now, there is a very limited supply of qualified people to do the work that we do. Whether it's in the office or out in the field, a superintendent, or even just skilled tradesmen... I would say for the last five, six years, we have struggled a lot to find people that actually know how to do the work that they're hired to do... Whenever the last down economy was... a lot of people left the construction industry... we're missing a whole, probably 10-year range of people. So, we've got a bunch of old guys like me that know how to do things, got a bunch of young guys that are trying to learn how to do things, but we're missing that middle group of intermediate work.” [#417]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “So, to find people who know how to sell and [do] delivery and [know the] technical [aspects], it's very rare. They usually do one... it's so difficult because we're a small business... They [employees] need a team to do the regeneration, a team to do the demo, a team to do the delivery, a team to talk to the customer, a team to answer the RFPs. We have to do it all ourselves... then it's difficult for them to stay because they're quickly overwhelmed.” [#418]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Our industry is cyclical... there's an ebb and a flow of availability of good people... the availability of folks depends on whether the industry is busy or not busy, and generally, if it's busier, hiring your staff is more expensive.” [#426]
- The Hispanic American male owner of a construction firm stated, “I think the labor pool has really been difficult for us, finding qualified individuals willing to work with us on a fulltime basis. That's been our main issue for the last year or so.” [AV#10]

3. Diversity in the workplace. Owners and managers explained what part diversity plays in their workforce and hiring practices. Most stated they seek out a diverse workforce and others stated diversity is not difficult to achieve in their line of work. A few stated they only hire based on qualifications. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “Our workforce is extremely diverse as it is... We try to maintain a balance between men and women, as well. I think we've been trying lately to hire more women in our industry. Construction is traditionally a male dominated industry... we have quite a few women now that have recently worked their way up to become Project Managers and Estimators and the upper echelon and some of our management team and stuff like that. I guess that's been a focus, as of late.” [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “And let me put it this way, for us, the majority of geologists in our company here in Southern California are women. And I would say in the last eight years,

probably half of our people, the engineers and geologists we hire, 50% are women, and 50% are men.” [#108]

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “I will not say it [the pool of applicants] is diverse in the slightest. I’m doing my best... It is a core tenant of this company... but the truth be told it’s still wicked hard.” [#227]
- The Black American female owner of a towing service firm stated, “It [applicant pool] is diverse. Most of the guys I have are white or Hispanic. No. You never find difficulty when you’re giving money.” [#302]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “We don’t have a set plan to place diversity over qualifications. And yet our firm is probably 40 percent, maybe even more women, which is fairly diverse. We’re pretty much gender correct in the United States, but diversity doesn’t really... It’s not a driver in our recruiting. We’re pretty small.” [#318]
- The non-Hispanic white female small business coordinator at a large construction firm stated, “All I know is that we do not have a highly diverse employee pool, especially not in management. And that is something we’re working on.” [#369]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “Yeah, you do [find diversity in applicant pool]... the decision is only ever based for me, on ability to do the job... largely in the kind of thing we’re doing, it’s more probable that I’m going to get Hispanic Latino’s, than I am going to find white or Asian, or black, or some of the other races... They are the kind of people that seem to be doing this kind of work. In fact, I would say the vast bulk of my customers are Hispanic small landscapers.” [#387]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “So, we do keep track of the [number] of diverse individuals as they self-identify. We also keep track of diversity in male, female, [and] other... [we] feel that diversity of minds and diversity of thought is our competitive advantage in sometimes industries where diversity is not as prevalent... there is a heavy focus on that in our hiring process... we’re trying to change the game by being an LGBT-owned business in this industry... we have found a warm welcoming from some of our clients.” [#406]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “When we’re looking for construction managers for our projects, we look solely at skill set, different skill sets needed for different types of projects and clients, and so it’s generally the skill set that we’re looking for, so we don’t specifically look for an ethnicity type or a gender type, we just look for a skill set... I’d say white male is the most prevalent, as far as construction managers as a profession in the San Diego region. We do have several women construction managers as well, but the majority of available resources is white male.” [#426]

4. Workforce development. Business owners and managers discussed the tools used to develop the skills of their employees and what factors were most influential in upward mobility in their firms.

Owners and managers explained their opportunities for training or apprenticeships.

- The non-Hispanic white male owner of a general engineering firm reported, “We’re members of the AGC. I’m on the board of directors at the AGC. And they offer a lot of training at their facilities... For our office... project managers, estimators, for our payroll clerks, for our accounting clerks, for our human resources, they have training for all of them and we generally start them out at their lower levels of education, and we sign them up to AGC to take all kinds of different classes for their position.” [#101]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “We were big fans of training... In fact, we just had a meeting and talked about working with the local universities as well to launch our internship program... training and development is critical I think to our business, we have to stay current and knowledgeable... we do monthly training with our team as well.” [#311]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “So I would say every single field level person is really under a sort of apprenticeship... And so, everybody really has the opportunity.” [#357]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “If you have the right person, we give them additional training that makes them more valuable. Maybe not to me necessarily, but just generally gives them more skills to add to their résumé. For example, if they’re driving a small loader as part of their job, we have other larger loaders then give them everything they need to do that. Two of our guys are very mechanical and they’ll do work on the machinery. And so, if there’s a slow thing I will have that person learn how to do some sort of basic mechanical work, changing cylinders on the equipment, and just gaining some useful real-world experience. That is not much help to me. It’s making them feel the job’s a little more worthwhile than just a day-to-day ordinary task that they do.” [#387]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “We’re non-union so we don’t do it in the sense that the union does, but we definitely train our people in the area of HR and safety, and then in practical application in the field with operating equipment.” [#396]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “So apprenticeship, not really like on the... I know what you mean, and we don’t have a program that way. But we do pay for additional education if it’s related to our service offering. We do send our leadership team members, any of our leads and managers to additional leadership training. If there is a certification that our employees are interested in, then they’re open, and it says it in our handbook that they can send us a proposal to explore that. And we will in most cases, pay for it or pay for their time to go and get the certification. So yes, we do have the programs in place... Because we’re small, and if it adds value on bid opportunities that are coming up, because we’re able to say that we have an employee that’s certified a certain way. Some of our training, additional training is companywide, and we’ll send out emails or issue out the training through our learning portal. So, it just depends, some of it is specialized. It depends on what aspect of our business you’re performing in currently, the opportunity that it could bring to the table for the company if we do proceed. And others are for everybody.” [#406]

- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “If there’s something new that comes up, we just say it’s mandatory training and we all do it, myself included. So, it’s never really a select this person or that person for training. I want to make sure we all have the same opportunities at the same time.” [#426]

Owners and managers explained the factors that influence upward mobility in their firms. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “Our laborers can turn into pipe layers, can turn into operators, can turn into foremen, can turn into superintendents. We have quite a few examples of those people that have come in at the ground floor, at the very bottom earning minimum wage with no experience in the construction industry, and one of them is a partner of mine now.” [#101]
- The non-Hispanic white male supervisor at a lighting contracting firm stated, “We’re a small office, but people could always move up the ladder, they move up the pay structure, some people... move on to municipalities... the City of San Diego, to Caltrans... some field people don’t like to go into the office, they make a lot more money being in the field, they get overtime, double time, night work and stuff like that, which they get paid substantially more for.” [#235]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “Yeah. As much as it’s allowed. Our industry similar to, let’s say like a military style, in that there’s a general at the top and there’s like a colonel below them and then everybody else kind of falls in line. You know what I mean? They’re all kind of equal. So, like for us, I guess I’m the general, I’m the owner, but my colonel would be Shelby. She runs my archeology program, and she manages a lot of the paleo. Then I guess after her, the next hierarchy would be [Person A] and [Person B], those to deal with the field level, they’re field level leaders. And then everybody else below them is just below them. They’re all the same sort of level, field level people.” [#357]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “If they do show a willingness to learn then I think that’s exactly what we’re obligated to do, is give them the ability to learn. Some have asked, you got to go to a professional driving course to drive the big trucks that we’ve got. And I’ve paid for people to go do that and get their license. And then work for me for a while. And then inevitably, I’m sort of paying at the bottom end of the spectrum, they can get better paying jobs, to go and work for the bigger companies that want them to go across country and what have you.” [#387]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “Performance on the job, being on time, honesty, and integrity, being able to handle the physical work and operating equipment and being able to lead other people.” [#396]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “Yeah. So, we’ve had a lot of movement in certain groups of our company. Because certain groups are bigger and more opportunity comes up or that group is growing, so people need to become leads. And then after we’ve had so many leads, now we need to have a manager. So, they are available but it’s when... I guess with the opportunities, it depends on where the utility client is located.

Sometimes they're, like in our Document Control Group, you can be a document control specialist, then a lead, then a manager. But then to be able to support other clients, that opportunity is not really there. So, I think after a few years of being in the same position, providing support to the same client, employees tend to look for other opportunities." [#406]

- The non-Hispanic white male president at a specialty construction firm reported, "Just ability to manage yourself and not need guidance and someone who's able to make decisions, complete work, again without needing to be micromanaged. And there's construction knowledge that has to go along with that... to some degree. Different positions are different. Someone that's working in the field, there's knowledge of the project, and there's managing people. And others would be project management or computer skills. It depends on what the job is." [#423]

D. Ownership and Certification

Business owners and managers discussed their experiences with the City's and other certification programs. Section D captures their comments on the following topics:

1. City and other certification statuses;
2. Advantages of certification;
3. Disadvantages of certification;
4. Experiences with the City's certification process;
5. Recommendations for improving the certification process; and
6. Comments on other certification types.

1. City and other certification statuses. Business owners discussed their certification status and shared their opinions about why they did or did not seek certification. For example:

Almost half of the firms (18 out of 40) did not hold any certifications [#101, #202, #212, #218, #230, #231, #235, #302, #308, #311, #335, #346, #352, #369, #387, #396, #398, #423].

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "We haven't filed for any of them. This is a woman-owned business, but we haven't certified, we haven't pursued anything like that yet." [#202]
- The Hispanic American female owner of a human resources consulting firm noted, "I think we would qualify for, for instance the minority on it, but I never... I guess because I don't assertively pursue business, I just never went through those processes, and it would be helpful for me to have that information regarding these potential certifications and perhaps links or how to pursue them." [#308]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, "No [not certified]. In fact, we started looking into that and COVID hit and sort of went sideways... we should be... [the business] is a minority owned and female owned. I'm sure there's a lot of things I don't even know about in places that I could be certified and having more exposure to projects, but I don't even know what these are. And as a small business owner, I've never received anything. So, I don't know if these are things that go

through the SBA or the County sends it to companies that are registered. I don't even know. How would one even learn about this?" [#311]

- The non-Hispanic white female owner of a consulting firm stated, "I actually have no idea. I know that over the years, the city has called me and asked me questions to put me on this or that list. But it's hard to keep up with all the certifications going on these days, so I'm not sure whether I am or not." [#335]
- The non-Hispanic white female owner of a WBE-certified consulting and recruiting firm reported, "No [not certified]. No [have not heard of a certification program]." [#395]
- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, "No [not certified as ELBE or SLBE]. I didn't really know about it and I haven't seen where you sign up for that." [#407]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, "There's a fellow who is a main contact on that program and I reached out and I said, this is what my business is. Am I eligible for the SLBE or the ELBE? And he goes, you'd be both. So, I don't know if I'm actually classified as both." [#410]

Eleven firms interviewed confirmed they were certified as SLBE/ELBE [#111, #227, #318, #322, #340, #357, #405, #410, #416, #417, #426]. For example:

- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, "And I just thought, if these guys are the ones that are aligned with the city to do that as a subcontractor, it's going to help them meet their goals if we have the qualifications to do it. So, they could say they're hiring not only somebody qualified, they're hiring somebody that has been recognized by these programs. So, they're meeting their goals of helping out the smaller businesses. So, that's pretty much why I looked at it because we had work that were part of the city contracts." [#340]

2. Advantages of certification. Interviewees discussed how SLBE/ELBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by SLBE/ELBE certification. For example:

- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, "So, the benefit for either one really, the SLBE gives you a certain number of points and the ELBE gives you a little bit higher number of points." [#357]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, "[In response to question about any benefits to having a SLBE certification] Yeah, I can get listed on some city jobs. I mean I have to do five to six city jobs a year." [#416]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, "Yes, there'd be a big benefit because the RFPs for City of San Diego and some of the regulated industry in San Diego require the big guys to use some of the smaller business that are local and certified, that would open the door to more opportunities as a sub to the big guys... Because we were losing work without it [SLBE certification]. So, the city had started that program however long ago... we didn't think we would qualify for it... There [are]

some jobs that are set aside just for SLBE firms... Anyway, so that's all we got, just one [certification] for more opportunity." [#417]

- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, "Having the certification brings us into the... pre-qualification pool for when the larger contracts, the prime contractors are needing to fulfill their ELBE requirements. They will be given that list of who's in that pool and that generally helps them streamline their selection of the team." [#426]

Several business owners and managers explained why their firms had not pursued SLBE/ELBE certification. For example:

- The Black American female owner of a towing service firm stated, "If it's shown that I'm a Black woman on top of that, it's a disparity associated with it. Yes. There may be one or two times I would get maybe a contract, but if those labels and those tags and those brands, follow you everywhere you go, I will never reach the level that other companies reach, who don't have those brands on them." [#302]
- The non-Hispanic white male owner of a landscape materials supply firm stated, "No, I don't [have ELBE or SLBE certification]. I at one point got the California SBE certification, but it didn't give me a single piece of work. So, I didn't bother renewing it." [#387]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, "We thought there would be [advantages to SLBE certification] but we've found that when we've tried to partner with prime contractors, that they find more importance in the DBE certification, than the Small Business... [the perception is that] the Small Business certification means that we may be small, very limited support, very limited experience... you could be a DBE and have been around for 10 years with 10s of millions of dollars in revenue, and that's what prime contractors would prefer to partner with, rather than a small company." [#406]

3. Disadvantages of SLBE/ELBE certification. Interviewees discussed the downsides to SLBE/ELBE certification. For example:

- A male member of a civil rights organization reported, "That SLBE program, if you actually look at the data, the single biggest benefactor of it are white contractors." [FG#5]
- The Black American female owner of a towing service firm stated, "No [does not have a certification], because in America, if you have any type of indication or any type of anything that would indicate that your business is black owned, you will not get any business. So, no." [#302]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, "It doesn't work in my favor. I just have it, and I'm sitting on a list and have been sitting on a list since they started the program. It was meant to assist minorities, women, small, local business, but as I've seen over the years with contracts and different things of that nature, when these people reach out, they're just doing a good faith effort. They don't have to be held to any kind of standard. And so, because I do staffing and I can do labor compliance, they just reach out. And if I respond, they can include that in

their bid. But once they get the project, I don't hear from them again... it's just a game... They're going to do internal, or they're going to use the people that they normally use and get them to come down on their pricing and select them over me.” [#405]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “I can honestly say we have tried and we're not trying anymore. I maintain the certification in hopes that, well, maybe there will be an opportunity where it says you must hire someone from this list, but I'm just seeing the city continue to hire the same people over and over again. If there's no incentive for a team to look outside their standard approach... for teams to become more diverse, to include SLBEs to provide opportunities. If you provide just the certification, that's like, ‘Check, did it,’ but if you don't put the other side of it on, which is, yeah, you've got to really make this meaningful and use it, then it's not going to happen.” [#410]

4. Experiences with the City’s SLBE/ELBE certification process. Businesses owners shared their experiences with the SLBE/ELBE certification process. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Well, again, when I did the first round of this, this woman up at the Small Business Development Center, I mean, literally she gave me a list of all the materials I needed to put together. And I literally sat at her desk with her while she filled everything out. It was good. It seemed to be fairly straightforward to go through the process.” [#322]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “I think if it gets more on the same level as that Cal eProcure, which is the California level of small business, then you might be able to get a lot more competitive numbers... which would cause the pricing to decrease a little bit. So instead of having eight local businesses performing one scope of work because they qualify, you can have 24.” [#324]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “It's in line with most of them... I liked that they at least make you qualify for it. And they look like they do actually look into it and make sure that okay, if we're going to put these people on the list, they truly should be on the list.” [#340]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “The SLBE, it was easy to do. Once we looked it up, and it was fairly easy to find. Then we gathered a little bit of paperwork and submit it to the city. I'm going to say it probably took us two or three hours to do the whole process to get everything submitted. Then we just waited for the city to review and approve us. It was simple. It was not hard at all.” [#417]

A few businesses owners described their experiences with the City’s SLBE/ELBE certification process in negative terms. For example:

- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “The city requires a lot more information than other agencies. Okay, so the City of San Diego requires one, two, three, four, five, six, seven, eight... 16 pieces of information as far as documentation, besides just general facts and figures... Other agency's like Caltrans or the

State of California will say, just give me the number because they can reference the number to see that it's valid. The city required provide us a certified copy of it. So, reading through the city's list, it's rent agreement, rent receipt, business tax certificate... three federal income 1065(s), K-1s, three 1120(s), Schedule E(s)... With the state, it's give us your ELN number and pretty much their system can gather that information straight from the IRS, and all that information is physically there." [#426]

5. Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process. For example:

- The non-Hispanic white male owner of an SLBE-certified construction firm noted, "I think just maybe keeping a more open line of communication, I mean, or processing prior to your expiration would help. Every two years I go uncertified for at least a month or two because they won't even look at it until it expires." [#416]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, "The process itself is very easy relative to how difficult most certs are because the city does theirs entirely online... Like for Caltrans, I have to print up all 90 pages of three years of my taxes and send it in... The only thing difficult about their certification process is, and I'm going to have to bad mouth the city's EOC a little bit because they're really snotty people to deal with... They'll wait till the last day of your certification to redo it or to renew you." [#357]

Comments on other certification types. Interviewees shared several comments about other certification programs. For example:

- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, "It's a small local business [certification]. Well, it's not registered with the city, I tend to do the national just because I could use it more... but my certifications will allow me to work in the City of San Diego or any other city. I guess I could potentially apply for every certification out there but because the City of San Diego or the airport recognizes the Airport Concession Certification DBE... it's not really a need, I don't think." [#347]
- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, "So for the [federal] DBE program, like I said, I am DBE certified. I think there is a lot of inconsistent information that you can be given. Because things changed so much and not everybody likes... joint venture." [#347]
- The non-Hispanic white male owner of a consulting and recruiting firm reported, "Yeah, [applying for disabled veteran certification] it's been actually rather difficult from getting my D-U-N-S number to trying to go through the multiple different websites just to verify for one certification to... or verify [me] on this website to get verified for that website... jumping from three different websites trying to get the certification, and then I'm still waiting [since April] on the decision. [There is an advantage to getting certification because] businesses appreciate disabled veterans, especially here in San Diego. And also, I know it will help with preferential points for winning government contracts." [#398]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, "We actually have the EDWOSB, Economically Disadvantaged

Women-Owned Small Business. We're certified with the CPUC, California Public Utility, and we're also certified with the state of New York and a few other states." [#418]

- The Native American male owner of an MBE-certified metal working firm stated, "So, when I first started up, I applied through the Pacific Southwest Minority Council and got an MBE, which is a Minority Business Enterprise certificate... they want you to pay like an annual membership... I didn't renew with them because I didn't really see a benefit from it. I am working on getting another one through my tribes. I just found out last week that they may self-certify native owned businesses." [#427]

E. Experiences in the Private and Public Sectors

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work. Section E presents their comments on the following topics:

1. Trends toward or away from private sector work;
2. Mixture of public and private sector work;
3. Experiences getting work in the public and private sectors;
4. Differences between public and private sector work; and
5. Profitability.

1. Trends toward or away from private sector work. Business owners or managers described the trends they have seen toward and away from private sector work. For example:

- The non-Hispanic white male owner of a general engineering firm reported, "I think overall I've seen the private industry get smaller and the public get larger. Just at least the size of jobs. There's private industry, no longer does it have the huge 1,000 home developments. They're five- and ten- unit developments. Smaller pieces, which steers us away from the smaller ones." [#101]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, "Because I enjoy the work so much with this nonprofit, I have been taking, I always take the work with them, and when I'm busy, usually it's the public sector work that I say no to. So, I'd say, based on my personal preference for the work, I'm trending towards the nonprofit private [sector]." [#322]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, "I would say public is about... I'm hired usually on a contract with the city during construction, I'd say about 60 percent, and then private the rest, but with real estate. I've noticed that I'm being called more for public than I am anything in private... but I've noticed a gradual progression over to just more contracts, government contracts." [#411]

2. Mixture of public and private sector work. Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

- The non-Hispanic white male owner of a general engineering firm reported, “It just depends on the economy because, the one follows the other. One industry is always lagging behind the other one... where owners and developers are building more homes, and we're typically on the front end with that industry and then it seems to follow right behind is the public industry for the sewer and water and all the public works... always changing the percentage of private versus public contracts, depending on the economy.” [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “Depends on who has funding. School funds or bonds not approved – may not see the work because of this.” [#108]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “We do both. I want to break it down to about 75 percent public, 25 percent private. It's fairly steady year-to-year.” [#357]

Eight business owners or managers explained that their firms only engaged in private sector work [#202, #212, #231, #302, #347, #395, #398, #406]. For example:

- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “I don't know [IF marketplace conditions have differed between private and public sectors] because we don't do any public work.” [#231]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “Oh, 95 percent private, 5 percent public. I don't really pursue public works projects, and there's a number of reasons why. One is that the paperwork is burdensome. The other is that it's difficult for our guys to go from a public works project where they're making prevailing wages, and then back to our normal projects where they're making about half that. The reason I do it when I do it, is when I've got a client that wants me to bid a public job with them, or our particular scope with them, then I will do it. I don't really search out public works jobs.” [#396]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “Private sector is a hundred percent.” [#406]

Three business owners or managers explained that their firms only engaged in public sector work [#405, #417, #426]. For example:

- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, “I've never gone private. Right now, the contract that I have is with the State of California.” [#405]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “Probably it's going to be 98 percent public. I guess for me the big difference is... You figure out what you think is going to cost to do that, turn in a number, and whoever the low number is that's who gets the job. I have a sense in the private sector that there's more negotiation and more back and forth... It's just, for me, I'm much more comfortable on the public side of things.” [#417]

For some firms, the largest proportion of their work was in the private sector [#308, #311, #335, #352, #387, #396, #418]. For example:

- The non-Hispanic white male owner of a landscape materials supply firm stated, “The most will be in the private sector. But we do a fair amount in the public sector. One of the products I sell is playground mulch. Then I sell a material for resurfacing sports fields. So, we end up in that part of those two parts of the business, dealing with a lot of schools and cities for those two products. And then I do supply specialty soils to the Zoo and the Wild Animal Park, and things like that.” [#387]

For other firms, the largest proportion of their work was in the public sector. They described multiple reasons for engaging in more public sector work [#101, #108, #202, #218, #227, #235, #306, #318, #340, #357, #369, #411, #423, #427]. For example:

- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “Public... we're upwards of probably 80%. Well, all your public works projects are typically prevailing wage, everything private is typically non-prevailing. So that's a major issue. Well, the private stuff is more non-prevailing wage work... So, if I wanted to do a high rise, I know I'm going to have to cut my wages way down low, then it becomes a problem of getting the manpower, the inspectors and so forth, because they don't want to work for that cheap stuff, they want the good stuff.” [#108]
- The non-Hispanic white male owner of a consulting firm stated, “[Public, they know] what they need and require, versus private. Private they're all over the place... You never know... That makes it a lot more difficult for us. So that's why we prefer public, [because] they're a lot [more] specific.” [#218]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “I think about 90 to 95% of our work is public sector, just a little small amount of private... In terms of profit margin, I think they're almost identical to the comparable public sector work. We pretty much quote the same rates.” [#227]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “I don't solicit a lot. I like to stay with federal and state... because I know I'll get paid. I can't afford to have credit problems... When you're working for individuals or with specific companies, sometimes it's hard to get paid. So, I just focused on where I know I'm going to be paid.” [#306]
- The non-Hispanic white male president at a specialty construction firm reported, “Well, private stuff, I wouldn't even know how to find it, first of all. I don't know... It's easier to get public work because you just have to get the low bid.” [#423]

Other firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy [#111, #322, #324, #346, #410, #416]. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Okay. I'd say about 50, 50 then right now. Because

I'm either a subcontractor working on projects for public agencies, or I'm working for nonprofits." [#322]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, "I'd say it's about 50/50 right now. There are times when it's been more like 70 percent public and 30 percent private, and I prefer that ratio. I prefer the public work and so I strive for it, but right now it's more like 50-50. [Public sector]... contracting that's a good fit for me, in that there are public policies, standards, and guidelines that are all pretty explicit. It's kind of a structured process. If you're contracted to do landscape architecture for a project, where there are certain standards, there's certain specifications. It's just a way to approach a project that I've done for 30 years... It doesn't matter which agency or which municipality, there's that common thread of structure." [#410]

3. Experiences getting work in the public and private sectors. Business owners and managers commented on what it's like to seek work with public and private sector clients in the San Diego area.

Some business owners expressed that it is easier to get work in the private sector. For example:

- The non-Hispanic white male owner of a general engineering firm reported, "I would say that in the private sector it's a lot easier to get a job... the paperwork is ridiculous in the public sector versus the private, but the private sector is slowly catching up and becoming more onerous just like the public sector. I would say there's a little bit less oversight in the private market, than there is in the public market." [#101]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, "It's easier to get your inspections done in the private world typically. One suggestion I would definitely have is private start privatizing all inspections. And that's both public and private, like have certified private inspectors that actually go out and do the same thing. Same with the engineers. It would make the cost of everything go down." [#324]
- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "Well, I've noticed that private entities, the big ones, they're beginning to act like government. They have become much more bureaucratic themselves... Small firms, they don't have that option. They have to perform. In the United States, if you're small, is you're nothing... If you're small, you're small percentage of the economy anyway, and nobody cares." [#202]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, "It's something we could look at [pursuing public work]. I just know the bidding process is going to be ridiculous so it's going to be a huge learning curve. It's something we can look at but it's not our main priority right now." [#231]
- The non-Hispanic white female owner of a consulting firm stated, "Well, I think these days in government... [there is] is a bidding process... it's a deterrent to have to do a lot of paperwork, like can you do this and can you do that? Then to jump through the next tube and the next tube until finally you've got the contract or maybe you did all that work for nothing." [#335]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, "[In the private sector] they've had experience dealing

with other people that don't know what they're doing. So, they finally got to the point where they were saying, we need somebody to take care of this because it's gone to a bigger problem... So usually, you get better margins because you have less competition, but you kind of have to be able to bring something to the table... So, private's better if you can get it." [#340]

- The non-Hispanic white male owner of a professional services consulting firm noted, "Easy to get work in private sector way... If a private company wants to work with us, they'll call us up. We talked to them, have a couple of meetings, maybe there's a proposal shown... Public sector, it's months of back and forth. There's RFPs, there's paperwork, and it's just a longer sales cycle for lack of a better word." [#352]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, "Private's much easier. Just because of less red tape." [#411]
- The non-Hispanic white male account manager at an SLBE-certified professional services firm noted, "I think private is easier, because in public, we have to go for bid and sometimes it's little bit difficult." [#111]

Several business owners elaborated on the challenges associated with pursuing public sector work. Their comments included:

- The non-Hispanic white male owner of a general engineering firm reported, "Because of the financial requirements and the bonding requirements and the payroll requirements. Bonding is a huge deal and having the staff and the overhead required for a public works project, far outweighs the staff required for a private project... [Public sector] payroll's much more difficult because it's all certified. Compliance, federal compliance and all that is huge. We don't have to do that compliance for private work." [#101]
- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "Liability insurance is even worse. Well, for us, engineers, that's a huge... I turn down so many projects because of it. I had a project to do an entrance into UCSD, close to, at the southwest corner of the campus. Was an easy job. I had no reservation, but the main thing about it was that there [were] a few issues with the liability portions of it. I didn't want to touch it. I'm a small firm." [#202]
- The Hispanic American female owner of a human resources consulting firm noted, "Well, I would think it is more difficult to get work in the public sector. And also, the contracting logistics are much more difficult, the paperwork and the steps. And so, at times it can be quite challenging for a small business with very limited resources, because I don't have an assistant, we do our work... Also, we have gotten so many different types of insurance policies that are costly, but we have them all in order to contract with public entities. So, I understand why it's needed, but sometimes, for instance, if we're doing investigation interviews via Zoom, to require certain levels of liability coverage and so on when we don't even leave our offices... I wish that there would be a review to see how realistic certain requirements are... They seem to be more blanket requirements rather than specific to the situation." [#308]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, "I will say that part of the reason that I haven't gone after public work as a prime contractor is because the RFP process is so enormously time consuming and complex, that it hasn't seemed worth it to me. Whereas when I'm a

subcontractor and that big company is handling all that stuff with their staff who is paid to do those things only, and I just have to submit my resume. It's much more worth it to me to do it that way." [#322]

- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, "The competition. If you work in the public, there's a lot of competition. That makes it difficult because basically, your margin will go down because you're competing against everybody, a lot of it's based off price." [#340]
- The non-Hispanic white male owner of a professional services consulting firm noted, "I think our fees are kind of a sham. I think they're given to favorites. And if you don't know anybody on a personal or very well, on a professional level, within that organization, we tend to not bother because favorites are consistently played, whether it's people on the public sector side that are used to working with somebody, and then that person now works at a new company, and they're involved in the process... Out of the percentage of RFPs, we've participated in one... maybe we've won one or two. So, it's just not worth it for us." [#352]
- The non-Hispanic white male owner of a landscape materials supply firm stated, "For me now, it's become impossible [to pursue work in the public sector]... I just don't have the time to do this for that small a piece of business. So, I've pretty much given up on it. And the other thing is the documentation that we get, if it's even for a simple job, has become very burdensome. And I just choose to stay away from it. When I hear terms like prevailing wage and what have you." [#387]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, "Well, we definitely have found that sometimes the proposal submission, and the requirements [are] a lot more detailed than proposal submissions in the private sector. They're asking for a lot more information, they require a lot more experience. And a lot of times, it asks for your experience in serving the municipalities and the public sector. That's a little daunting as a small business or a DBE company that knows we've never provided services. It hasn't prevented us from still bidding on certain opportunities. But it is definitely daunting reading some of that wording and a lot of the proposals that we've seen." [#406]
- The male member of a chamber of commerce stated, "Usually because of how many details they ask on the proposals, it's very pricey for a small business to put it together.... So, they were not motivated or encouraged to submit another proposal later that year because of the experience that they had in the first proposal that they submitted." [FG#4]
- The female member of a civil rights organization stated, "Even when small business can do the work, they don't necessarily have the administrative support to deal with all of the paperwork and just the process to put their hat in the ring and to even where medium to large businesses don't even apply because the ROI, just the time it takes to bid, the ROI is just not there for them." [FG#1]

Other business owners and managers described public sector work as easier and saw more opportunities in this sector. For example:

- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, "For example, we do work in the medical world, and then in a large hospital, our

actual contact might be a facilities guy, and in a small hospital, our buyer might be the CEO or a purchasing agent or whatever... in the private [sector] it's really hard to determine who the buyer is... For example, all the school districts in the state of California are identifiable, and who does the purchasing is identifiable. Federal government is pretty decent, pretty easy, States pretty easy, whereas the private sector, you never know who that actual buyer might be." [#306]

Some business owners or managers noted that it is not easier to get work in one sector as compared to the other. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, "It feels pretty similar to me, again because with the contracts I work on... I'm a subcontractor, there's usually a layer between me and the public agency... like anything else it's not about whether the agency is easy to work with, it's the people you are working with... When you're working with awesome people, it doesn't really matter if they're public, private or whatever." [#322]

4. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

- The non-Hispanic white male owner of a general engineering firm reported, "[The difference] is huge. Private, non-prevailing projects, labor makes between \$15 to \$20 an hour and a public works project, that same labor makes \$30 an hour plus benefits on top of that. This can be anywhere 15 to 18 bucks an hour. The cost of labor is extremely more expensive in the public works market." [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, "Yeah, the public sector work, a lot of times has a lot more contracts, I would say, that aren't negotiable in some [respects] for indemnifications and so forth, and insurances and all. Whereas the private side... if we have an issue with it, we can strike out paragraphs and so forth and get rid of them or have them rewrite them to what we can accept, whereas the City of San Diego will not allow you to change them." [#108]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, "I mean [there are] a lot less hoops to jump through for private. You get paid immediately instead of waiting 90 days. There's no consistency on public jobs unless you get the same inspector twice." [#416]

5. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Some business owners perceived public sector work as more profitable [#218, #311, #322, #324, #335, #369, #423]. For example:

- The non-Hispanic white male owner of a consulting firm stated, "Well, we have to be a lot more specific with the private than we do with public. We basically know what they are looking for, what they need, and what they're requiring. Public, they're all over the place... [Private is more profitable] yes." [#218]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “When we say private for me, we’re talking about non-profit, and my billing rate is much lower for that work than I can typically ask for in this work that’s directly with the public. And it’s just because of the nature of the nonprofit. So, it’s definitely less profitable to work for, what we’re calling private for me.” [#322]

Other business owners and managers perceived private sector work as more profitable [#101, #308, #340, #396, #410, #418]. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “I would say there’s a better profit margin in the private.” [#101]
- The Hispanic American female owner of a human resources consulting firm noted, “We have kept our rates without increases for many public sector clients. And so, maybe it’s my own doing that I have not raised the rates. So, the profitability can be lower in the public sector.” [#308]

Six business owners did not think profitability differed between sectors. [#227, #235, #306, #318, #352, #417] For example:

- The non-Hispanic white male owner of a professional services consulting firm noted, “I think we probably aren’t as profitable on public, but those contracts can be bigger... there’s probably a little bit more of an administrative need on kind of marketing and PR work for public sector, because they require more detailed, monthly reporting on activities and what we’re doing, and it’s a little bit more bureaucratic... but still, it’s probably under a 5% difference in terms of profitability, so it’s negligible.” [#352]

F. Doing Business as a Prime or Subcontractor

Part F summarizes business owners’ and managers’ comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors’ decisions to subcontract work;
3. Prime contractors’ preferences for working with certain subcontractors;
4. Subcontractors’ experiences with and methods for obtaining work from prime contractors; and
5. Subcontractors preferences to work with certain prime contractors.

1. Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

Some firms reported that they usually or always work as prime contractors or prime consultants [#101, #111, #230, #231, #235, #302, #311, #369, #406, #416, #417, #418]. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “I would say 90% of the time, we’re a prime contractor. Well, because we typically self-perform all the work necessary for the projects that we bid... Basically, we like to control our own destiny.” [#101]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “I mean, it would have to be a much bigger company for us to be the sub because we don’t just do one specific trade. That’s why we get hired, to do multiple trades so it would have to be a pretty large project for us to be a sub.” [#231]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “Right now, I would say 85 percent of our business is as a prime contractor... There are programs in place where our clients will encourage our sustainability, our financial well-being. And we go through different courses that our clients put together, like SDG&E has this whole score program that helps small businesses getting started, *Thrive*... that’s I think [why] clients have given us prime contracts because they have put us through what they believe is needed in order to be sustainable.” [#406]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “Ninety percent, we’re prime. Which is rare for a small business.” [#418]

Some firms reported that they usually or always work as subcontractors [#306, #318, #324, #340, #347, #357, #396, #405, #407, #410, #416]. For example:

- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “Currently, I would say we’re a majority sub.” [#318]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “We’re never a prime, we’re always a subcontractor. Either we’d subcontract direct through the general contractors or we’re a second-tier sub under electrical contractors.” [#340]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “Yeah. City contracts, we’re always a sub. That’s kind of one downside of the city is they won’t hire a small business like ours to be a prime. They there’s no fairness at all with that. They just won’t do it. But I think it’s because they’ve been burned by small businesses before, overselling themselves and not being able to really fill the capacity that they say they can do.” [#357]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “The only time we’re prime is when we’re residential.” [#416]

Some firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project [#227, #302, #318, #322, #352, #423, #426]. For example:

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “We are primarily... in terms of dollars, I think I’m 60/40, 60%

subcontractor, 40% prime. This particular work that we do gets added on to larger projects. So, it's way bigger projects than we can handle. So, we're used just for the niche work." [#227]

- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, "In 2014... we were a sub to another firm and competed for the County of San Diego contract. In our debrief there, we were told... had [we] primed that contract, we would have won that contract. The next time that we competed, we primed the contract and won. So, it's really that part of learning where your client's comfort level is, if that makes sense." [#318]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, "Some of the solicitations are written in such a way that only a large firm could actually complete for those proposals. So, when we see those, we will generally team with a larger firm, ones that we know have those good relationships with those clients... We also look at who the other bidders are essentially, on any proposal that we're interested in to decide whether we stand a chance going after it by ourselves or whether we would be more competitive teaming with someone else on it. So, it's generally looking at the contracts and looking at how the contract language is and how competitive the bidding pool is." [#426]

Several firms explained that they do not carry out project-based work as subcontractors or prime contractors [#201, #202, #308, #335, #346, #387, #395, #411, #427]. For example:

- The Hispanic American female owner of a human resources consulting firm noted, "I have never attempted to get work. I was just called and offered the work." [#308]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, "I've never been a prime... If we're sitting there really saying I'm a sub, I'm not. I'm hired by them [the prime contractor]. But I make a contract with them... but I've never been in the circumstance where I've been called a sub. It's just an agreement, an IC agreement or company agreement that's been procured." [#411]

2. Prime contractors' decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with certified subcontractors.

A few firms that serve as prime contractors explained why they do or do not hire subcontractors. For example:

- The non-Hispanic white male owner of a general engineering firm reported, "Yes, we subcontract work out all the time. The biggest struggle we have is these certified small companies... giving them the ability to correctly do certified payroll and to correctly enter their compliance paperwork on a weekly basis is very, very tough and onerous. And as a result of that, we've had to hire a full-time employee on our side to work with those subs... We're forced to give our own work away. The work that we self-perform normally, working for the City of San Diego, we're forced to subcontract out our own work just because we have to, because they make us." [#101]

- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “I mean, there's one [sub] that I've got that's certified and he's used to getting paid prevailing wage, so he tends to be more expensive... he's not going to be competitive for private work like he would be for prevailing wage, for public.” [#306]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “We subcontract the work out for services only. [Subs are selected on] skill set and experience. Because every time we have IT stuff, it's always like a niche of something very specific. So, we usually know who is good at what in the market.” [#418]

A few firms that the study team interviewed discussed their work with certified subcontractors and explained why they hire SLBE/ELBEs. Their comments included:

- The non-Hispanic white male owner of a general engineering firm reported, “Experience, history, working relationship. A lot of times we have to hire SLBEs and ELBEs, and so we don't really have a choice. We have to hire a Small Local Business or Emerging Local Business Enterprise, especially when it comes to the city of San Diego, because they have mandatory contracting subcontracting goals that we have to meet.” [#101]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “I've had better experience with the certified guys, again, because of all my federal work... once they get approved for those programs, they have the luxury to say, ‘Okay, I don't have to keep finding the dirt cheapest guys every time.’ Now that we're all qualified, there's peers like me, that now it's about performance.... And that's what's good about it is these programs, they grade them after every project and everything.” [#340]
- The non-Hispanic white female small business coordinator at a large construction firm stated, “We call them [subs] for opportunities. They don't respond fast enough or efficiently. They don't get pre-qualified like they're supposed to... It's like taking a child by the hand... it's been very frustrating because we have so much work to give them... sometimes they don't even submit bids when they tell us they're going to bid... it's my job to try and convince my estimators, to keep giving them a chance when those companies don't respond. It's not easy.” [#369]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Yeah, sometimes we do that intentionally [solicit certified firms as subs], because we're... all in a very similar place, where we're trying to figure out how to make this work, and we're teaming up so that we can be larger.” [#410]

3. Prime contractors’ preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “Yeah, we have a bid list, and we keep a record of all the subs for the different trades and who we've used in

the past and we're always leery about starting a new relationship, but we always do. We just make sure that we put more effort and more time into a subcontractor if we're going to use them for the very first time." [#101]

- The non-Hispanic white male owner of a general engineering firm reported, "If we're not required to then we don't specifically search them out [SLBEs or other local enterprise business]... If there is no requirement for those types of situations in a private job, then no, we don't discriminate against anybody. We go with who we know is going to produce the best job for us and whoever's going to help us create the best project possible." [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, "We've gone out and we're constantly looking for small businesses to work with to be able to do it, but at the same time you can't take a firm that's two or three guys that are doing testing and inspection, and then put them underneath... our contract, and take the liability on, sometimes with those companies... let's say we have a project that's got a five-million-dollar insurance requirement. Those small businesses typically can't get five million dollars' worth of insurance, but... we're taking on the liability, we're expecting them to, if I send a guy out there, and he screws up, and it costs me 20 million dollars to fix that building, he's not going to have a liability coverage." [#108]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, "One, we trust the work that they do, and there's confidence because we've worked with them before." [#231]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, "Sometimes it's based on who I've worked with in the past and what I know their skills are. Other times, I am introduced maybe by a third party, someone I already know who's introduced me to someone. One of the reasons I get involved in associations like the APWA, which is the American Public Works Association, and other engineering groups and architecture groups, is so that I can meet other consultants, and so I know them well enough so I can think, Oh, yeah. So-and-so has experience doing designing restrooms in parks. I think that's what I need." [#410]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, "Of course we have subs like that, that we really like to work with... we are very strong in our office about not bid padding or sharing numbers or whatever. So even if it's my preferred sub, if he's not the low bidder on bid day, he doesn't get listed. We believe very strongly in the integrity of that process. But there's other times where we have, particularly smaller projects or projects that aren't publicly listed, where I'll go out to just two or three of my favorite subs and say... would you give me a bid for this work? But on the big stuff... everybody's got a fair shot." [#417]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, "So, usually we work with all the small businesses if we can, because they're more flexible." [#418]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, "We generally use the same folks in the same categories because we have a good working relationship, a good history, a good partnership through several projects so we

know how we work with each other, we know the people, we know our business processes. So, we go with what we know, to be comfortable what we're familiar with." [#426]

Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform. For example:

- The non-Hispanic white male owner of a general engineering firm reported, "Sometimes... some companies are in a better financial situation than others. And sometimes when you get one of these certified companies, a lot of times they tend to be smaller and if they're bidding a big portion, sometimes they overextend themselves. I've seen that quite a bit. Not being able to perform, to actually put the amount of labor and effort and resources into a task and being able to complete it on time." [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, "The problem that the small business firms have is, is a lot of the contracts, they don't have the manpower necessarily sometimes to be able to meet the needs of the larger companies for some of the services that are out there. It's not that they aren't certified to do it, but they can't meet the needs." [#108]

4. Subcontractors' experiences with and methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors.

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, "I would say 80 or 90% of the jobs we already know about. So, we go ahead and just submit our bids unsolicited for those primes that have already identified themselves... 10 to 20% of jobs, that'll be primes reaching out explicitly for us, because they've worked with us in the past or they heard about us through somebody else, or even the city. The city will drop our name here or there. And so, when that happens, we can end up with somebody reaching out saying, 'Hey, we want you to go do this work.' So, we say, 'Okay, here's what the price is going to be.' And then they're surprised that it's that expensive." [#227]
- The non-Hispanic white male owner of a landscape materials supply firm stated, "I believe a couple of them are [certified primes]. But again, it's one of those areas where I really don't care. It's more to do with, 'Does what I do work for me?' So, I'm not out there looking for contractors that have those things." [#387]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, "It really makes no difference. A prime's a prime. I've only had a few SLBEs that hired me as a sub and it just, it's the same. I usually get subbed in on city jobs... it's the same with them as it is with regular primes." [#416]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, "If we know something's coming up, we'll reach out to some of the primes and ask if they're interested working with us, so as I said, works both ways. Normally you know about proposals coming out before they do, word on the street and all, but I'd say it's a mix between the primes reaching out to us and us reaching out to the primes." [#426]

Some interviewees said that they get much of their work through prior relationships with or past work performed for primes. They emphasized the important role building positive professional relationships plays in securing work. For example:

- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “But again, we get involved through experience because we're experienced working on a certain basis, or our experience with certain type of project or something, [primes will] be looking for that. And we can approach them and say, ‘Okay, this is project's out to bid. This is what we've done. We've done 12 projects out here. And these are...’ So, we can qualify [ourselves] that way doing it.” [#340]

Some business owners reported that they actively research upcoming projects and market to prime contractors. Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “[On the occasions when going in as a subcontractor] I mean, yes. I mean, advertising, and publications, and online with some of the different contractors and associations like AGC, or Blue Book, or Bluebeam, but we don't really find it necessary for us to advertise on any of those sites really to get what we want. We find out about the projects there, and then we'll sign up and find out who all the generals are, and then call each one of them up and tell them, ‘Hey, we want to bid this. Would you accept a bid from us?’” [#101]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Knowing the clients and having your ear to the ground, you know generally, what's going to come up in the next year or two. We also look at, since our work is with public agencies, which are tied to funding, which is tied to elections and bond measures, et cetera, we kind of follow the money to see what would be coming down the line. Plus, at the time, we subscribed to bid boards and digital bid boards that would give us email notifications of solicitations that get published and yeah.” [#426]

5. Subcontractors preferences to work with certain primes. Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

Some subcontractors did not have strong preferences and were willing to work with any prime contractor. For example:

- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “I mean it starts with them winning the job. If they win the job, I like to work with them. I mean the bigger ones that are more machines, I don't really care [to work] for. I prefer the smaller primes, but I mean as long as they understand what my scope of work is and they stay out of my way, they're all decent.” [#416]

Some subcontractors preferred not to work with certain prime contractors. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “[On the occasion this firm works as a subcontractor], they [primes] go to the low dollar, and they squeeze you to the last bit of blood you got to squeeze out and rub you the wrong way. They have poor field staff that run their projects in the field and are generally lacking the education necessary to do the job they're doing.” [#101]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “I won't work with [Company XYZ] because they're racist and they won't pay on time. Obviously, [Company ABC] because they hired us and copied everything we did, and then now they won't, they literally are our only competitor. The sister company to [Company XYZ], I won't work with because again, the guy berates my employees. Then I have a couple of plumbing companies that I won't work for because he talks down to them. So, I just told them life's too short.” [#416]
- The Native American male owner of an MBE-certified metal working firm stated, “It would be very nice if a lot of the companies really took that minority business to heart and actually, will give you some preferential treatment. Because it's almost impossible to compete with some of the larger companies, because in my line of work, they'll take losses. They will undercut your price to take losses for a sustained amount of time just to push you out. And it's a very hard thing to deal with. I mean, there's been contracts where in jobs we've lost out and because we were not the lowest bidder and on that, I gave them the exact price that we were paying for it. We were not making a dime on it and we still got undercut. So, some of those bigger companies will take that loss just to get the job.” [#427]

Subcontractors also offered their perspectives on hiring second-tier subs. For example:

- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “Yeah, sometimes if we get inundated with work, I'll sub somebody in. Most of the time I use subs on a residential private job. [They are] just people that I've used for years, either used to work for me and started their own company, or someone I used to work for. I sub back to them sort of thing.” [#416]

G. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section G presents their comments on the following topics:

1. General experiences working with public agencies in the San Diego area;
2. Barriers and challenges to working with public agencies in San Diego; and
3. The City of San Diego's bidding and contracting processes.

1. General experiences working with public agencies in the San Diego area.

Interviewees spoke about their experiences with public agencies in the San Diego area.

22 business owners had experience working with or attempting to get work with public agencies in the San Diego area and in other places [#101, #108, #111, #201, #227, #235, #306, #308, #318, #322, #324, #335, #340, #346, #357, #387, #410, #416, #417, #418, #423, #426]. Their comments included:

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “The City of San Diego is really easy to find, because it's all on PlanetBids, so we know where to find it. It's all posted. So, it's pretty open and transparent there as to what's going on.” [#227]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “Yeah. There was a... Well, school district I don't work with because their product is... Even though it's modular, it's very difficult to compete with the other people in the industry because they are also manufacturers. So, the school district, I don't, but the airport I've tried. I think I'm pretty sure it was the airport recently I've tried to get on their list again and I have to show them the deed to my property, the deed to my office to verify that I really was in the County of San Diego. I had a hard time finding my deed and getting it then, it's kind of crazy stuff.” [#306]
- The Hispanic American female owner of a human resources consulting firm noted, “And thinking about it, maybe I went through a couple of bidding where we received the notification that, ‘Yes, there was this opportunity,’ and then we submitted information. And in one case, I'm thinking we spent a lot of time and completed a lot of paperwork, and for a small company is hard. It was a lot of work, and we didn't even hear anything. I mean, no response, no acknowledgement. Anyway, I understand these things happen, but it's very burdensome, and then we don't even hear anything back. So that's one of the reasons why we try to not even pursue unless we are asked.” [#308]
- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, “When they put these bids out, maybe they should email companies that do the work or something. I don't know. Because, like I said, if I would know about something going out, like I said, I'm a unique business. I do [Service ABC]. We don't mow lawns. I don't do any landscape construction. And you see those bids all the time, and I'll see them in the paper. But I'll never see a bid that says, ‘Hey, this park needs to be [Service ABC], okay?’ Yeah, I won't see that. And so, that's just something that I have to do a one-on-one with the person in charge because I'm the only company in San Diego that really specializes in this one service.” [#346]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Sure. I've got a whole range of things. Most of my experiences are really good. I'm often brought in as a sub, so I understand that's a good way to start. I think it's hard to get work with the County. I think I've never gotten to work with the City. I would say both those entities are fairly... I don't know what the right word is. Are not structured to provide opportunities to new firms, even though they do have certifications.” [#410]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “We've worked with the City of San Diego, City of Chula Vista, City of National City. I don't even know. Almost every city in San Diego County. We've worked with the County of San Diego. We've worked with the State of California. We've worked with almost every school district in San Diego County. So, for the most part, I think most of them, at least at the size jobs that we're doing. We worked for the San Diego Airport Authority. Most of them have... The integrity of the bidding system is good. So, you just bid the job and if you're low, you get it, if you don't, you don't. There have been occasions where we don't feel like the integrity of the system is really being withheld or upheld. We just feel like some of those agencies, it

doesn't matter what we do, we're not going to get the job. It isn't because our bid is bad, it's because somebody else who already has a relationship with that agency knows where they can cut corners on the contract so they can bid lower and get the job." [#417]

Business owners described their experiences working with or attempting to get work with the City of San Diego specifically. For example:

- The non-Hispanic white male owner of a general engineering firm reported, "It's very difficult to get our retention on a job with the city's closeout process. When a job is complete, it takes them sometimes three to nine months to completely close out a job after all the work has been done. It's takes them an inordinate amount of time, it's terrible. It's despicable how long it takes to close out a job, and for us to get our final retention payment. The progress billings and while the work is proceeding, generally I have no qualms... The subcontracting markup and holding retention. I think they should hold zero retention. I'd say it's tough on cash flow. Basically, there's a state mandate that a maximum of 5% retention shall be held. That's usually pretty much all of our profit on a job. Every invoice they deduct 5%, and they hold that in a kitty until the very end of the job to basically... It's a way for them to make sure that we don't go anywhere, and we don't abandon the job and not finish it. They hold... All of the work that we do for the city is bonded already. They have two methods to not make sure we go anywhere, and we don't abandon the job, and that we finished the job. They have a bond that they make us sign up for, and they hold retention. They hold twice the amount they need to." [#101]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, "[Compared to working with other public agencies in the region] they're about the same. About the same." [#318]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, "And there's been so many changes at the City that it's been difficult just from the fire alarm world, because of all the inspectors have changed. All the processes have changed. The locations have changed back and forth. Now everything's online and that wasn't working real efficiently, but it's gotten better. The fees are constantly going through the roof, which is ridiculous when you're trying to bid a job. And then six months later, when you go to apply it, you find out your fees are way higher. So, it seems like it's all influx right now with the City of San Diego. So, that makes it difficult." [#340]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, "When I work with the City, an actual City inspector that's pay-rolled by the City, we have no issues. If I work with an inspector that's subbed in, like a [Company A] or a [Company B], the people that come in like consultants, that's when the wheel gets reinvented. Every project you've got to retrain every inspector because none of the inspectors have ever seen a rehab before. They're all used to cookie cutter, out of the green book stuff, and then they all find some different kinks to get on. I've never had an issue with the city people, it's always the subs that they bring in." [#416]

2. Barriers and challenges to working with public agencies in the San Diego area.

Interviewees spoke about the challenges they face when working with public agencies in the San Diego area.

- The non-Hispanic white male owner of a general engineering firm reported, “I think they [the City] need to relax the [number] of requirements that they put on the SLBE and ELBE mandatory participation. I think that the percentage of work that they required to be subcontracted on certain contracts is too high. I think, just for instance, some of the projects we bid, maybe it's a \$5 million job, and it's a pipeline job, and we pretty much self-perform every aspect of that project. [There are] requirements most often to have to meet and have to subcontract up 22.5% of the job to SLBEs and ELBEs, and that's very onerous. I think it costs the City money, because generally, when you're forced to subcontract work that you'd normally do, it's more efficient cost efficient for you to do it yourself, rather than pass it on to somebody else, and then put markup on top of it. It costs the city more money.” [#101]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “It would be really helpful for the city to be more consistent in their inspections, if we didn't have to have this randomization factor, just consistency that we know what the expectations are, we can go achieve those expectations. That would go a long way for us.” [#227]
- The Asian Pacific American female owner of a construction firm stated, “We haven't touched a lot of City or port work yet but are interested in doing it. Most of our work is federal or military. Not many small women-owned business opportunities (under \$1 million).” [AV#68]

Business owners and managers highlighted the complexity and difficulty of the public sector bidding process, and the length and large size of projects as challenges, especially for small-disadvantaged firms. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “And what a lot of small businesses talk about, and I don't want to say complain about, it hasn't had a big effect on me, but I do notice that these companies, they seek you out. You do the work to put your resume together and all this stuff, which is much less work than doing an RFP. So, I'm not complaining about that, but then you never hear from them again. I'm on an on-call contract right now for Caltrans with AECOM. I did all the work to get them the documentation, got the announcement that we wanted, and I never heard anything about it again. So, I'm not sure that the system for tracking, whether the DBEs are actually getting used after they get on the team is very good, because I've heard a lot of small businesses say that they do the work, sometimes they even go to the interview and then they never get any work from the contract. I think there might be some holes. And now I'm talking about in general, not specifically the City, but just in general, that is a conversation that's had with more than one small business owner.” [#322]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “The City looks for a lot of relevant bids for work. And a lot of times you can't meet that because people don't like to give you an opportunity. So, when you can't get the opportunity, you won't have the past performance. Their insurance requirements are too high. They do need to reduce their insurance and their bonding requirements.” [#406]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Enhance availability and opportunity. So, the City's been great with having those requirements in their large RFPs, which is there already, which is good. I would say, on some

of the contracts, the larger contracts, they came to limit the type of small business that fits into the prerequisite. Like you mentioned before, there's ELBE, there's WBE, there's all the other requirements for minority and underprivileged components to be involved in a proposal in the team, and I'd say, not all of the ones recognized by the state are recognized in the contracts that the City has. Some might be more focused on one or the other versus inclusion of all the state recognized emerging or previously disadvantaged companies. Sorry, I'll say, inclusion of all the entity types would be a recommendation." [#426]

- The male member of an equality organization stated, "Some of these contracts are bundled into larger contracts. So, a small, minority owned enterprise might not be able to compete." [FG#2]

3. The City of San Diego's bidding and contracting processes. Interviewees shared their comments about the City, contracting and bidding processes.

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "Yeah. It's hard. The process itself. I don't mind filling out the form and applying. That's not a problem. The other problem is bonding, which I don't think you need bonding from engineers. But they do need professional liability insurance, which is right. They should ask for it. But you can either ask for it or you can get a professional liability for that job separately. Add that to the cost and now you have a much bigger pool of engineers that can do your job. It's like this. If you have a house, you want to do an addition. If you go get the contractor to do your plan, and this, now you're limited to that contractor only. He owns the plan for your building. If you go draw your own plan and then get bids from 5, 10 contractors, you get a better price. Same with the City of San Diego or public entity. If you want to take care of their professional liability insurance for your project, you're sure that it's covered. You don't have to guess it because you already got the contract. Then you can choose the qualified engineers to do the job. And that person doesn't have to worry about liability insurance. You don't have to pay \$200, \$300 an hour extra for it." [#202]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, "So their bid process, for the City, I guess, just to clarify in my industry anyway, there's really only two forms of work that come out. You're either on an on-call, working for some department within the city or you're bidding on capital improvement projects. So, the on-calls through the city are always the same way, like I described. You got to get on a team, they'll get invited, they'll invite you and all that. The only projects you can bid on with the City of San Diego outside of those on-calls would be a capital improvements project. And those ones are really terrible, really tough to deal with. Um, you deal directly with the contractor. So, your contract, my contract is never with the City. I've never signed anything with them ever... The contractors are especially terrible to deal with. They nickel and dime. You try not to pay their bills, all sorts of stuff. And the City takes a very hands-off approach, because when it's an on-call, they can tell that contractor exactly what they want them to do." [#357]

Some business owners discussed difficulties in learning about the City's and other agencies contract opportunities. For example:

- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “It’s typically harder [finding out about city opportunities] because of the way that the PlanetBids is set up. You have to log in, then you have to look for it. It’s not just something that shows up. If you look at the San Diego County websites, it’s a lot [simpler] and easier to get pre-qualified with and everything.” [#324]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “The pre-bid meetings are never good for us, because they don’t ever call out what we need. So, we don’t go to them anymore. What we found pre-bid meetings are really good for contractors. So, if you’re on a backhoe and you’re going to sub the backhoe to this other company, it’s really good for them because they can say, ‘Oh, we’re digging 3000 feet of linear trench and there’ll be 38 services.’ There’ll be all these different things. Everybody knows right what they’re getting into. They never answer. If we go, ‘Will you require archeology?’ They all look at each other and go, ‘We don’t know that’s up to the City.’ Well, you are the City. Well, it’s not up to us, it’s up to the... And so, it keeps, we’ve found them to be fruitless just because they don’t specify for our industry.” [#357]

Several business owners shared recommendations as to how the City of San Diego or other public agencies could improve their contract notification or bid process. For example:

- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “Typically, that process [from being selected to getting a signed contract] should take no more than 60 days, however, the City of San Diego, it generally takes about six months. I would give them a negative on that one. If you’re looking for something they can improve on.” [#318]
- The non-Hispanic white female owner of a consulting firm stated, “Well, for example, if I were to receive something today, I would just appreciate, some really clear goals, really clear project, understanding exactly what it’s about, because I read a lot of things these days that are so mired in the lingo and the current jargon, that is it’s so unclear exactly what would you be doing or what is involved or the qualifications.” [#335]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “The thing that I don’t like about it, it would be very similar to PlanetBids in that, there’s 18 individual cities in this County and Imperial. So, El Centro, Brawley, San Diego, Imperial Beach and there’s all these cities. And so, if you registered with just the City of San Diego, it really wouldn’t do you any good for Carlsbad? They wouldn’t... If you have the City of San Diego a better representation might be the City of Imperial Beach. They’re right next door to each other. And you can hardly tell where one ends and the other starts. But if you’ve certified with City of San Diego, you’ve missed all Imperial Beach work, because you wouldn’t know about it. So, I would think that possibly like SANDAG could be a better outlet because they incorporate all the governments within the San Diego jurisdiction. And so, if you’re a vendor with one, you could be a vendor with all of them and sort of, naturalize a certain way. So, it’s normal for everybody. Everybody has the same thing. Because they all need the same thing at the same day, at the end of the day.” [#357]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, “If I’m not seeing something that pops out and slaps me in the face and says, this is your opportunity. It makes it hard to do and navigating through some of the sites that we try to

look at or having to register here to go over there. It is confusing. And it gets to a point where most individuals will quit. Will be like, I can't do this. But having a liaison, if you do want to get into government contracting, having a liaison basically help you through that first one, showing you the steps, I think would be wonderful additions.” [#411]

- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “The bid process I'd say they have a decent problem with, I think they have at least two or three different planners that make up the bids, and each one of them has their own idea of bid items. And when you're pumping out cookie cutter bids, you don't need to reinvent the wheel each time, and try and get cute with let's do it by the foot this time. You've got to keep the bids consistent because they'll... try to make it by the foot instead of each, and it doesn't work out. Or they'll try to say deeper than seven, less than seven, and they don't know what they're doing, so they're flip flopping the numbers, or one will say there's lateral launching. [There are] different line items that they put in or don't put in that make sense or don't make sense. And then when you try and bid that job, and they put some weird item in there that makes no sense and you bid that way, you're potentially going to win the job or lose the job, and it's going to cost the city thousands. I mean I've won jobs that they've flip flopped the wrong way and the city has lost hundreds of thousands of dollars. And I've done it the opposite way, where I lost the job, and they would have lost again hundreds of thousands of dollars. It's crazy.” [#416]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “Anyway, substitution is my hot button. I would recommend that the City simply follow the public contracting rules, which says that when you specify a single product, it is to be a basis of design, not a proprietary thing, because in public contracting, you're not allowed to specify proprietary products. I don't know if it's in the code anymore, but it used to be that if you want to specify a proprietary product, you had to specify three options. Now, they specify one and then you've got to figure out, okay, what's the basis of design? What're the critical elements of this product? Then, you can find substitutions for that. Honestly, what I rant and rave about is, while City employees can't do it, I think that architects get some perk from these various manufacturers for specifying their product. So, when they specify their product and hold to it and say, you have to use this product, then they get their vacation, or they get whatever. They get some perk for doing that. That's the only reason that these prices can fluctuate so much, at least from my perspective, so much from one bid to the next. If they're specified, they've got their prices sky high. If they're not specified, their price is competitive. Until the City comes back and says, ‘No, architect, you have to legitimately look at this’, until they start doing that, the system is going to be the same. That's my big problem with the City of San Diego.” [#417]
- The Native American male owner of an MBE-certified metal working firm stated, “I think if everything was more streamlined and if they could reach out and like for instance, like how the prime contractors in the military work is they have what's called a Qualified Vendor List. So basically, they would reach out to you as a small business in the area or someone they want to do business with, and get all your paperwork upfront and get you on a list that says, you've been qualified ... So, that way they're able to send you requisitions without having to constantly go through that same process of sending everything in and getting all for each bid, you're on their list. Then you can say, these are the things I'm going to bid on. These are the things that I'm not going to bid on and send them back and go from there. The other big thing

is that the problem that I've seen with different requisitions that we get in, is sometimes they'll send over a long list of items they want, and you're pricing these out as if it's a package. And when they go to order, if they want to order maybe half of it, or bits and pieces, because somebody else under sold you by like a dollar. But what they don't realize is then you have to adjust everything because a lot of that took into account like, freight charges that were being priced per pound for stuff that was coming in. So, it affects the overall price of everything. So, there's times where we have to put on, if it's a big package, like it's an all or nothing deal like you buy it all or buy nothing. So, if they were more up to date like if the buyers were cognizant of different things that go into a price, that would be helpful." [#427]

Recommendations as to how the City of San Diego could improve their administration of contracts or payment methods. For example:

- The Hispanic American female owner of a human resources consulting firm noted, "And also, the accounts receivable function can be a major challenge. Oh, I'm trying to remember. Before the pandemic began, I had three public sector clients, I won't name them, but who had not paid their invoices in months, months, months. And finally, I was able to collect some of the money, but it took over a year in some instances to be paid. And that's really hard for a small business because I pay the employees immediately. I mean, I follow the law. So comes a pay period, I pay them. So literally, I paid the team that worked on the project, and over a year later I was paid by the public entity." [#308]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, "When you work as a subcontractor, you're generally entitled to be paid within seven to 10 days after the prime is paid by California Statute. That doesn't always happen. So, the one issue I have with the City of San Diego as a sub is when you pay the primes, and so if I have a prime that plays games, I don't have any leverage to know whether he's been paid or not. The issue is as a sub, once you submit your invoice to the prime, the prime has to submit it to the city and then the city will cut a check to the prime, and then the prime will cut a check to us. And so, we don't know when there's a delay in payment. When we haven't been paid for 60 or 90 days or 100 days, we don't know whether the issue is the prime failed to submit the invoice to the city in a timely manner, whether the city has objection to the invoice and it's being reviewed, or whether the city has already made payments and the prime is just late in making payment to us. So, there's no visibility on payment to the prime. And I think it could be improved on." [#318]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, "As a subcontractor, there's no way for us knowing if the price has been paid. And we don't know if the prime has applied for payment. We don't know if they've acknowledged and issued our payment requests with their payment requests. So, it's just a blank world that you kind of hope that and you're up to the mercy of the contractor being upfront. And of course, some aren't." [#340]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, "I typically get paid from the prime, so the City, I don't ever get a check from the City. But there are times when I get, where I'm sitting 90 days out and the prime has gotten paid 60 days ago, and I'm begging for my money even though they've had it forever. So, I don't know what the City could do to make sure that... I mean dual checks is a pain, but I don't know what they could do to

make sure that the subs get paid as soon as the primes get paid. I don't have a solution, but I know it's a problem." [#416]

- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, "I think there's a lot of institutional knowledge that's gone and that's retired. We're actually working with a lot of people that just absolutely have no experience, no construction knowledge. We just started a job three or four months ago. We had the pre-construction meeting and the person for the City, our direct contact with the City, was the one leading the pre-construction meeting. They have an agenda and he's just reading it word for word all the way through, but at the end of it all, he had no idea what he even said to us. He didn't even understand the words he was reading. That's not an exaggeration or an embellishment thing. He absolutely did not understand. After talking to him in other situations, he's from, I think, Iraq and his command of the English language just isn't there, so he had no idea what even read to us. When we're trying to talk to him about other things, he doesn't even know what he's looking at or talking. He doesn't understand the conversation. That makes it very difficult for us. We've got at least three projects right now where the people that we have to deal with directly just don't understand the plans or the field operations. Not that we're trying to change anything. They just don't understand what we're even doing and if we're even building. There've been places where we were putting in, underground, a storm drain pump, and we're putting the work in the ground and they come out and they ask us, 'What are you doing?' We're doing this. They don't even understand where that is on the plans or how the plans relate to what we're actually putting in the ground. The relationship between the actual field work and the plans, there's just no understanding of that. That's the problem with contracting with the city. Yeah. When a situation does come up, they can't communicate to the rest of the City design team what the real problem is because they have no idea. What should be resolved in 15 minutes is taking three or four weeks to get resolved. By the time I finally get something to change enough for somebody to come out to say, Okay, we don't get this. Then, you start getting the heated emails back and forth and people misunderstanding all kinds of things, and then finally, after about three weeks, they come out to a meeting in the field and say, 'What's going on here?' We explain it and the higher up people recognize it immediately and say, Oh, yeah. That's a problem. Well, that's what we've been saying for three weeks while we've been stopped." [#417]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, "The City takes longer than our other clients to pay the prime. The prime's been quick to pay us but the City of San Diego, of all of our clients, the one that takes the longest to get payment out of." [#426]

H. Marketplace Conditions

Part H summarizes business owners and managers' perceptions of the San Diego marketplace economic conditions and what it takes for firms to be successful. A section was added to address challenges created by the COVID-19 pandemic.

1. Current marketplace conditions; and
2. Keys to business success.

1. Current marketplace conditions. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors, the effects of COVID-19 on the local marketplace, and what it takes to be a competitive business. They also commented on changes in San Diego’s marketplace that they have observed over time.

- The Hispanic American male owner of a security company stated, “Very competitive field. Companies from other states and other areas of California including Los Angeles [are] coming into San Diego and submitting bids taking business from us.” [AV#51]
- The non-Hispanic white male owner of a software development firm stated, “How would I describe the market conditions? I think they’re kind of slow.” [#212]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “The skill of the workforce plan that the California mandates is very difficult to comply with and... especially how expensive the prevailing wages are, is causing a large amount of the public works costs to go up. I got guys that I usually pay in the private sector, thirty-five, forty dollars an hour, and then they go get a prevailing wage. They’re making one-hundred dollars, and then you also have to add the efficient administrative fees on there, meant to oversee all the prevailing wages on LCP tracker and whatever else. And then also in-field workforce, it’s hard to find anybody that can be compliant with it right now, so that the rules that they set out for it right now there at least in Southern California, San Diego, you can’t, even the unions are having issues, being able to comply with it.” [#324]
- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, “The conditions have been great but if you’re looking at construction which I think this is probably what we’re talking about here. When you look at the construction side ... I think one of the problems that we face is a lot of public agencies get comfortable with using the same person over and over again and tend not to use new people. So, it’s not really a level playing field. If I have been laying concrete for your company for on the last two or three projects, you’re comfortable with me. So, guess what you know I’m a small business or you know I’m a prime that’s going to hire a lot of small businesses. You’re going to go right back to me and use me again. But it doesn’t give other companies an opportunity to step up to the plate and do what they’re supposed to do...That was a huge problem when I was at the [ABC Airport Authority] because I felt a lot of that. And the idea is to make it a level playing field for everyone and give everybody an opportunity. And a lot of times people we weren’t given the opportunity simply because our project managers at the airport were comfortable. And it’s understandable.” [#347]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “[The local marketplace] feels pretty steady to me. The City of San Diego, [do] a lot of things to their credit and this being one of them, they’re very proactive when it comes to climate change and sea level rise and shortages of water. And where are we going to get water from in the future, pure water project, these kinds of things. So, if anything, I see a resurgence coming up of even more work coming up because of what the city is doing, to prepare for sea level rise and these such, such sort of things, shortages of water.” [#357]

A few interviewees described the current marketplace as increasingly bureaucratic and competitive. For example:

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “Globally, in this construction business and development business, the bureaucracy of not just the City itself, but the organizations that are involved with it, has made decision making, finishing projects a lot slower. Nothing ever gets done. It takes so much that at some point people have to realize that the system in which they’re executing projects, not only costing too much, but it’s also... everybody and their mother is writing policies and procedures. What they don’t realize that when you write 400 pages of procedure and policies, somebody who has a business has to read your procedure and policy. Nobody goes back and looks at the procedures and says, ‘What parts can I throw away? Why am I keeping this? What’s the purpose for this?’ That is a huge thing in construction, is causing a lot of issue.” [#202]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “Price mainly. It usually comes down to price, that’s the number one factor.” [#231]

Many owners and managers spoke about the effects of the COVID-19 on the current marketplace. For example:

- The non-Hispanic white male owner of a general engineering firm reported, “Well, it’s shitty right now. If you asked me that two months ago it’d be wonderful. Quite a few projects, all public and private are being delayed or canceled due to this COVID deal. We’ve had, I don’t know, large jobs that are now on hold because of financing. Well, we’ve had probably seven contracts that have either been delayed or canceled. Everybody’s afraid to open the public and private market right now because of no taxes coming in for the public sector. The uncertainty of the economy for the private sector has made it very tough. People are not awarding that many projects right now.” [#101]
- The non-Hispanic white male account manager at an SLBE-certified professional services firm noted, “Yeah, we got really affected. A lot of people that don’t want to work and that refuse to work during the pandemic. This is all major problem, and a lot of small account, a small client or a small business cancel service because they don’t have money.” [#111]
- The Black American female owner of a professional services firm reported, “A lot of the work that I would do for youth organizations and within some schools, or out of school times but it was usually working with children and due to COVID, the children don’t actually, haven’t been going to the organizations that I would typically be contracted through. They haven’t been participating in after school programs or coming together for our workshops and presentations or anything like that. So, a lot of my income went down to zero. Basically zero. I did get some online tutoring, but very, very little, especially because it was right before the school year ended. A lot of parents just said, no, we’ll just figure it out or wait till the school year starts again.” [#201]
- The non-Hispanic white male owner of a consulting firm stated, “Yes, but lately, since March, everything is cut way back. I’d say at least 75% cut back on everything because we cannot go visit customers, we cannot travel. I refuse to travel right now because of COVID, and so pretty well staying in my office, making calls. And it’s been fairly quiet. We’re still working, but it’s a lot more slowed way, way down.” [#218]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “We have a global pandemic taking place with all of these

understandable concerns and requirements to try and comply with, with the global pandemic and global health recommendations. At the same time, I've got the same municipalities and the same health department, the government entities, but obviously different organizational structures, who are saying, 'Hey, the streets are empty. This was a perfect time to get yourself out there and get to work, try and do as many of these jobs as you absolutely can since you guys are critical infrastructure. So, do all this work as quickly as you possibly can. And how come you haven't finished already? I need you out there right away. Why didn't you just get this done?' At the same time, we're trying to say, 'Hey, keep social distance, be safe, keeps your crew sizes small.' I've got at the exact same- literally the exact same time, a major fight that says, 'No, no, no, get this work done right away.' So that's where the danger, you know, that's, what's made this dangerous." [#227]

- The non-Hispanic white male owner/CEO of a technology construction firm stated, "Well, any of my local business has pretty much stopped. Travel's impossible now. If we're just talking about local stuff. That's pretty much it, anything that was that I was doing locally, I'm not doing anymore. The only projects that we're doing now is the international stuff." [#230]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, "So we did a lot of... outreach, I guess, programs and speaking to the business community, I was invited to, I don't even know how many networking events, an early morning coffee, Zoom meetings, and once the word got out, I kept getting invited to more and more of these meetings where I was talking and educating people on what to do, what not to do and how to safeguard against shutting the doors down and just getting rid of all their employees and putting out newsletters and bulletins. And I mean, it sort of became a joke a little bit because I would send these updates and I would put the date. And then suddenly we noticed we're sending out even more. So, I would time it and strangers would call and say, my friend owns a business and shared this document with me. I would love to hear from you, how I can salvage my business. And I would say, 'Well, which one did you get? The 9:00 AM to PM or 5:00 PM version?' So, I knew which one they were talking about. It was sort of a joke, but it was the sign of the times and how quickly information was coming. And I felt like it really... And none of this was billable work, but I was having my teamwork and I figured it was a service we were providing to the community and it was worth, to help these small businesses understand what they were dealing with and how to protect themselves and their employees. So, I think we did a lot of really good outreach and development for the local community. Were we impacted? Yes, our clients were shutting down and laying off and furloughing as well. So, we did our jobs and helping them. So, our business went down as well, but I'm proud to say we didn't lay off a single soul during that time. I held on and held on to my team. I decided not to take a salary to help my team survive. I'm a single mom, but I was like, that's a part of owning a business. You take some hits for your team." [#311]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, "Typically in this business, one of the ways that you stay in tune with, client needs, what's coming up, kind of the whole workflow of this area is, I mean, you're routinely out on jobs meeting with the clients, other consultants, and right now, none of that can really happen. So now your only way to do that is via phone or zoom. And it's just not as practical. Here's probably my better example. One of the primary communication formats for our industry, the construction management industry is CMAA. And since February or March, every monthly meeting has been canceled and generally once

or... Probably once a month, they provide some forum or historically have provided some form of seminar training. And those have been set aside to more of a non-personal interaction thing. And they're probably less, appealing to us to go and spend an hour in a webinar doing... or there's no interaction versus an hour meeting where there's lots of interactions. So, it's affected us that way." [#318]

- The non-Hispanic white male owner of a landscape materials supply firm stated, "Only very recently... I had an experience where I needed an entry level employee who would load customers and generally keep our yard tidy and do deliveries in a very small truck when requested... the one I selected to go with worked two days and said, 'You know with this government program I'm making way more on unemployment. So, I don't want to do this unless you'll pay me a lot more than I'm getting on unemployment'." [#387]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, "I geared up in 2019 to expand and grow in 2020. And without any sort of funding or anything like that, I'm on hold. Nobody seems to be wanting to really take on, I haven't seen any contracts really come through that were in need of support services. Which I would have thought a lot of individuals would have needed, especially the essential companies would have needed but I guess, I don't know. Doesn't come my way." [#411]
- The Native American male owner of an MBE-certified metal working firm stated, "Yes. That's a drop in sales drastically for the entire span that it was from March. We were told from all of our customers that the government was pretty much shutting down until September. And so, our business had dropped off drastically from March all the way through September. September it picked back up again. And then it did just for that month. And now everything's kind of going back to where it was when everything's closing again. And so, it definitely impacted the sales volume of everything." [#427]

Some business owners and managers reported the COVID-19 pandemic had little effect on their business. For example:

- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, "If you pick up your phone right now and call most engineering companies, or surveying companies, or any of that type of stuff right now, you'll find that a lot of them are working from home. But they're still all working." [#108]
- The non-Hispanic white male supervisor at a lighting contracting firm stated, "My office has not closed, my two coworkers who work in the office work from home, I've been coming to the office basically every day, I have worked from home several times, but my employees who work in the field still come to the office, they still need material, they still need guidance, we still have issues we have to work out. So, it really hasn't affected us. It has, we have a lot more protocols now, hand sanitizing, mask wearing, how you interface with people in public and stuff like that." [#235]
- The non-Hispanic white male owner of a software development firm stated, "[The effect of COVID on business] I think it's about the same. If anything, there might be a small bump up. Well, people had to realign some of their functions to do it online, to an online market. So, it's kind of helped me a little bit with some of the business." [#212]

- The Black American female owner of a towing service firm stated, “No, so to answer your question, yeah, during COVID, it slowed down somewhat, but there were still people having accidents. There were still people who had breakdowns and needed to be moved, just not at the pace and volume of business that it was prior to COVID.” [#302]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “It hasn't really affected us. What it has affected, though, is that the cities and county building departments, for lack of term it feels like they are slacking on responding back or having proper protocols set up to where the streamline of the permits and responses needing in order to get those permits. ... Well, like for an example, like what used to take... where you could just walk in and go get a permit, for like traffic control or something like that very simply now you have this submitted digitally and you don't hear something back possibly for five to six days or weeks it all depends on whatever, however, it gets moved around in the portal.” [#324]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “Yes. Well initially we like everybody, there was a sort of, everyone held their breaths for a couple of weeks and didn't do anything. Everybody felt that. But then after that, it's been really interesting to see what people are doing. And a lot of people, they're not traveling. So, they're saying, 'My goodness. Maybe this is the time when we should be fixing up the backyard.' Or if you're working from home, chances are that view out of that third bedroom without a window is not that great. And you want something a little nicer, so you're modifying your house in some way, shape, or form, to have a better working environment, and what have you. So, there's an awful lot of that going on. So, the contracting part of our business, the billed part, it's been phenomenal. And all those contractors have got work all the way through next year. Whereas usually at this time of year, things are starting to slow down ... If they're [contractors] doing well and building these things for people, they'll need our products... We're up about 7 percent over last year. And last year was a record year. So, I would say that's all COVID related.” [#387]

Business owners and managers were asked if they needed or applied for federal COVID relief.

For example:

- The non-Hispanic white male owner of a general engineering firm reported, “Well, we qualified and received our paycheck protection program.” [#101]
- The Black American female owner of a professional services firm reported, “I received the EIDL (Economic Injury Disaster Loan) and then I've also received the one from the Black Business Relief Fund that was put on by the Black Chamber, but none of the other ones. The PPP went through my bank, but then going back to check the status of it there's, it basically goes to a screen that says we're reviewing your application, but I haven't received anything based on that. And I also received some feedback. I don't know if it was from the PPP or another one where they asked how many employees I have outside of the founder, outside of myself, and his answer was zero. They said, I don't qualify. And then just some of the other ones, I don't know. And it was also very difficult to know which one was actually contacting me, which one wasn't or when the EIDL got deposited in my bank account. It doesn't say EIDL, it comes under a different name in your bank account. So, I had to Google that name to find that it was actually the EIDL that was deposited there. For the Black Chamber, that came with, I had to take a class at the Small Business Development Center. I registered for the class and

then emailed that confirmation to the Grant Fund, but there was no real process to follow. And then actually, it was supposed to come in two payments. And so, it took a long while for the process to go through. And so, I followed up with it and they said, the second payment is coming in the mail now, so I ended up getting the second payment, but I never received the first payment.” [#201]

- The non-Hispanic white male owner/CEO of a technology construction firm stated, “I get messages about all the payroll protection plan or whatever it is, small business loans, I'm aware of all that. I did that. I did the PPP. We don't need anything, honestly. I mean, everything's fine. There's nothing I can think of that would be a big standout for us in particular. I'm sure there's plenty of other businesses that could use help, so I don't know what they would need, but we're fine where we're at.” [#230]
- The Black American female owner of a towing service firm stated, “Yes, but they weren't going to give it to me. They lied to the public in saying as well, ‘The stimulus package is to help small businesses, et cetera.’ They must have helped et cetera because they didn't help the small businesses... Whatever the PPP program offered. There were a lot of different ... What do you call them? Brokers, the small business administration who were taking applications that you could do online only. I had gotten some that say, ‘Well, your business is ideal for a loan. If you don't get the PPP loan, we can get you another type of loan or a business investment loan.’ But I just left it alone. I just told them, ‘Leave it alone. Forget it, go away.’ Because I knew that no matter what is required, I would have to jump through hoops. And I don't feel like it. Nothing is effective. If I keep applying for contracts, if I keep pushing and pushing, eventually something will give.” [#302]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “I mean that [PPP] was helpful. I didn't... I was planning on keeping him on the payroll somehow anyway, but it was certainly nice to have money to pay him without me having to worry about it.” [#306]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “It was a little frustrating at first because I think the big banks were getting the loans and we were getting pushed aside. But then we heard about people who were helping small businesses. So, we reached out to someone who helped us, and he connected us with a bank out of L.A. who gave us the loan.” [#311]
- The non-Hispanic white female owner of a WBE-certified consulting and recruiting firm reported, “The Small Business Association process was painstaking. The feedback was very slow because of the overwhelming amount of numbers that they received, and then through my accountant, I found a local e-commerce bank that made me a loan within 72 hours.” [#395]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “Yeah, we got some assistance from the SBA. I don't think there was any difficult issues with the SBA. We got the PPP loan and the disaster loan, and those both came through the SBA.” [#396]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, “[Regarding EIDL process] I'm not really one who talks negative... But I would have to sit [here and] say it has been a poor experience... My application was approved and then it was taken away because of review. Then it became something else and it just seems like there's

always another condition that I've got to fulfill. And I know there's been a lot of fraudulent claims and things like that. But it's kind of really hard when you're not one of those persons. But I know that they're working on it. I am in the reconsideration department. And it's just when you got the momentum and you were prepared to move forward as a small business and then just to be stifled, I've already invested a lot of my own money just tried to stay afloat with my personal side. Do you know what I mean? With my home and my kids. But to also try to put that on top of the business, it's when do you shut the doors. But I know it's out there, so I'm not going to worry." [#411]

Business owners and managers were asked what type of assistance would be most beneficial to recovery from the effects from the COVID-19 pandemic.

- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “HR practices are left vulnerable, especially in a time like this, when companies can be vulnerable to lawsuits and frivolous claims. So, you still are maintaining that the HR tasks that could inadvertently, put the company at risk because, someone's not there managing it. Things can fall through the cracks or be done illegally.” [#311]
- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “One is that local and state governments continue to put public projects out on the street, advertise and continue on with public projects. And along that line is noting that state and local governments are going to be in a tremendous revenue crunch due to lower taxes, having the state and local governments petition Washington for an additional recovery type act would be beneficial, in my opinion.” [#318]
- The non-Hispanic white female owner of a consulting firm stated, “Money. It would be nice if there were more contracts offered to help with the new, whatever's going on. Just trying to think. This is an interesting question, because obviously it relates to the very larger question of, how are we going to survive economically in this country and get people back to work? How do we get our trainers and consultants and OD specialists and so on back to work in a COVID environment, in a safe way?” [#335]
- The Native American male owner of an MBE-certified metal working firm stated, “I think the biggest thing the government could have done would have been instead of letting all these people become unemployed and trying to supplement it through unemployment, it would have been better even if the employees didn't have to report to work, but if they still got paid their full salary, because the businesses were getting payment to cover their salaries. So that way there wouldn't have been all the costs of having to reemploy people and your unemployment rates changing. And it just would've been more beneficial for the business that way. Plus, it still would have benefited the people who would have been getting their payroll taxes or social security, everything's still taken out. And it would have been a big burden for those companies to not have to cover salaries of their employees. They would just have to cover the other expenses. Like we were considered an essential business and we had to stay open, even though our sales drastically diminished. We were still at our physical location because we had to be ready in case the military needed something. And we kept getting letters from the Department of Defense saying we were in essential business, if we need anything, we need to be open and ready. So, I think that would have been more beneficial since I paid my employees the entire time, they never got laid off. They got their

full salary the whole time. I had them come in. But it would have been helpful if they had covered that expense since we were essential to stay open.” [#427]

- A female member of an equality organization reported, “[Businesses need access to] capital, one and then even just things like PPE and from an Asian Pacific Islander perspective, I’m a part of the Asian Business Association, we were actually feeling that need to provide things like PPE to businesses just so they can operate.” [FG#1]

Some business owners and managers reported that the local economy had been generally good before the COVID-19 pandemic.

- The non-Hispanic white male owner of a general engineering firm reported, “The economy. The economy 110%. When private people are investing money in the community and building homes that is good for us, because we do all the infrastructure. That is good for us, because we do all the infrastructure for all those public and private developments.” [#101]
- The non-Hispanic white male owner/CEO of a technology construction firm stated, “If I can put my finger on what external forces have changed the marketplace. I can’t really think of anything. I think, if anything, the marketplace and things that I do has gotten a little bit better because there’s more stringent requirements on who can do what. Mainly in the solar industry, it seemed like anybody that had a contractor’s license could do it. Now that’s changing for the better, I think. Trying to limit that to folks that have more experience with solar.” [#230]

2. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the San Diego marketplace, in their respective industries, and in general. For example:

- The non-Hispanic white male owner of a software development firm stated, “In order to stay competitive, you have to bring value to the customer. And the value is in either increase productivity or lowering costs. So, I focus more on increased productivity, so reducing some of the redundancy and employee tasks and just streamlining the processes.” [#212]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “Actually one that really did seem to have a big effect, which was kind of funny, was the gas tax. A large number of my employees, not to be political, but it was kind of funny at the time, a large number of my employees were like, ‘Oh, the gas tax, terrible. We’re going to be voting against it.’ You kind of have to do a bit of education and say, ‘Guys, the gas tax is what funds this company.’ When the gas tax is approved, all of a sudden, hey, there’s more money for roads and infrastructure. And so that part was kind of funny. So that was a nice help. Really, I was pretty happy about that... Probably the biggest thing [to being competitive in this line of work] is just staying small. There are some advantages to being small when it comes to- there’s carve outs for being a small business, there’s carve outs for being a disabled veteran, but you’ve got to stay small. As soon as you start getting bigger, you start having to compete against a multibillion dollar a year behemoth, and it’s just not going to- I’m not going to have a chance in that environment. You’ve already got to be pretty good sized to make that work.” [#227]

- The non-Hispanic white male supervisor at a lighting contracting firm stated, “Experience, employees, knowledge, not biting off more than you could chew, taking on projects that you can't handle, making sure that you're well aware of the project and what's expected, and how it's supposed to be done. Just mostly experience, I would say, the biggest thing is experience.” [#235]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “The VA has a program called Verified, a verification program, because like everything else in this world and in this country, veteran-owned, they always talk about helping out the veterans. And so, you have a veteran-owned business and there's a program where you really used to be where you could self-proclaim that you were a veteran owned business and all you had to say was, yep, I'm a veteran and I have this business. And then they said, 'Okay, we're going to verify that because there's been a lot of people saying they were veterans, and they weren't.' So, it took me six months and a 14-inch stack of documents. And I got verified and the VA puts me on list that says, yep, you really are a veteran... Well, that's over the top. But I really think sometimes that cities, counties, municipalities should have some kind of pre-qualification so that you eliminate a lot of people that are just out there, just starting up and, and not being really qualified. That can make it kind of messy in the marketplace. So, I think prequalification is a big thing for me.” [#306]
- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, “As an independent consultant, as a woman, you need family, you need family or capital, so you need to have somebody who's willing to start you up and give you cash, to do your marketing and to do your accounting and your clerical work and hold your business together for a couple of years, while you just go out and do the work, or you need family members or a spouse who can do those things for you. That's the thing that makes a difference. That's a difference between me and other environmental consulting firms that are owned exclusively by women.” [#407]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Being a construction management firm, all the proposals that we pursue are selected by best value versus price, and value is somewhat of a subjective term. There are a lot of good people and good companies out there providing similar services, so it's clients knowing you and you knowing them and having those relationships, having that level of trust and that history, I guess is the driver to competitiveness.” [#426]

I. Barriers to Starting, Growing, or Staying in Business

Business owners and managers discussed a variety of barriers to business development. Section I presents their comments and highlight the most frequently mentioned barriers and challenges.

1. Obtaining financing;
2. Bonding;
3. Insurance requirements and obtaining insurance;
4. Personnel and labor;
5. Working with unions, being a union or non-union employer;

6. Obtaining inventory or other materials and supplies;
7. Prequalification requirements;
8. Experience and expertise;
9. Licenses and permits;
10. Learning about work or marketing;
11. Unnecessarily restrictive contract specifications;
12. Bid processes and criteria;
13. Bid shopping or bid manipulation;
14. Treatment by prime or customers during performance of the work;
15. Approval of the work by the prime or customer;
16. Delayed payment, lack of payment, or other payment issues; and
17. Other comments about marketplace barriers and discrimination.

1. Obtaining financing. Interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses. Examples of their comments are included below.

- The non-Hispanic white male owner of a software development firm stated, “Actually, being under financed was possibly one of my bigger failings. Yes. We launched an application and because we’re under financed and didn’t have enough resources for marketing we basically failed at that application.” [#212]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “When we started our business, cashflow was a real important driver for us and banks generally want financial history in order to provide business loans or lines of credit, so generally you’re kind of caught between a rock and a hard place when you’re starting a business. You don’t have that history. Even providing personal assets and personal financial history, it still doesn’t fulfill the auditor’s requirements for loan approvals, so that was a huge challenge initially. As we’ve moved on, we’ve kept enough aside for a rainy day to deal with cashflow, but initially, that was a huge challenge for us.” [#426]
- A male member of a chamber of commerce reported, “I just received a substantial contract with the City of San Diego and ...I got a line of credit and to be able to sustain this contract, but I really need that for me to sustain my other contracts. So, really the inability to access to capital really has helped or hindered small businesses to obtain these jobs with the public sector.” [FG#4]

2. Bonding. Public agencies in San Diego typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds. Securing bonding was difficult for some businesses and other interviewees discussed their perspectives on bonding.

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “The liability insurance and bonding, you will pay for \$200, \$300 an hour for it, easy. Maybe \$300

is too much, but you'll pay a lot. Especially when you make it an hourly... they pay a lot. For that job, city can buy the liability insurance, hire whoever you want. Just go by qualification, not by who's the bigger firm. City will save a ton of money. See who can jump in there and solve your real problems in a day. Tell the city project managers to watch for that. I got called after that single job I did for the city. I got several calls after that, because of the insurance I couldn't pursue it anymore. But they called me, and within the same day, the retaining wall issues were addressed. The project manager was very impressed. He called me after that for other projects. But that has no value to the City. Not just Yes, but they weren't going to give it to me. They lied to the public in saying as well, 'The stimulus package is to help small businesses, et cetera.' They must have helped et cetera because they didn't help the small businesses., everybody. There's no metrics to measure that." [#202]

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, "Our bonding, of course I don't know the history all the way back, but because this company has been around so long, we are fine with the bonding requirements." [#227]
- The non-Hispanic white female small business coordinator at a large construction firm stated, "When you go through our prequalification program and you get pre-qualified, we actually bond our subs. We have an internal bonding program. And, also, insurance, we have an insurance program where your general liability is also covered, so we help financially, but they have to go through that prequalification program." [#369]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, "There was a situation when I was bidding on a janitorial contract and they wanted me to have so much in bonding and the company wouldn't bond me because they said I didn't have the history." [#405]
- A male member of an equality organization stated, "So some of the roadblocks that people face...Trying to get the bond." [FG#2]
- A female member of an equality organization stated, "I know that [Person A] was saying that we've heard testimony, public testimony, from people saying that the bonding was a huge issue, as was payments." [FG#2]

3. Insurance requirements and obtaining insurance. Business owners and managers discussed their perspectives on insurance.

- The Black American female owner of a towing service firm stated, "Obtaining insurance is a little bit difficult but I have managed to do it. I found one person who we became friends, and she seems to be one of those few people who can get insurance." [#302]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, "I mean, a lot of times the projects will require automobile insurance certificates with... what do you call it, additional insured requirements and all that kind of thing, for a project that you'll never drive on the project. And those things can get very expensive. You just have to shop it around, but it's an issue. Sometimes insurance requirements can get a little restrictive. I've again, been able to handle it, but I can see how some people would have some struggle with it." [#306]

- The Hispanic American female owner of a human resources consulting firm noted, “I spend an inordinate amount of money in insurance every year. Yes.” [#308]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “So insurance, I do have to do, it's a couple thousand dollars a year. So that is an investment, but for me, it was very easy to figure out because my friend said, call these folks and here's what you get. And so, I just did it. So, because I had a good mentor, other than paying 2,000 bucks, which was not nothing, when I started my business, it really was pretty easy to figure out. Well, it could easily be a barrier to someone who doesn't have a good mentor. To understand what you need, and how to get it, and who to call it. I could easily see that being a barrier if you didn't know someone who'd just gone through the process themselves, you know?” [#322]
- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, “Absolutely, yeah. Yeah, insurance is way too high. And then especially for workman comp, yeah. And nowadays, that's why I say in California, if you have one employee, you have one too many because there's just so many guys out there that just fake it. Come in, work a few weeks, and then, Oh, my back, Oh, my shoulder. At one point, the only insurance I could get was state fund, and it ran up to 60 percent, almost went out of business.” [#346]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “It's a risky business. And as a small company, paying for risky insurance is a hefty price. Luckily, we've been able to pay insurance premiums and we've been able to step our insurance premiums up to have like 20 million dollars umbrella coverage. But it hasn't come at a small price. So, we're constantly having to buy new insurance policies, grow our insurance policies, pay more for insurance. And that hasn't been a barrier that stopped us. But if we were smaller, I could definitely see us not going after certain opportunities because we couldn't afford the insurance policies.” [#406]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “I do hear other small firms saying, first of all, it doesn't make sense. My piece of this project is 50,000 dollars. Why should I carry 2 million dollars of insurance just because the City of Oceanside says that's their standard for everyone across the board, or whoever it is who's requiring that.” [#410]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “It's hard, and it's a very expensive. Like I said, because a lot of the stuff now requires cyber security and other stuff. So, it's not easy to get. I think because I'm a stable company and I'm many years, it's easier than somebody wants to start now, it'd be almost impossible.” [#418]

4. Personnel and labor. Business owners and managers discussed how personnel and labor can be a barrier to business development. For example:

- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “Being forced to use apprentices kind of messes people up with the City. You have to use 20 percent of your labor force has to be apprentices.” [#416]

- The non-Hispanic white male president at a specialty construction firm reported, “Yeah, personnel sometimes. But we're a union, so it's pretty easy to get personnel. But usually we're in a specialty trade, so I don't just go to the union to get a lot of labor. If I do get somebody, I need to train them. So, it's not a problem getting it. It's trouble getting somebody who's experienced in our field.” [#423]

5. Working with unions, being a union or non-union employer. Business owners and managers described their challenges with unions, being a union or non-union employer. Their comments are as follows:

- The non-Hispanic white male owner of a general engineering firm reported, “I can't stand PLAs, they're ridiculous. The City of San Diego adopted Proposition A back in 2012. It's a fair and open competition initiative measure. That's one of the best measures they've ever passed in the city of San Diego, which does not allow PLAs to be implemented on a lot of public contracts. We like that. We are a non-union company. We feel that we have the same right and should have the same ability to compete on any project with union or non-union companies. Yeah, the unions, they attack us all the time. We've had projects picketed before. We've had jobs that required a PLA and would require the union to give us a one job agreement, and they will not. They would not offer one to us, so we couldn't do the project. Unions have been onerous.” [#101]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “Meeting prevailing wage is not an issue. The issue is with unions, we do have projects where some of the school districts have gone over to union, presents a problem because a union only allows us to have a certain number of core employees be in the union. And therefore, then we have to go to the union halls, and sometimes they can't supply union people, or I would say qualified union people because we are a specialized industry and require certain certifications. Sometimes the unions here in San Diego County don't have the employees to work on our projects down here, so they are having to come from L.A. to work. We have a current project with a union down at the border crossing, and they've had to come from Inland Empire, which is about a two-to-three-hour drive for these guys to come down and work the job site.” [#108]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “Yeah, we're a non-union shop and we're happy to work with anyone. We're really happy to work with anybody. Union shops often are not happy to work with us. We've been basically put on the do not do business with them list for some companies, just because we're non-union. So, the union shops tend to hire union only... I've got a contract that we're trying to get into right now that's a union shop. They want us, they need us but the agreement I think they have with their labor union is that they're only supposed to hire subcontractors who are also union. Again, it's a very small niche and now they're in a bad spot where they're trying to figure out, well, there's no other traffic signal contractor available that meets the requirements. So, what do you want to do here in this situation.” [#227]
- The Black American female owner of a towing service firm stated, “I love unions and I'd like to work with unions, but I can't adhere to union requirements all the time. And that is a certain minimum hourly wage, there's the insurance, the workman's comp, all those things.

That's what unions require. So being associated with a union for me is economically uncomfortable. And not that I don't want to, I would love to, but I can't because financially I'm not able." [#302]

- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, "I think PLAs are just making it very difficult. I don't know why every project has to have a specific PLA. When you're paying union wage, that should be good enough. I just don't understand it because some of the requirements ... For example, I'll give you an example. The people that install our equipment, our buildings, there is no category. There is no specific category for that in the municipal or in the wage and whatever they call it, in the prevailing wage documents, there's no specific category for a modular installer, okay? So, I think what they end up with us is they say that it's carpenters. So sometimes if I'm going to go on a job with a PLA, they'll say, all right, you can bring in your installer, but we have to have two people watching him. If you bring in your guy, you have to hire two of our guys. And those two guys end up standing there watching my guy do the work, because they don't know what he's doing. That's why I'm against PLA." [#306]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, "Yeah. I was about to say I don't, but yeah, prevailing wage. Wow. What a pain in the butt that is. I've had to work on a couple of projects with my nonprofit clients. Literally, you have to hire someone to do it, it's so complicated and hard to do. It's incredibly complicated. That is a mess. Oh, it's a huge barrier. I know small firms who will not take public jobs because it is so labor intensive to do the prevailing wage documentation. Small businesses who are like, 'We won't do it.'" [#322]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, "They're just union employees. They have a mentality if you're a private, if you're a non-union shop, then you're low on the totem pole. So, you just don't get the best type of workers. And this is my experience, and I apologize, but it seems like you get about four hours of work out of an eight-hour day." [#324]
- The non-Hispanic white - Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, "We were ready to provide employees to one of our clients and then the unions got ahold of the job. And asked why they weren't getting the work. So then in order to provide that client with resources, we had to find individuals that were certified professional engineers. And had a specialty license so that they were being brought in as professional consultants rather than taking away work from union folks. We went from providing 11 people to then having to only provide three that were actual certified engineers." [#406]
- The non-Hispanic white male president at a specialty construction firm reported, "Well, being union basically... there's certain wages that I have to comply with. So, if I wanted the opportunity to bid on work that was lower cost work, like maybe private work, where it's not prevailing wage, then I would be at a disadvantage because I would [get] stuck paying the union wages, which are more [close] to prevailing. They offer a lower wage for like commercial, but as many times as I've ever asked to use these other rates, they have to actually accept them. I've never once had them accept the idea of using these alternate rates, so yeah, I cannot do private work now. There's work that I've passed up, that I've gone away from, now that I've become union. But I became union because in LA there's a lot of union

contractors, and to work for them as a subcontractor, they need to hire union contractors, so I need to be union to be able to work for all the different contractors.” [#423]

6. Obtaining inventory or other materials and supplies. Business owners and managers expressed challenges with obtaining inventory or other materials and supplies. For example:

- The Native American male owner of an MBE-certified metal working firm stated, “Sometimes that can be an issue trying to get enough material. Some of it gets backlog or some of it gets just purchased by the larger companies.” [#427]

7. Prequalification requirements. Public agencies sometimes require construction contractors to prequalify (meet a certain set of requirements) to bid or propose on government contracts. Multiple business owners and managers discussed the challenges associated with prequalification. Their comments included:

- The Black American male owner of a security firm stated, “Mostly the smaller companies don't have enough experience, and, in most contracts, they require a good amount of experience. In order to gain experience, you have to start somewhere, and a lot of time smaller companies don't get that opportunity.” [AV#63]
- The non-Hispanic white male owner of a software development firm stated, “Hasn't been at problem so far, but I know... that's one of the things that keeps me from going into the government business, the various certifications and other requirements, especially when it comes to federal contracts. Various degrees of security certifications. Basically, security certifications.” [#212]
- The non-Hispanic white male owner/CEO of a technology construction firm stated, “Sure. There's been plenty of issues with prequalification. Most of those are whoever writes the RFP doesn't understand the full breadth of the contractor that could be doing the work. So, they try to tailor it down to a very narrow gap, not realizing that [there are] plenty of qualified people that may not check every box on their prequal. That's fine. I mean, most of those things are written to try to get a specific contractor, and if that's the way it's going to go, then they should just name the contractor they want. Save everybody some time.” [#230]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “I think it's not done enough. I think that there should be more work on the agency's part to really pre-qualify people because they can... [there are] a lot of people out there that really shouldn't be in the business and... An agency puts out a bid and they really don't know who's bidding. And I think a lot of times they'll end up getting a contractor that bids as low bidder and then they find out that either they're really not qualified, or they made a mistake or whatever, and then they have to go to the next one. So, I think there should be a better screening of qualified people.” [#306]
- The Hispanic American female owner of a human resources consulting firm noted, “Well, the pre-qualification. Yeah, so I would say yes, if that includes all the paperwork, all the insurance, the logistics, the billing systems. I mean, I don't know if that's included but if so, yes, [it's burdensome for small businesses]. Yes, because part of it doesn't even seem applicable.” [#308]

- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “To meet the qualifications, I have to exhibit things to meet those qualifications. And I have to do investments as a business owner to meet those qualifications, which makes sense...But what bothers me is when they do that, and they don't enforce it. So, it's kind of like I'm not as effective. And I'm getting penalized for going through the process when other people aren't and just bidding on it anyway and it's not being enforced. So, it's like, okay... I'm at a disadvantage because I'm investing in doing all this stuff. If you're not going to enforce it, the people that don't do it, they're at an advantage because they're not spending the time, the effort, the money to do that. So, it's kind of reverse sometimes.” [#340]
- The non-Hispanic white male co-owner of a specialty construction firm noted, “Well, I am a sub, and so prequalification can be an issue because, again, starting a new business, you don't have a track record that people can look at. So, I would say that 90 percent of the pre-qualifications that we send out, we get accepted on. There's a very, very few, in fact, I think I've been turned down maybe twice in my five-and-a-half years of business, and it was primarily because my sales weren't large enough to qualify for what they wanted me to bid.” [#396]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “It makes total sense, because everyone is trying to mitigate risk. And in our industry, safety is a really big thing. So, having experience in delivering on comparable projects is important. But we do have that experience. So, I'm not quite sure if it was enough. But I understand the need for pre-qualifications. I just don't know if as a small business we're taken as seriously.” [#406]
- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, “Well, you just have to have the two years of past performance. My thoughts would be give independent consultants the opportunity to, I would say use, I understand why they have to have contract past performance. It's not just about the ability to do the job, but they need to create some sort of frameworks so that we can get paired up with organizations and develop that past performance experience in the contract. Unless you have a relationship with a company, there's no way to do that.” [#407]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “And an example of that is the requirement for conforming with the DIR, the Department of Industrial Relations. I believe the original intent of having to pay for a DIR registration every year was meant for contractors based on contracting labor rates. I don't see where it's applicable to designers at all, but yet it's a very expensive certification to have to have, just to even put your credentials forward for consideration. And they [City of San Diego] clarified that about a year and a half ago, because a lot of people were pushing back and saying, this is meant for contractors, and the city decided, well, they were going to cover their bases, and what if you hired a contractor, or a surveyor, or somebody as a sub to you that had labor rates that would be applicable. And so, they just across the board said, ‘Oh no, it covers us better to say everyone who ever works for us needs to have a DIR.’ Crazy. This state does that a lot, and it is such a burden on small businesses. I don't think anyone takes that into consideration, or nobody cares.” [#410]

- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “Now it's not just being good, you have to be political, you have to have insurance, you have to have cyber security, you have to have... So, to be a small business, almost like they want you to be a superman and superwoman, right? They treat you like a big one. So small business has no advantage from the big ones in requirements. None.” [#418]
- The non-Hispanic white male president at a specialty construction firm reported, “I think it's good. I think they should have them. I think they should be realistic,... if you're going to take the lowest bid, it doesn't mean we want the lowest quality of work. So, I think that having someone who's already proven themselves is... that's the one place at least as... that we can get our money's worth, I guess, as a citizen. I also support the idea of cities or districts who can choose which bid they want to accept, and most people won't do that. They'll just take the low bid. They'll have to take the low bid, otherwise they somehow get... they don't want to get in trouble somehow. But some that will refuse bids because of past performance. I think that shows good quality.” [#423]

8. Experience and expertise. Interviewees noted that experience and expertise can present a barrier for small-disadvantaged businesses. For example:

- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “Major problems. It's not like this is a normal trade. Our inspectors, they're ICC certified special inspectors, or in the welding inspection it's AWS or CWI that we have out there have to be certified in certain ways, and now with the requirements of the trained and skilled workforce, it becomes an issue where because of the language of the skilled and trained, they have to come through an apprentice program, there is not an apprentice program really set up in San Diego for apprenticeship for inspectors. And the other problem, because when you go to the unions, they supply the employee, but they expect you to be responsible for all the training and everything else.” [#108]

9. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. The study team discussed whether licenses, permits and certifications presented barriers to doing business.

- The non-Hispanic white male owner of a general engineering firm reported, “Permits are tough. Getting permits and stuff, I think, take longer than they should. It's just the typical going through the government bureaucracy to get those things approved. It takes long time. Learning about work or marketing.” [#101]
- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “So, like the City of San Diego's Building Department? Well, when you go to pull a permit, you realize that they've made it such a complicated process. Not because the building department is requiring this, it's because city has so many entities and so many things they demand, and they want that permit processor to get the water impact fee, the state fee, that fee... It's become the intersection of sending people to 5,000 different places. It's easy to blame it on building department or development service, but it's not just as simple. It's the Department of Fish and Wildlife that wants you, it's department of this that wants you... It's a very complicated process. That's why there's so many...People who do this for a living they

because they're beginning to understand the system. They're basically doing what the City is supposed to be doing." [#202]

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "I'll give you an example. I went to the City to pull water permits for a house I have. We didn't have water. The main line to the meter broke. The person who sat there told me I need to get an encroachment permit. I need to go to the traffic department. I need to make an appointment with the City engineer to come and meet me at the site to decide what parts of asphalt I can cut, all of that. As soon as I asked about one requirement, he would come up with the other. People at the City they're afraid to make a decision to say, 'Okay, you do this and this and this. It's done.' They have to say the most conservative thing because they're afraid they might make a mistake, and somebody is going to bust them." [#202]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, "No. I wish, for example, while we've been on the phone, I've just went up and looked at for City of San Diego purchasing stuff. And one of the first things that I see here is ... Where was it? A business tax certificate with the City of San Diego? See, I didn't even know. I don't even know what that is. I'm supposed to, if I'm going to do work at the City of San Diego, I have to have one of those. And I would think that a state tax certificate would be good enough, but I guess not. So that's just one of those ... It's like, oh really? I didn't know that." [#306]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, "It's a barrier to starting a business. I mean, you definitely, I guess if you're just starting off yes, it's a barrier. And the first two, three years, it's a big barrier. There's a lot of licenses we got to carry." [#340]
- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, "Yes. You know, contractors and developers and the City of San Diego generally look to the County of San Diego's list of qualified consultants to find people that they need. And I'm not on that list because in 2004, the City of San Diego decided to remove small, independently owned consulting businesses because they felt like they didn't have the size qualifications to meet the need for County developing projects, whether they were independent or not. And so, they ask us all to re-qualify and all of the small independent consultants got kicked off the list, including me... I reapplied twice and both times I didn't make it because the first time, because the size of my business was too small, and they didn't think that I could meet the production requirements for documents. And the second time they changed that requirement but did something else that still made it impossible for me to get that certification...You know because the City of San Diego doesn't have a developer's list. You're not required to sign up with them as a San Diego City certified consultant. So, people want to find, and they don't make recommendations either. So, people naturally go to the San Diego County list of consultants and I'm not on that list so nobody's going to reach out to me. That's why most of my work is in Riverside County." [#407]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, "Licensing has been hard, only because everybody shut down. To get the paperwork in, the health board [has] lost my application twice now for my salon. And each time I do it' it's another six weeks. So, I can't even move forward with something and I'd hate to already be done and, in the water, when I've got it just sitting here." [#411]

- The non-Hispanic white male president at a specialty construction firm reported, “In general, I think licenses and permits are sometimes... they're kind of a pain. They're just more of a pain in the butt, and the inspection process for that. It makes it difficult to do, I guess,... That whole process... See, I work for municipalities, where we just go in and we wipe out a bunch of work. There's a lot of work that's done in people's properties, where we could offer to do upgrades to some of the other sewer work going from their house to the newly installed sewer lines. There's a segment of their pipe that would be... it would make sense to replace these pipes as well, but to babysit all these different homeowners without having them as part of the contract with the City, it's just too much of a hassle to have to come back and forth and meet inspectors and this and get this. Have to fix something, and then get reinspected again. Someone like myself, who could easily do a bunch of this work for these and improve the overall system, yeah, it just makes it too difficult or too time-consuming to, especially when you're paying the union rates or the prevailing wage rate.” [#423]

10. Learning about work and marketing. Business owners and managers discussed how learning about work and marketing are challenges. For example:

Marketing. Business owners and managers discussed barriers faced while marketing. For example:

- The Black American female owner of a professional services firm reported, “And that's been a barrier. So, I know there's a lot of people out there or a lot of different organizations that could use what I do, but they just don't know about me and I don't know about them. But if there was a way to be able to market to even industries or companies or whatever that I don't know about. Yeah, that'd be great.” [#201]
- The Black American female owner of a towing service firm stated, “Marketing is only an issue because I need money to pay for the marketing. Otherwise, it has to be done the way it's being done. And that's through people who are willing to distribute cards. I mail letters. I contact people. I reach out to car dealerships and car retail places and truck places and transportation places and auctions. Yeah, I do need professional marketing. But I can't afford it at the moment.” [#302]
- The non-Hispanic white male owner of a consulting and recruiting firm reported, “Yeah, it's kind of like a vicious cycle. I mean, I don't have the money to market because I don't have more clients and I don't have clients because I can't market. So, it's kind of a vicious circle there.” [#398]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “Yeah, I mean that's hard. I'd love to be able to find a marketing company that could get me straight residential. I pay a marketing company every month, but it seems like a lot of these other companies are getting a lot more calls than we are, and I don't know how. So, I guess that's a barrier.” [#416]

Learning about work. Business owners and managers discussed challenges associated with learning about work. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “I get notifications all day, every single day, in my

mailbox from the different bid platforms that the City uses and everybody... But, literally, every day I get notifications. So, it seems like someone's doing a good job of getting the word out there. I don't usually look at them, but they're out there for sure. If you get on the right mailing list." [#322]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, "So I think not having access to what's coming up in their capital program is a big barrier. For some reason the City, and they're not alone, holds that information really close to the vest. If you're a consultant who's already working for the City, and you have access to their project managers, you will learn about it. You will know what's coming up. If you're not, you won't, and that's a barrier for a new firm." [#410]

11. Unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Multiple interviewees commented on personal experiences with barriers related to bidding on public sector contracts. Their comments included:

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, "I would say the biggest problem is that when it comes to specifications and contracts, they're written by individuals and then enforced by different individuals, and the overall management is handled by yet different individuals. And so, the language on the paper may say one thing and the people who are responsible for either inspecting, or if we're talking about a contract then the project manager who's kind of overseeing that contract through its execution, those individuals may not be fully up to speed of what's in those same contracts or specifications that they're there to do, to basically enforce. And then all of this then gets routed through an entirely separate entity when it comes time for billing, and they will independently take assessments. So, you can kind of have three different versions of the same story scenario." [#227]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, "No problems. I just don't bid on their stuff again because their insurance requirements, their bonding requirements, they want bonds that are ridiculous. I can't carry that kind of stuff and payroll and be inexpensive in my pricing. There's just no way." [#405]
- The non-Hispanic white male president at a specialty construction firm reported, "Well I think that sometimes the engineers try to... they try to put things in the specification that cover their ass, but it's unrealistic. So, it's kind of like a blind shot in the dark. When we bid it, we look at the plans on a piece of paper and it shows that everything's hunky dory. But when you get into the field... But that's foreseeable by... the engineer can say, I can foresee that there's going to be some problems, so therefore I can adjust for it in a bid item or somehow... without just... But as a bidder it's not foreseeable. You're looking at a piece of paper that doesn't show those imperfections. But they might put on the plan, Hey, any imperfections need to be fixed. Okay, but they're not listed on there, so really, it's kind of like a catch 22, and it's... the problem is that I think that the districts or the cities need to take responsibility for the conditions that they're offering the contractors." [#423]

- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Some RFPs are based on templates that agencies use and some of them have clearly rigorous clauses in them that essentially would prohibit small businesses from bidding. And I’ll say not purposefully, it’s just some of that contract language is very boiler plate, very stringent, specifically when it comes to certain insurance requirements, as well as range of stark resources required for some of those contracts. We know a client would only need 20 people but that ask for 200 resumes. There are some boiler plates out there that can create some impossible hurdles for us... So, interestingly enough, we do a fair amount of work with the City of San Diego, but they all have subcontract arrangements with large companies, but we wouldn’t be competitive based on the contract language of the RFPs trying to compete against the large companies on those proposals. However, with that being said, the City does place SLBE, ELBE requirements into their large contracts so that helps smaller companies like myself and others in my industry to still be a part of those teams, so that’s worked out, keeping us engaged with the City over the years.” [#426]

12. Bid processes and criteria. Interviewees shared comments about the bidding process for agency work; business owners or managers highlighted its challenges. For example:

- The Subcontinent Asian American female owner of an HR services firm stated, “It’s just a matter of marketing and networking. When it comes to working with agencies like Caltrans and the City of San Diego the barrier is having access to information, so we are aware of projects, so we are able to provide a proposal.” [AV#12]
- The Black American female owner of a towing service firm stated, “If it’s governmental, it’s always complicated; always extensive, always too many questions, always a massive amount of information to provide. It’s overkill.” [#302]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Wow. If the City wants small businesses to apply directly for those contracts more... I don’t know if this is possible, but I personally am not planning to bid as a prime contractor on City contracts because it’s too complicated and the amount of time it takes me to do it, and then the lack of certainty that I would get the work, it’s just not worth it for me right now. So, if there were a way to streamline it, then I would certainly consider it. But as it stands, it’s too complicated and time consuming for me, for it to be worth my time as a small business. So, I guess that’s what it is... You can put all this work into it and get disqualified because you missed one page, and it’s not even worth it to me to try. It’s not even worth it to try.” [#322]
- The non-Hispanic white male president at a specialty construction firm reported, “I think San Diego is pretty good, because they’re on maybe PlanetBids or something maybe. But yeah, I mean that whole thing, finding out who’s bidding, is difficult sometimes. But I mean, if you search enough websites, then you can keep track of the jobs... The cities kind of farm that out to these other companies. So sometimes it’s ineffective, I think, and hard to figure out who to send quotes to. You used to be able to call up the City and say, ‘Okay, can you send me the bidder’s list for this so and so project?’ And they would send you everybody that got plans. But now... they have plan rooms, and they have websites, all these things, and they don’t always have to list their company and their information, so you kind of miss out on those people bidding.” [#423]

- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “Just putting requirements down for having DVBE or woman-owned or something like that, disability. The point, in my opinion, is the point of having a public works project is to have as many people bid it, but also have it be the best price as possible. And so, when you do that, there are entities that are aware of that...that you need them in order to get the contract. And so, there's a lot of Indian trading that goes on at times-- inside deals, as well as the pricing going up too.” [#324]
- The non-Hispanic white female owner of a consulting firm stated, “Well, that's always a question with some of these contracts. Sometimes it's hard to know...Sometimes the company has already picked somebody and they're just interviewing or getting candidates in order to satisfy a requirement by the government or whoever, that they have tried to find someone, and they have interviewed a certain number of people. But they've already written the job description. Sometimes it's really obvious; they've written the job description to fit one person. That's the only thing. That really bugs me.” [#335]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “So, the federal government uses a system called Best Value. I think UCSD does the same thing or a similar thing. Which is not only is it whoever's got the lowest number, but then you turn in a bunch of subjective criteria of experience, and different things that's based on your experience. And then they can evaluate your bid proposal based on not only the cost of the project, but now they can take and decide if your experience is good enough or not. If you had enough, if your firm is big enough, all these other things. So, yeah. So, we've lost a few projects that way through UCSD. We did a few years back through the military and didn't get a job. We've lost a few that way. So, it hasn't been huge to us, but it has kind of turned us away from those agencies because we, again, I think that's where the favoritism can come in and the integrity of the process goes away. We just kind of move away from that.” [#417]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “[Contract size as barrier] Yes, because now they're centralizing. So, they're doing less contracts with bigger amounts because they tried to centralize and have less vendors. So, the bigger the contract, the less opportunities for small business and the more you rely on subs and the less you execute on subs. So yeah, it's a big issue.” [#418]
- A male member of a chamber of commerce stated, “And so the problem you have with having to take lowest cost bid is that the incumbent should win that 99.9 percent of the time.” [FG#3]
- The male member of a chamber of commerce reported, “Especially as well once, once you see not just the report, but maybe some of the previous contracts that were awarded, I think the lack of knowing exactly how to proceed and making up a full submittal, making that transition from private clients, jumping into a government contract and submitting the correct documents and format of the documents, is what really discourages a lot of the small business owners to try to follow up. I think that's one of the biggest voices that we hear that everybody gets discouraged after a couple of tries, because there's really not a really a guideline to follow, an easy guideline if you want to call it.” [FG#4]
- The male member of a chamber of commerce stated, “Usually because of how many details they ask on the proposals, it's very pricey for a small business to put it together...she [local business owner] was sharing with me a proposal that they put together that it cost them

10,000 dollars to put it together and they didn't win the contract and of course it was a big financial burden for them.” [FG#4]

- A female participant at a public meeting stated, “Particularly my focus is of course, is concerned African-American community and the Southeastern [San Diego] community. I think that the City to me has an obligation to look through contract awards and through a racial lens as well, because to do less than that would result in a more contracts going on to communities that have already have a lot of wealth built and none are going to the Southeastern community [where] you're still trying to build wealth. So, I would think that in order to eliminate poverty in the Southeastern community, that the County will look at that, I'm sorry, that the City will look at contracts through different lenses and not just the lowest bidder.”[PT#4]

13. Bid shopping or bid manipulation. Bid shopping refers to the practice of sharing a contractor’s bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process, or a bid, to exclude fair and open competition and/or to unjustly profit. Business owners and managers described their experiences with bid shopping and bid manipulation in the San Diego marketplace. For example:

- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “Well, bid shopping, we see that all the time. Almost every bid is always a bid shop, on anything that's construction, it's usually bid out, shopping it around. We get ours by, on a project we may have three or four contractors asking us to bid, and we know that they're asking three or four consulting firms to give them a bid, and they're trying to shop it out. Sometimes it's just a low bid, sometimes they'll go, okay, if we know these guys can perform better, even though they're not the low bid, we're going to go ahead and use them, but whoever they're bidding to has to be a low bid.” [#108]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “Yes, just people that already have a preferred contractor and they just want to get a lower price so that they can use our lower price as leverage for their contractor to match our price. So, in reality we never had a shot at getting the project, but we devoted a lot of time and resources into bidding on it. It happens all the time. It's part of the game.” [#231]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “I don't think that's affected me personally. But I feel like we're kind of going away from that too, a little bit, but that there's a recognition that the lowest bid is not always going to get you the job done right. And so, I feel like that's where an agency is talking about being able to use qualifications more. Because you talk about the lowest qualified bid, but everybody still knows it's the lowest bid. You're not going to get honest bids; you're going to get low bids. Anyways, again, I don't know that it's affected me very much, but I think just simply going on the lowest bid is a terrible idea.” [#322]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “It's horrible because they're in a position when they know the small business would take anything right now. So, they really, really, really squeezed their rates or they give you the things they can find, which is usually the hardest. So, what they give

to the sub, it's not the easy part. It's usually the hardest and where there's least margin. So that's a huge issue because they select the things they don't want to do. So, imagine if they don't want to do it the big guys, how can a small business really do it, you know? So, they squeeze out because there's no requirements on what they need to give, it's a percentage. So, they squeeze out all the shit, basically. Sorry. They don't want to do what's not making money." [#418]

14. Treatment by prime or customers during performance of the work. Business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge.

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, "Well, I will say that there's been more than one case where we have a customer, say the City of San Diego, for example, and we have a prime contractor. And then if the City does not flow clean requirements and a clean schedule as to their expectations for the prime, then our end, as the subcontractor, we end up with even dirtier requirements and a schedule that's almost impossible to figure out what are we supposed to be doing. We're basically on the far receiving end. We have to basically race at all times to meet the prime contractor's expectations that they change, in response to the city's expectations. So that becomes a real, like, come on, subcontractor, how come you haven't finished this work? Well, because I'm being punched by multiple primes concurrently because you all seem to think that on the same Thursday, we have to do all of these jobs and get them complete. And in some cases, it's literally with the exact same prime. I wish I were joking. I've got one prime for three different jobs with three different project managers. And I've had all three different ones basically saying, 'We expect your crew out there working on our job on a particular day.' And when you're like, 'Yeah, I'm doing work for your other guy in the office.' And they're like, 'Well, that's not my problem.' Our contract doesn't really specify that you have to work across all of them. Each one's individual, an individual contract. If we tell you to jump on a certain day, we expect you to jump." [#227]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, "That [racially inappropriate behavior] always tends to come from the same contractors. There's one in particular called [Company ABC]. And if I just flashed that name across anybody at the City, they know exactly who and what I'm talking about. [Company ABC] is a second time red flag or the City's looking very eagerly for a third case to red flag them so they can ban them from all City work forever. That's what their red flag system means, according to what I've been told. But no, for as far as the City goes, the City can be condescending, but they're not... It's really a manager-to-manager thing. You'll get one person who's kind of a real jerk to work with and the next person's a real great person to work with...We tolerate each other and get by. It's just the contracts on the capital improvement side... I'm not going to go out and say any of them are really good. They'll [contractors] kind of tend to be the same kind of good old boy attitude." [#357]
- The Native American male owner of an MBE-certified metal working firm stated, "So there's one customer that we had that I don't know what their justification is or what their issue was that they were doing business with us. But one of our competitors complained to them, even though we were offering them better service and better pricing, they had done business with

them longer, that they should be loyal to them. And they ended up going back to them because of that, because the owner felt some type of obligation to this other company to continue doing business with them, even though we got them better pricing and more reliability. So that was an issue.” [#427]

15. Approval of the work by the prime or customer. Business owners and managers described their experiences getting approvals of the work by the prime contractor or the customer.

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “It’s both, it’s literally a random roll of the dice, and it’s based on which inspector on which day, and it’s highly dependent on the RE, that was assigned to that particular project. And you don’t know these things beforehand, so you don’t know which RE is going to be responsible for the project or at least I don’t think we do. And if we did, we’re certainly not paying attention to it beforehand, but yeah, it’s literally rolling some dice and sometimes you just get really unlucky, whereas sometimes you roll and you’re like, I can’t lose whatever I do apparently is totally fine on this job. And then you go to the next job and no matter what I do it can’t be right on this job. It’s incredibly frustrating. Or does it mean we’re going to be consistent and we’re going to be super strict and tight. And now all of us who have tried to win bids to be the lowest bidder, because we have to factor in this funky randomized pattern. Now, all of a sudden it can go to the strictest sense. Now our profit margins go way close to zero or even flip negative. And if that happens, not many of us are going to survive, and it all comes back to, are we actually working, is everybody working with the same spec here or not, and I don’t have a good solution on this.” [#227]

16. Delayed payment, lack of payment, or other payment issues. Business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms.

- The Hispanic American female owner of a construction firm stated, “Major issue is [I] can’t compete with larger contractors. Can’t wait to get payments from city, military and even private companies. Can’t afford to finance jobs while we wait for companies to pay.” [AV#113]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “We have a little bit of leverage, because if we’re not getting paid, we’re not going to finalize out the project. But generally speaking, we do occasionally get some that are going to be bad, and it may take a little bit of work. Occasionally we’ll get another consultant we’re working for or something, even with the City of San Diego, where it gets bogged down at the City level. We may not get paid for six months, or nine months, because of the way the City was handling it.” [#108]
- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, “The only thing I know on the City of San Diego’s payments, the issue on the payments a lot of times will come down to they have project managers that are working, and they won’t pay a bill until it’s gone from the project manager over into the accounting department. Once it hits the accounting department it’s got so many days to go through the process at the accounting department to get out and get paid. But it’s the

approval of that invoice that can hold up everything. And what I've heard of is where a project manager will sit on that invoice, and he'll think he's got so many days to sit on it, and then he'll find one little flaw or something like that, and then he'll send it back to the contractor, and then it gets fixed and sent back to the project manager, and he may sit on it again, and you can go through cycles on some minor little issues or something like that, and it can hold up a project six months on payments and stuff." [#108]

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, "But there's rules on that so that helps keep the primes paying off their subs. So that part we don't have problems with, but where we do have problems is when we're the prime or even when we're a sub and there's a delay from the City in paying. I haven't fought the City a whole lot on it lately because I am already in a situation where I'm kind of fearing some retribution and retaliation. Not that I necessarily should, but it's still a small community and when you ruffle feathers it creates some second order effects." [#227]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, "So we're out on a job and I've got a city electrical type inspector, this traffic inspector whichever, but from the electrical department and they say, 'Hey, I don't care what the plan says. I need you to do this extra work.' Okay, we'll go do that extra work, we'll do it on a field order. Then we submit our bill and then it gets to the contracts folks. And they look at it and they say, 'Holy smokes, we didn't agree to this. Why'd you do that work? Well because your guy out there in the field told me he needed this done. Well, okay. We understand that it needed to be done, but not at that price. Well, this is our price. We're happy to give you pricing upfront. We can do that.' In fact, we started trying to do that, but the City has returned with crickets. They won't do it. They don't want to pre-authorize it, which basically is tantamount to, now I'm in a spot where I have to do the work because you're ordering me to do the work. But my contracts folks now say, wait a minute, we're not going to pay you. Or we argue for a very long time over...We have cases where the, I wish I were joking here... We have cases where the bid item says, I want you to install a widget assembly. Okay. I don't know what a widget assembly is exactly in this case because the widget assembly may consist of up to seven parts. And I think you only need one or two, but I'm not certain of it. So, I had to bid that item because you laid it out as that item. I have to bid it as seven, the entirety of the assembly, seven parts. And we're having cases now where the contracts folks come back later after we've done the work, and they say, 'Yeah, but that widget assembly, you didn't have to put in all seven parts. You only put in three of them. So, we don't think we should pay for the entire widget assembly that you did at that price, because you only did three out of the seven. Well, the contract you wrote, the bid you provided, didn't give me the option of breaking it down into component parts. You only gave me the entire widget assembly. That was my option.'" [#227]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, "So, being paid regularly, and predictably, makes a much bigger difference for a small company like mine than it does for one of the big firms. And if you want to make a bigger proportion go to the small businesses, you're going to have to figure out a way to make the payments more regular and prompt. I definitely think that's one of the big issues." [#322]

- The non-Hispanic white male co-owner of a specialty construction firm noted, “Yeah. If we're in position three, which is there's an owner or developer who hires a prime, who then hires us, there's an extensive period of time. Usually, it's very close to 60 days before you get paid, because the owner will only take payments middle, once a month, and then they take half a month to review it, and then they pay it, and then the prime takes another half a month. So, it's pretty close to 60 days when we're in third position. If I'm directly hired by the owner, then it's usually much closer to 30 days.” [#322]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Yeah. I honestly think it has more to do with my prime than it does the agency, but ... Sometimes my payment is held up because the prime may not have done something right. You know? And sometimes the agency isn't going to accept a payment request, because of something the prime hasn't done right. Not because of something my firm hasn't done right. That structurally could be an issue why primes don't like to hire subs, but honestly, we are small, and we do live and die by cashflow. [To improve the payment process] a prime could be required to pay subs based on a reasonable timeframe after acceptance of invoices, but often contracts are written so that the prime is only required to pay the sub when the prime gets paid. So, you think about that and you think, Well, that makes sense. Why would the prime pay a sub before they even get paid for the work? So, it's hard to argue with that, right? But if the prime has a problem that's preventing them from getting paid that has nothing to do with the sub, why should the sub have to take the brunt of that? It would incentivize the prime ... If they have to pay in a reasonable time after the invoice is accepted, it would really incentivize them to work out their problems with the agency quickly, because if they don't, they're going to be paying all these subs.” [#410]
- The non-Hispanic white male president at a specialty construction firm reported, “Timing of payment is pretty bad. I would say that payments are rarely made even remotely close to on time, and it's usually blamed on the city or the municipality.” [#423]
- A female member of an equality organization stated, “A lot of these smaller subcontractors that are put onto these prime contracts cannot wait around for six months, eight months to a year for payment. It's just not something that is feasible for a smaller outfit like that.” [FG#2]
- A male member of a chamber of commerce reported, “[The incumbent contract holder, they] know the job, they know the high points, low points, and more importantly, they know the inside people where they can do change orders and get them approved. And the problem you have when diverse companies come in, I'm going to talk specifically black-owned companies, and try to play the game of low bid, and they try to do a change order or something, and it gets refused, they go out of business, they go bankrupt, right?... And that's all of the systemic issues for these things are, I don't want to say rigged, but they clearly favor the incumbent. It's the person that knows the job and has the relationships.” [FG#3]

17. Other comments about marketplace barriers and discrimination. Some interviewees described other challenges in the marketplace and offered additional insights.

- The Black American female owner of a towing service firm stated, “I may hire somebody White to represent the company to go out and put out our business cards and to talk to people. I don't do that myself, but I will hire a White person to do it if I do anything like that,

because they're going to better accept that face walking in and asking for business than my face walking in, even if I'm prettier." [#302]

- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, “Well, I’ll tell you one thing, people that sign up for our service, the first time they have it done, they always say, Oh, yeah, make sure you send a guy that speaks English. Don’t send them Mexicans. And then my wife laughs about it and says, Well, the only Mexican that works here is my husband. That was about it. No, people want people that speak English. Yeah, so that’s about it.” [#346]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “At a state level, it’s been determined that if you do preliminary work on a project, like say you’re a surveyor and you’re hired to do a boundary survey for a park and that’s the first phase, and then you’re all done. And then five years later the agency comes out with a design project for that same park. Because you’ve done initial work on the project, you’re excluded from working on future phases. And for small firms, we had such a small piece of it, that’s a barrier. I don’t think that’s a City issue, I think that’s a state issue, it’s a state statute, but it applies to all entities within the state and it is a barrier for small business.” [#410]
- The Native American male owner of a consulting firm stated, “Everybody just reaches out because you are a veteran or minority, so it is a waste of time. For years and years. Big firms get everything.” [AV#98]

J. Information regarding effects of race and gender

Business owners and managers discussed experiences they have with discrimination in the local marketplace, and how this behavior affects minority-, woman-, and service-disabled veteran--owned firms.

1. Price discrimination;
2. Denial of the opportunity to bid;
3. Stereotypical attitudes;
4. Unfair denials of contracts and unfair termination of a contract;
5. Double standards;
6. Discrimination in payments;
7. Predatory business practices;
8. Unfavorable work environment for minorities or women;
9. The ‘Good Ole’ Boy Network’ or other closed networks;
10. Resistance to use of MBE/WBE/DBE/SDVBES by government, prime or subcontractors;
11. MBE/WBE/DBE/SBE/SDVBES fronts or fraud;
12. False reporting of MBE/WBE/DBE/SBE/SDVBES participation; and
13. Any other related forms of discrimination against minorities or women.

1. Price discrimination. Business owners and managers discussed how price discrimination affects small -disadvantaged businesses with obtaining financing, bonding, materials, and supplies.

- The Black American female owner of a towing service firm stated, “Honestly, I don't know on that one. I always have someone else, I have a white male to secure supplies, to do the negotiations on trucks. Equipment, he does that too. So, I have a white male who works for me, that does that. If I were doing it, it would be very frustrating. But, because he knows the ins and outs, et cetera, and because he's privileged, and entitled. He can negotiate better prices than I would be able to negotiate.” [#302]

2. Denial of the opportunity to bid. Business owners and managers expressed their experiences with any denials of the opportunity to bid on projects.

- The Black American female owner of a towing service firm stated, “[When asked about being denied the opportunity to submit a bid or quote to a prime:] How would I know? It's racism, it's not... How can I put a name and a finger on something, and nail a person and what they did? Of course, I know I've been discriminated against. I'm going into Ralph's after I finish talking with you, I will be discriminated in some way in that grocery store, that's America. It's built into our system of doing business and our socialization process. So everywhere you go, in everything we do, in every situation, there is racism. So no, they have taken it out so that technologically it's all embedded now.” [#302]
- The non-Hispanic white female owner of a consulting firm stated, “I have been discouraged to bid. I remember one time I got a call; somebody was interested in maybe having me bid on something and wanted to know how much revenue my company made for a year. Then when I told them the average, he said, oh, they dealt ... It was probably like, I don't know, 10 times what mine was and, ‘No, we only deal with super big company type people.’ I just thought that was interesting. I can't think of any other time.” [#335]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “Without sounding like we're just making assumptions; I think we know exactly why the DBE program was created. Which was to give opportunity to small diverse or disadvantaged businesses and to hold prime contractors accountable to spending dollars with DBE companies. So as far as losing opportunity, I would say being an LGBT company in construction. And the fact that it's not a widely accepted certification or widely accepted way of being that we have seen. There'll be a negative impact because some clients will hold that against us.” [#406]
- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, “Well, yeah, that was when they took away my certification with the County. So that denied my opportunity with the City and with other organizations that use that list.” [#407]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “Oh, many times because like I said, they predefine who they want to work with. So, they don't leave it open to bid really. It's not really open to bid. It's only open to bid, publicly put out, but they already know who they're going to work with so they're not really doing a true RFP selection.” [#418]

3. Stereotypical attitudes. Interviewees reported stereotypes that negatively affected small-disadvantaged businesses.

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “There is some of that. Americans are far, far better open people than French, than German, than Italian. I just compared them to a bunch of European countries. Do they look at me the same way as some others that they can discuss common experiences they have, like baseball, football, or something that I wasn't exposed to? Yes. Do they bond a little bit faster with that person? Yes. Is that unusual? No. That's human nature. There is some, but generally in this world, I don't think Americans are more discriminatory than Russians or many other places. Is there a problem? Yes. Should it be fixed? Yes. But I can't really fault Americans for communicating with somebody else that they share common experience with. I can't change it, it's how it is. Does that common experience make a difference? Yes, it does. Is it a lot? I don't know. Should they change? My answer to you would be, they have to change the whole world.” [#202]
- The Hispanic American female owner of a human resources consulting firm noted, “When you mentioned that, yeah, some specific examples came to mind of demeaning comments, referring to me, let's say something like, ‘Young lady, you don't know anything, that kind of thing.’” [#308]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “I think that when women have used the same techniques to try to maybe run a meeting or be assertive or do things that would in men be considered appropriate and even as admirable, have been told that they're combative or hard to get along with. And these are people that I know well who are very good businesspeople [are], very experienced. And I know... and obviously I'm not going to name a name. But a person who I know who works for a smaller firm not a tiny firm, but a smaller firm has been told by clients that she is... Her assertive behavior is inappropriate essentially.” [#322]
- The non-Hispanic white female owner of a consulting firm stated, “For many years, I did not. It was not an issue. It really wasn't. But in recent years it's become an issue. It's so funny. It's almost like it's gone backwards. Now that awareness is raised, so is prejudice. That means that a lot of people are doing it because they know about it. Just the way they treat people, some people who have a tendency to want to discriminate against women or whoever minorities, it seems like it's come out of the woodwork more, which is really sad.” [#335]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “Yeah. I guess it's hard to say, but you hand out a business card that has pride and rainbow on it. And you're in the construction industry, again, that is... You're faced with individuals that do stereotype and don't think that the quality of service that we provide is going to match up with another company that is maybe not LGBT certified. So, there's some stereotyping there, because the quality of our service is absolutely up to par with some of our competitors, and even our larger competitors.” [#406]

4. Unfair denials of contracts and unfair termination of a contract. Business owners and managers were asked if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract.

- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “Only once by the City of San Diego. It was about three years ago. We bid on a job and we won it and somebody anonymous, one of our competitors, but we don't know who, wrote and complained to the EOC that we were not qualified to do the job. They didn't determine that we weren't qualified to do it. It ended up being, we were qualified, but the City didn't know it. Because we were brand new at what we were doing. And so, the City pulled the contract and gave it to somebody else, probably the competitor, that complained. I didn't do anything about it. I just said, fine, you win some, you lose some. And so just two months ago, we lost one exactly the same circumstances with one of our competitors. I told the City, I said, Hey, just so you guys know. You pulled this contract away from us for the exact same circumstances that are going on now. City swept it under the rug. They said, oh, well, thanks for bringing it to our attention. And nothing happened. They still awarded it to a firm that is absolutely not qualified, and they know it, I proved it to them, but they won't do anything about it yet. So that's really the main thing is you can absolutely lie on these things. And it's really a matter of who you know at the city, are you going to get anything done? How loud are you going to squawk? But that's the only circumstances we've had. I've heard it's happened to other people as well, but I couldn't prove it for you. I've just heard. When they said, 'Oh yeah, that's happened to us.' When I tell friends and competitors what's happened.” [#357]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “We've seen that sometimes, unfair denial of contract award. Again, it's assumption. But we've definitely seen opportunities where there are three companies invited to provide a proposal. One is a large company that recently had a fatality. And the other are two small companies that have never provided this type of support but are diverse businesses. So, the appearance of that is that you're checking the box by at least giving small diverse businesses the opportunity to provide a proposal. But at the end of the day, you know that you want to give it to this larger contractor. But you can't just outright give a contract to a company that just had a fatality. So, it's almost as if we were used to make it seem like the company went about it the right way liability-wise. But at the end of the day, they had an agenda the entire time.” [#406]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “Not official termination. They tried one time this year because of an incident we had with a subbed in inspector, but they didn't kick us off because we're an SLBE.” [#416]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “Well, like I said I had an RFP with City of San Diego through another prime, a big prime. And I just realized that they were done with the project in 2018 and they never gave me the portion of my job. So, I'm trying to figure out what happened there. It seems like they sent a letter to the City of San Diego saying that I declined the job, which I never did. So, and it was a pretty big contract. So, I'm trying to figure out, I've just learned that maybe a month ago. I thought the project maybe was still going on and they can use us at any time of the project, but sometimes these projects go for three, four, five years. So, I wondered since 2018, so I was worried without being worried. But now I know that they were done, and they told the City of San Diego we declined the job. I'm like what? Why would I win and decline? But that's typical.” [#418]

5. Double Standards. Interviewees discussed whether there were double standards for small - disadvantaged firms.

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “When this [English] is your second language, you cannot smooth talk people as much. And it's human nature. You smooth talk somebody, you're going to get a little bit less flack, a little bit less work to do. You're going to get a little bit more relief when you have an issue. But again, that's so fundamental in human nature. I don't think your government rules and regulations can do anything. You can't even complain. I just did. It's much, much easier to just do the work, the extra work and say it's fine, I'll just ride through it. Yeah. It's there.” [#202]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “Yeah, I am noticing that, but I don't know if it's... It doesn't appear to be based on the things like whether there's a woman involved or whether there is race, ethnicity, religion, any of those. It appears that the differences in standards is... I'm going to say it's related on something less tangible. It's basically a quid pro quo that apparently has to exist between the City inspectors and the contractors.” [#227]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “And sort of my concern in answering these questions is those of us who work our butts off, I think it's easy to accidentally or just unwittingly say, ‘Oh no, I get treated fairly.’ But you have to consider that the reason you're quote unquote treated fairly is that you work harder than men do. So, it's not fair. You know what I mean?” [#322]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “What's painful is that when you're a woman, is that they assume you don't know your things, so you always have to prove yourself. They can't see you and see, ‘Oh, she is...let's say pretty or not.’ Right? But if I show up in my high heels and I'm dressed and I look like a woman, it throws them off, like, What? It throws them off. They can't picture that you can have a brain or that you have experience, and you can solve this off technically. It's a block. You see my point? It's real but it's the reality. They look at you like, ‘Oh no, she doesn't know.’ She can't know her stuff. And if you know, they don't know how to act with you.” [#418]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor were often mentioned by interviewees as barriers to success in both public and private sector work. Examples of such comments include the following:

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “Well, we have had many cases where if the City inspector says, ‘I need you to go do this work. Don't worry. I'm going to authorize it.’ And then we perform the work and then we get burned on the other end because the person responsible for approving the payment was not made aware by the City inspector and so then we get burned with them, not actually wanting to pay us. It's become a problem.” [#227]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “Yes. We'll pay them [subcontractors] before we get paid, these are people working

out of their trucks so it's usually to do with payment. We can afford to wait to get paid or we pay them right after they finish the project.” [#231]

7. Predatory business practices. Business owners and managers commented about their experiences with predatory business practices.

- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, “Oh, yeah. I got competitors all the time saying that I sold the business to them and they're now taking my accounts or servicing them. I've had other companies say, yeah, just outright lie, say that they're us. I've had customers go, Oh, yeah, you were just here. I go, What? Yeah, a guy came by and said that you sold the company to him, and now he's doing the accounts. So, we tell the customers, ‘Look, only make the check out to ____ or call us to make sure,’ you know?” [#346]
- The Native American male owner of an MBE-certified metal working firm stated, “They're purposely taking it as a loss because we would know that there's no way for them to get that pricing. And there's times where we may even know who the other company is. And we know for a fact that they're taking it at a loss just to get the order. They want to take away the contract from other businesses, but they also want to get their foot in the door so if they start getting the contracts and the other business suffers, maybe they'll go out of business or not be able to do business with them anymore. So, then they can start gradually raising their prices again, once that other business is out of the way.” [#427]

8. Unfavorable work environment for minorities or women. Business owners and managers commented about their experiences working in unfavorable environments.

- The Black American female owner of a towing service firm stated, “My main thing is I see racism is huge; one. And two, I see the fact that I'm a woman with a tow business and I know how to talk cars and trucks as placing myself in a position where folks can disrespect you because I'm a woman.” [#302]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “I always advocated for all companies to train all their employees, but there have been times, we've definitely been in a room and the presence of folks who are a little bit old school and some of the things that they say or do, they have not been appropriate. So, depending on our position and our responsibility, we've either spoken to the person or spoken to someone above them and addressed it. There've been a couple of times where it was the ownership and we just knew that was not something we could address and, we slowly just migrated away from those clients.” [#311]
- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “There has been some, that's kind of been rare, but I've had people ask me, ‘Do you speak English? Do you understand English? Can you read English?’ And stuff like that. But it's been minor. I feel a lot [more] sorry for women in the workplace, on the construction sites, that's a lot more difficult than I think minorities. That's just generally. The City of San Diego, I would think it's a lot less than it would be a lot of places. It is a lot less than a lot of places. I think it's almost to the point where in San Diego specifically, if you are a woman in the trades right now, you'd kind of have an advantage.” [#340]

- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, “It’s still prevalent in particularly when I’m doing monitoring work, when I’m working with public utilities and with any kind of public job where there’s people that are hired by big company that it’s predominantly male owned or male occupied. The jobs are primarily filled with men and particularly for women who are in environment, the attitude is one of derision and hate. And it’s sometimes directly and deliberately threatening where you’re receiving direct and deliberate verbal harassment, physical threats and the other times it’s just a part of their culture to be insensitive and thoughtless and crude. But for any kind of work where you’re working with tradespeople, that’s something I experience. I’m really tough and resilient when I’ve been in those positions.” [#407]

9. The ‘Good Ol’ Boy Network’ or other closed networks. There were a number of comments about the existence of a ‘good ol’ boy’ network or other closed networks.

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “Well, for about a year, many years ago, we had a service that was giving us all the audit requests for proposals for a lot of Southern California entities. We did a lot of work. We tried really hard, me and my friends. Later on, my friends got some, but I wasn’t able to get a single one. It’s basically good old boy, who works for who? Especially in the planning business. It’s not necessarily City of San Diego. Because they don’t farm out that much. But a lot of the cities, it’s the who you know, it’s really contacts, individual contacts. I’m not saying there’s anything wrong with that. It’s just that qualification, turnaround time, accuracy, quality of work, quantity of work should be in the picture too, and that’s not. It’s one dimensional.” [#202]
- The Black American female owner of a towing service firm stated, “Yes, I have. As a woman who has taught school for over 23 years and who has taught in the graduate school of education at the University of Massachusetts for many years, as a professor, I cannot walk into a dirty, greasy, grimy collision center and work with the owner of that collision center to do his tows because I am a black woman.” [#302]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “I’m actually feeling that right now with a networking group that I’m in, and it is very obvious with this group that the men tend to just kind of bond together and have golf talk and the women are just sitting there. But if the men talk to each other way more than the females, and I don’t know if they’re uncomfortable and they don’t feel like they can be chummy because they’re worried about, the women feeling, or taking it the wrong way, but I’ve made a comment after these networking meetings to my friends saying, I guess I need to learn how to play golf so I can have the golf talk with these guys. But I’m okay with it, I’m not sour about it, but it’s highly evident in these meetings.” [#311]
- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, “And especially in a male dominating industry, this is my personal opinion. I have a feeling that when I first started at the Airport Authority, it’s interesting, I don’t think that I got what I call the side-eye because I was African American. I think I got the side eye because I was young, female, and working for the Airport Authority, you’re in a male [dominated] industry. So where did this... I actually heard someone say before, where’d this little girl come from?” [#347]

- The non-Hispanic white female owner of a WBE-certified consulting and recruiting firm reported, “I think that's pretty much all of corporate America. Exclusions to dinners, meetings, parties, things of that nature. Golf games, outings.” [#395]
- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, “Well, yeah. I mean that's the whole reason why we're talking here. Contracts aren't available. The institutionalized system for people to have access to contracts and who they're available to, it's not available to women and unless those women are subsidized by a big company or investors or are propped up in a position with a big company. I mean how do people get those big companies started? They groom the men to get into those positions. And those are the ones that because of they're big, survive. There are very few large companies that are controlled by women.” [#407]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Yeah, I think the City has a little bit of that going on. Now I don't know if it's gender based. There may be other people who had been working for the City who would have a better idea about that, but it's definitely a good old boy network where if you're in, then you've got information, and if you're not in, then there's no avenue for you to get in.” [#410]

10. Resistance to use of MBE/WBE/DBE/SBE/SDVBES by government, prime or subcontractors. Interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm.

- The Black American female owner of a towing service firm stated, “No, I don't know because I usually stay out of the light. Is there language that is used that's saying ‘I'm not using a nigger tow company?’ Yes, that happens. I'm told, but I don't go. I don't do it because I need the work, I need to earn money. If I'm going to earn any money, I've got to send an ambassador to represent our company.” [#302]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “No, I think it's the opposite, actually.” [#306]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Oh no. I'd say the opposite. I'd say the government is constantly pushing for more. I think prime contractors have trouble getting the percentages that are being asked right now. So, certainly the government is... well, okay. We'll get... We're still going to get to these small business networking fairs at some point, right? I don't think the resistance is like we don't want you. I think the resistance is in the accessibility. Like I said, like the... it's so hard for a small business at all to do what you have to do to get those jobs. It's a different level of difficulty for a company that doesn't have staff who do that for a living. And I can't afford that.” [#322]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “Only when it comes to being the prime. They absolutely won't do it. Yeah. The cities adamantly will not use us as a prime. So that's a form of discrimination for sure. Though. I can see their point, like where we might be able to handle most of these larger contracts that come through, most of my competitors can't. I can think of two or three of us that can handle that as small businesses and everybody else, no way.” [#357]

- The non-Hispanic white male owner of a landscape materials supply firm stated, “Yep. It's like I said, the rules are thought out at the big picture, but I don't think as they operate, they really assist small businesses. Then you have to define what a small business is. Because if you group me into the sub-200,000,000- [dollar range], then to me, we'll never have a chance. Because in a 200,000,000-dollar company, you can put people full-time on the looking and the bidding on contracts and work, and what have you. I just can't do it. I'll have to bring someone on full-time. The burden of that cost, I'd never make the money back. There is a scale in there. And that's my point, is there's small businesses and then maybe we need another term. Micro-businesses, or something.” [#387]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “I think the City actually suffers from that a lot. Like I said at the beginning of the call, they require you to jump through the hoops, and you get that certification, and then there's no way to mandate that anybody uses you. So, I think they suffer from that a lot. I don't even know why they have a list, why they require it if they're not going to use it as a tool to help firms get in.” [#410]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “Yeah, so that's not an issue, particularly with the City of San Diego it's not an issue. I think they work very hard to work with small businesses. I think there are other agencies that only want to work with bigger companies, like say UCSD I think is one of those. The Federal Government is one of those. Some of the water districts want to work with bigger companies, but yeah, but not the city of San Diego. There's not a problem there.” [#417]

11. MBE/WBE/DBE/SBE/SDVBES fronts or fraud. Business owners and managers shared their experience with MBE/WBE/DBE/SDVBES fronts or frauds. For example:

- The Hispanic American male owner/principal of an SLBE-, MBE-, and SB micro-certified DGS electrical contractor firm reported, “There [are] companies that represent themselves that get the advantage to bid on these projects and have the advantage because they get women owned, disabled veteran owned or wherever else. If they are, that's great but there's been situations to where companies misrepresent themselves. They get a large amount of work because of that. They hardly ever get caught, when they do get caught, they pay a fine. But even if they pay a fine, there's a bunch of people like me that never had the opportunity to bid on the work. When it comes to light that they did that work, they reaped all the benefits from it, they paid a fine, they still profited from it. But all of us never got anything and never had the opportunity to do it. So, it's like, okay, you got caught, you got admonished for it, you paid 10% penalty on it, but you still got 90% of a bunch of work you never should have had. There are no repercussions or anything else, it's like when they do get fined, where does the fines go? So, to me it's reverse discrimination sometimes. If they are going to put the policies in, that's fine, I get it. I get advantage out of it. Not directly, but because of some of the contractors we work with, but I just wish they enforced it more correctly.” [#340]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, “The guy that referred me to the contract that I have currently. He's a white guy but he has a minority owned certification. How did you, with your wife? What? You understand what I'm saying?” [#405]

- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, “No, I’ve seen it and it’s so disappointing when it’s considered a woman-owned business and it’s just not, it’s not. And I’ve seen it time and time again. It leaves a bad taste in my mouth, where the individual... I don’t know, the husband or that will get all the qualifications and the wife is not even there. And it’s like, you’re getting this, this isn’t fair. I’ve seen that on more than one occasion.” [#411]

12. False reporting of MBE/WBE/DBE/SBE/SDVBEs participation. Business owners and managers shared their experiences with the “Good Faith” programs; which give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals.

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “And I don’t know if it’s a City issue or otherwise, but one of the interesting things about being on all of these certifications is instead of being contacted about design opportunities, I’m inundated by contacts from contractors looking for a landscape contractor. It’s the most bizarre thing. And I’ve asked them, I said no, I’m a landscape architect, the licensing is different for a landscape architect, I’m not a landscape contractor, and I’d say, ‘Why am I on your list?’ And they say, ‘I don’t know, we just have a list and we’re doing diligence, and so your answer is no, then, right? You’re not going to bid on this?’ And I feel like I’m being played, because I’m not even eligible to bid on it. But yet I’m on some lists where contractors are putting the time in wasting my time so that they can say, oh yeah, we contacted this many people on our list, and so many said, no. Well, I don’t even have the right license, they should not be contacting me.” [#410]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “Yeah, I only have one experience with that, and that actually came from our office several years ago. Somebody tried to falsify the good faith effort. This was for the City of San Diego, actually. Then when the City challenged us on it, I said, because the person in my office told me, yeah, I did it. This is all it is, blah, blah, blah. I was ready to go to bat for her. We were going to get an attorney and I got everything we were doing the whole thing, and when I pressed her a little bit more, it finally came out that she had actually falsified all of that information. Yeah, which we would have been caught with that and if the City would have pursued that, we would have been deemed barred from working for the City for three years. So that was that girl’s last day.” [#417]

13. Any other related forms of discrimination against minorities or women. Interviewees discussed various factors that affect entrance and advancement in the industry.

- The Black American female owner of a towing service firm stated, “No, the people that I send out that represent my company are usually white males and they’re networking through others. I have some that dearly love me; therefore, they’re always hustling to help me get business. If I walk into a company, the average company, saying ‘Hey, my name is [Jane Doe], and I own [Company ABC],’ it’s not going to work the same. I don’t know what you all do not get about white privileged male. White privileged, entitled males get the job. Qualified black women dressed up in heels don’t. Where’s the mystery here? That’s how it works in America.” [#357]

- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “The only limitation or the challenge really is for women in construction for an industry that's been primarily male dominated forever, the challenges for women, but particularly in the management side of things. We're seeing more and more women involved in management of construction on both our side and on the agency side. And so, I think that barrier is at least being broken, but as far as owning a construction company and operating a construction company, I still think that that's there.” [#417]

K. Insights Regarding Business Assistance Programs

Business owners and representatives shared their knowledge of and experience with the City's Small Local Business Enterprise's SLBE/ELBE program and provided recommendations for improving programs elements. For example:

1. Experience with the City's SLBE/ELBE program; and
2. Recommendations about race-/ethnicity-/gender-/disability-/ or veteran-based programs.

1. Experience with the City's SLBE/ELBE program.

- A business owner provided written testimony about ELBE certification stating, “Now that we have developed some relationships with primes, our ELBE certification is paying dividends. But it has taken us to organically make those relationships, then the ELBE helps.” [WT2]
- The non-Hispanic white male owner of a general engineering firm reported, “I think there's programs out there that the City offers, and all the different municipalities offer, and AGC offers to assist those businesses in educating them how to do work with the public and private sector. I think there's ample resources out there. The AGC, it's City of San Diego small business. The EOCP, Equal Opportunity and Contracting Portion of their division does a good job on educating, and informing, people and keeping them informed.” [#101]
- The non-Hispanic white male account manager at an SLBE-certified professional services firm noted, “I think they give us that couple of points over everyone if you are certified. That help us to get some contract.” [#111]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “For us, we did it through the state and then once we did it through the state, doing it through the City was super easy, it was nothing. Everybody else just takes the state certification, and the City does pretty much as well. So, it's really simple... I think it makes it for little guys, little companies like myself, we couldn't compete without it. One of my main competitors is a multibillion-dollar revenue type company. If at any time they wanted to squash us they could, the fact that we have the carve-outs for SLBE or DVBE allows us to compete on a more equal footing with them... There's an upper limit on how much we can earn in a given year. That's the small piece to it. I think that limit probably could be tweaked a little bit because it's kind of one of those, for us three and a half million dollars a year in revenue, that's still pretty small. We could be \$10 million in revenue and we'd still be pretty gosh darn small. And how do you compete against somebody, a company making multiple billions a year, I'm still on a whole different plane of existence than they are.” [#227]

- The non-Hispanic white male co-owner at an SLBE-, DBE-, SBE-, and WBE-certified construction management firm stated, “I think the benefit to that certification [SLBE] is twofold. One is that when the City requires small business participation, there's already an existing pool of firms that primes can look towards. So, I think that's one of the advantages there. Well, in fact, things I do know about that program, the SLBE, the City has, over time, increased the limits, which makes good sense to me. So, with that program, I think that it is and should be dynamic, because we live in a world and an industry that is dynamic. So, I give the City kudos on not being static on that but looking at it from time to time and being more realistic.” [#318]
- The non-Hispanic white female small business coordinator at a large construction firm stated, “I think their [City] database could have better information and that would help us as general contractors find small businesses to use. Their database is not that clear. You can't download it as an Excel spreadsheet. I suggest they do that because I do know that my counterparts at the other big companies, we all use their information, but that would help their businesses get more work. Now for the small businesses to get more work with the City. I think there needs to be more of... I think the City should have more outreach events. Maybe work closer with the organizations that are doing those types of events to get the word out better.” [#369]
- The non-Hispanic white male owner of an SLBE- and SBE-certified general contracting firm reported, “The San Diego, the SLBE, I think, again, as much as I did not like it when it first came out, I think that it is absolutely a very, again, of all of the programs that we've ever encountered that are supposed to be, you know, supposed to help small businesses, I think that is the most effective of all. And whether it's a small business or minority business or anything else, I think is the most effective program that we've ever come across. When it talks about a small business, I think it actually means a small business. Small business for State of California or the federal government is 50 million dollars a year. I've been in business for I don't know how long, I don't think I've made 50 million dollars in all of that time. But with the city of San Diego, small business is I think they just raised the cap to an average of 7 million over the last three years. Now that's a small business. So, when they, when they start limiting work to small businesses, they truly are targeting small businesses, not a 50 million dollar a year business, but a five or 6 million dollar a year business.” [#417]

2. Recommendations about race-/ethnicity-/gender-/service-disabled veteran-based programs.

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, “Half the population of this nation are women, especially in construction. I've got probably 15 inspectors that I work with, and right now I don't have a single female inspector. That's not right. There's a need for it.” [#202]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “The barrier is that I'm the disabled veteran. I own a parent company and then this C corporation is subsidiary. And so, the parent company is the DVBE, is a disabled veteran owned business enterprise. The parent company is for the federal government, but the subsidiary company, even though it's a hundred percent owned by the parent, is not considered a disabled veteran business owned enterprise. Whereas the state

says we don't care, we want to look at the entirety of everything you own through this. And so, they basically put a circle around the entirety of the enterprise and say everything here within the bubble counts as a disabled veteran business enterprise." [#227]

- The Black American female owner of a towing service firm stated, "As a subcontractor, one reason why I may have gotten one or two [contracts] is because there was a requirement in their contracts that they have, 'quote unquote,' a minority contractor. Well, I don't consider myself a minority contractor since five eighths of the world is of color and it's not white, really it's not black people that are minority it's y'all. That was the theory there. I think I see that as racism." [#302]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, "So the City has this, it's kind of like an as needed for all disciplines. So you can submit your qualifications every couple of years, and if you meet the requirements of submitting the document accurately, then they'll put you in a file, and you've probably heard of this because probably everybody does it, but that puts your firm information in a file, and when project managers have work they want done, they can go to that file and they can pull out your information and review your qualifications for selecting you for upcoming work. Now that in theory sounds great, but I don't know how to make it work. We've submitted every year, I decided not to this year because it's a good amount of work to go through to just have something sit and have nobody call me. So, I think it's another example of how the City says, let's provide this opportunity and have the firms jump through some hoops to get in the files, in this case, and tell our project managers that here's a file, come and look at what you need, and we can contact these firms. But then for some reason there's a missing piece on the City side where either, I've asked this question before to the City, 'So what's your process, what's your protocol for a project manager selecting a firm from this file?' And they say, 'Well, we go in order, and then we ask them to choose three, and then we contact those three.' And either there's never been an opportunity for a landscape architect in five years, or maybe the process just doesn't work, because I've never been contacted. So, there's a cloak of something happening on the backside of that that does not seem to give the outcome that they say it should give. I can see how the City would think, this is a great opportunity, any firm who wants to work for us, we'll keep their current information in our file, and our project managers can go select. But the project managers aren't selecting, or they're just selecting firms they know. So that's a process that seems, kind of just like the SLBE, seems to be a lot of effort on our behalf with no outcome." [#410]

L. Insights Regarding Race-/Ethnicity-/Gender-/Service-disabled veteran-based Measures

This section includes business owners' knowledge of and experience with the City's current program elements, as well as recommendations for improvements.

1. Awareness of programs in general;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;

5. Joint venture relationships;
6. Financing assistance;
7. Bonding assistance;
8. Assistance in obtaining business insurance;
9. Assistance in using emerging technology;
10. Other small business start-up assistance;
11. Information on public agency contracting procedures and bidding opportunities;
12. Online registration with a public agency as a potential bidder;
13. Hard copy or electronic directory of potential subcontractors;
14. Pre-bid conferences where subs and primes meet;
15. Distribution list of plan holders or other lists of possible prime bidders to potential subcontractors;
16. Other agency outreach;
17. Streamlining/simplification of bidding procedures;
18. Breaking up large contracts into smaller pieces;
19. Price or evaluation preferences for small businesses;
20. Small business set-asides;
21. Mandatory subcontracting minimums;
22. Small business subcontracting goals; and
23. Formal complaint/grievance procedures.

1. Awareness of programs in general. Business owners discussed various programs and race- and gender-neutral programs they have experienced. Multiple business owners were unaware of any available programs for small business assistance.

- The non-Hispanic white male owner of a software development firm stated, “No, I didn't even know it exists.” [#212]
- The Black American female owner of a towing service firm stated, “Because you get their information [Small Business Administration]. You hear about professional development. They have workshops. They're not having them now unless they're virtual. But then you would have workshops. They had, let me see, I use the word opportunity very lightly, to talk more about the extension of businesses owned by women and other quote, unquote ‘minorities.’ But nothing real. Nothing hands on. There's never been a check in the mail that I can determine as a result of them.” [#302]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “There seems to be a lot of help available if you seek it out. I mean, I see all, and I get emails and there's just so many groups that say, ‘Hey, if you need help, come see us, come talk to us.’ The SBA, the PTAC, there's a lot of stuff out there.” [#306]

- The Hispanic American female owner of a human resources consulting firm noted, “I’m trying to remember the proper terminology. There are several resources, some agencies... the Small Business Development Corporation... So, I know that there are some resources. Unfortunately, when I went through that PPP loan experience, it was an extremely disappointing and ineffective attempt. I spent hours and hours reaching out to these businesses. I just wanted to know answers, so that I did the right thing. And I knew many other small business owners that were just taking these loans and saying, Oh, don’t worry about it. I’m not that kind of person. I wanted to know to make sure that I understood that I was really responsible, and that I right from the beginning I did everything right. I’m trying to be non-dramatic. It was an extremely negative, disappointing experience that I went through with these small business development corporations, that whole group. Maybe I shouldn’t name names, but I actually went through Todd Gloria’s office because I knew him from my neighborhood, and unfortunately never got back to me, all these different agencies. They talk as though they’re really a good resource and they help, and I’m sure they do some good things out there. For me, personally, it was very ineffective.” [#308]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “So, the Small Business Development Center is a... I believe a nonprofit organization and they’ve got a couple offices in San Diego. They’ve got one in National City and I think I’ve been there once. But the one... Because I heard about Cheryl Brown, I went to the North County one. And as I mentioned, because of her I very quickly and easily got the majority of the certifications that I had. And that was an enormous help... So, they really worked hard to try to get me into that as well which I thought was great. I think there’s a number of organizations that give them money. I think it’s something to do with the Small Business Administration. But I think there are a number of local agencies that also give them money in an effort to get people prepared to be successful. Small businesses and so forth.” [#322]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Yes, I would say that the City’s ELBE program has been [beneficial]. We’ve been able to team with several firms over the last few years with the City of San Diego because of that program, so yes, their program has been beneficial for us.” [#426]
- A female participant at a public meeting reported, “I wanted to offer just some maybe potential avenues for the city to think about and to transform the idea that prop 209 is a limitation in diversifying contracts, and rather to see certain areas within their operations policies and practices that can be amended or improved in order to reach communities of color in more intentional and specific ways. So, asking for diversity metrics within the bidding process, as I understand it is prevented by 209, but communication and outreach to communities of color, looking specifically to work with folks like the Black Chamber of Commerce, to put out the bids is in a way to ameliorate the problem of diversifying contracts that prop 209 has presented. Mentorships programs, which were mentioned earlier also a very good way. And so, there are other mechanisms to arrive at ameliorating the problem of systemic disinvestment in communities of color, until we can change the prop 209 limitations.” [PT#6]

2. Technical assistance and support services. Some business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of a software development firm stated, “Just the small business administration programs and the training that they provide for small businesses. They just provide useful information on how to find resources and get started in the business world.” [#212]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, “Well, there, like I said PTAC is good for the federal government and the SBA again, for the federal government. The PTAC sponsors a lot of states. They have these forums where they meet the buyer and the PTAC people usually show up for those. I'm not even sure who sponsors those, but I know there's a lot of those that happen and they're good.” [#306]
- The Hispanic American female owner of a human resources consulting firm noted, “Yes. That would be nice. I'm struggling with bookkeeping right now. I had a change in CPA, and now I don't have anybody to help with reconciling accounts. Again, I don't expect anything for free or any handouts. It would be helpful, for instance, to have some credential trustworthy, a place where I could go and I could hire, let's say, a bookkeeper that was totally well-vetted, said, Yes, this person is really, background check and all these good... just that in itself would be helpful.” [#308]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Yeah. I think that would be really helpful and that's in some ways what that SBDC is doing. So, yeah, that's extremely helpful I'd say.” [#322]
- The non-Hispanic white female owner of a consulting firm stated, “Maybe understanding the tax laws, like how to, what are all those requirements and things you have to do and what are some ways to write things off, if you have them. Something like that would be helpful. I'm flashing right away when you're asking this question on the SBA, because the small business association regularly, at least in Iowa. I'm not sure about California, but even now in my emails, I get regularly SBA workshops for free being offered. Right now, they're offered online, about this exact kind of thing and they're good.” [#335]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “I think it could be... I'm not aware of any program. I think it could be valuable for folks just starting out because I happen to have a cousin who is my competitor now. She thinks if my stupid self can do it, anybody can do it. So, she's trying to get out. And for her, one of her biggest challenges is my mom's now her pro bono bookkeeper because she can't do it herself. My mom's well retired and not gonna do this much longer for her. So, she's going to have a real issue coming up. Bookkeeping and how do you invoice? Those are issues.” [#357]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “Some of our utility clients put us through learning and training that even focused on, this is how you get your financial back office in order so that your invoicing is in order. So that you guys can go out there and just deliver quality service and we don't have to worry about whether or not your back office is a complete mess. So that type of training to me, shows that our clients are interested in us

being around for long-term. Then that gives us a lot of stability and confidence that we can move forward just providing service.” [#406]

3. On-the-job training programs. Some business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of an SLBE-certified construction firm noted, “I know the AGC has that that's the apprentice program we're a part of.” [#416]
- A male member of a civil rights organization stated, “Your award [should] add some clauses to those contracts to have some kind of an apprentice program or mentoring program for these minority contractors so they understand what they need to do and they're taught along the way and trained on how to do this so when their next contract comes, they are then qualified to apply for those things, because those are the things that people always say, ‘Well, you're not qualified.’ We'll make it a mandatory apprentice program for all of these contractors that they have to have one or two minority businesses, a part of their process.” [FG#5]

4. Mentor/protégé relationships. Some business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of a software development firm stated, “I think that'd be useful, having some other successful small business startups be mentors for some other ones, the ones that are just starting out. That's always good. That's a good thing.” [#212]
- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, “It would be neat if there were, and maybe there already exists, now that I'm thinking about it, maybe there is a small business ombudsman who works to advocate on behalf of small businesses and can help small businesses navigate the city's unwritten rules as well as their written rules. As a small business, we can't afford to have the roll of the dice based on the inspector on whether we're going to have an easy time or a hard time on a project. So, having somebody who is able to provide the advice and counsel on, ‘Hey, this is how the city works. Not saying it's right. I'm just saying, this is what it is,’ would certainly go a long way, I think, to helping small businesses get a fair shake.” [#227]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “We did one through the State of California. It's still ongoing now. And pretty much, we're just wondering why we even did it. I've heard this from a couple of other folks. All they do with us – ‘We don't like your logo. We don't like your company's name. Make your company's name, not [Company name that is tied to Native American culture], make it something anonymous, like [ABC Company]. Change your logo to something non-abrasive.’ Our logo has a very specific sort of Native American theme to it and they hate it. They want us to change it and make it like three colored blocks that don't really mean anything. They don't really... It's been really fruitless for us the mentorship program because, there's nothing that a small business is going to tell us, help us with, that we didn't already have. But we might be special because we didn't have any... We figured this out on our own. I did. There was no, Here's what you need. It was me reading on the internet what do I need? Hey, don't forget workers' comp. Hey, don't forget this insurance. These are required by law. I just studied it

and figured it out. And I don't think either most people don't do that or they're not willing to, I'm not sure. Yeah. I don't know if that's very helpful, but that's okay." [#357]

5. Joint venture relationships. Some business owners and managers thought joint venture relationships are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of a software development firm stated, "Yes, I think that would be, that would be great. Being able, if the city could, or the County could, provide a way to match businesses that are just starting out with other ventures that are already established and have the capital and other resources, sort of as an investor. I think that would be a good thing." [P212]

6. Financing assistance. Some business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of an SLBE- and DBVE-certified construction and maintenance firm reported, "Yeah, probably the biggest one is really, truly just financials. In order to kind of get your start in this particular industry, you've got to come in with a bucket full of cash to get started. It's really hard to start with nothing and build it from there. So, from that perspective, I think minority owned businesses, women owned businesses really struggle to get off the ground from the financial side. I know from my own personal experience, when I was acquiring this business, I was able to pay cash for the company and even still, I couldn't secure financing to do it. I can pay in cash and nobody wanted to give me a small business loan, even though I could pay in cash for the company. So, it's like, 'You know I'm good for it.' And this is me, a fairly well-off white guy and I'm basically being denied, so it sure makes me wonder what happens for somebody in a lower socioeconomic class or a minority of any sort. It sure makes me wonder how they would secure financing." [#227]
- The Hispanic American female owner of a human resources consulting firm noted, "Yes. I think it would be helpful. Even though I may not need it as much, I think for others." [#308]

7. Bonding assistance. Some business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses. For example:

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "For a small firm, it's like a Catch-22, because you have to get the job to get the bonding requirement. But then you need the money to do that." [#202]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, "Yeah. Bonding is very difficult. I pitch, there's just not a lot of, it's a trial by error kind of thing. I mean, people how do you find the bonding company that does, you have to practice. You have to research the internet that's about it." [#306]

8. Assistance in obtaining business insurance. Some business owners and managers thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses. For example:

- A male member of a chamber of commerce stated, "Then the other thing that would be beneficial...is the city has the power to get all this business together for minority business.

They [minority businesses] don't have the capacity to have the right insurance risks individually, but if the city were to globalize that and I can help you with that...If I were to bond just myself, it's very expensive. If I do it as a community of 1000 or whatever, then the price [goes] way down, it's affordable." [FG#4]

9. Assistance in using emerging technology. Some business owners and managers thought assistance in using emerging technology can be helpful for small and disadvantaged businesses. For example:

- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, "Yeah. Those types of things I think would be good, because what the city will do or any agency will do is, they'll tell you, 'Oh hey, we're on PlanetBids.' What does that mean? I don't know if you know what PlanetBids is, but most people don't. And so, they first start getting it and they go, Oh, okay. PlanetBids. Now you got to figure it out and work through the system. There's a lot of glitches in the PlanetBids system. And others even more glitches in the City's Prism system that you have to report hours into. If you're not familiar with the glitches and where to go, it'll take you days to figure that stuff out. And if there was just a class like, Oh, hey. Here's a class on how to use the Prism system, on how to use PlanetBids. Here's what planet does is really for." Because you'll find out PlanetBids is an overarching, it's just for the city. If you go to Carlsbad, it's just for the city of Carlsbad, just for SANDAG. You've got to know that it's a different notification you're getting every single time for every tiny little agency there could possibly be. Then knowing how to check back on it and look if you won the job and what all these things mean. There's maybe 50 percent of the stuff on PlanetBids. We have no idea what it means. We can just tell if we won, we could tell if we lost, we could tell who won if it wasn't us. Yeah. But, those kinds of things would help, even for us, we've been doing this for years, we might actually attend that if it had it." [#357]

10. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. A few owners agreed that start-up assistance is helpful. For example:

- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, "Startup assistance? I'm not familiar with any, however, I've heard that they're out there, money that's available for small businesses to help them start up. Like the SBA office, I don't know that you can get money, but I know they will walk you through the entire process of how to start a business. And the reason I know is because... I know the people there, but they didn't realize... They didn't put two and two together. So, when I got my business license for the city of San Diego, I got a call from the small business office and they offered me an opportunity to come in and they wanted to help me with the entire process of helping me start my business, right down to how to get clients, the marketing piece, how to market your business, how to market and brand yourself. And once I called back and I spoke with the girl, she's like, 'Oh my God, Regina, I didn't realize that was you.' But I thought it was amazing that they were offering... I mean, just from me doing that, some way the city, when I got my license to do business in San Diego... I guess, I don't know if they just funnel the information over to them, but I got a call out of the blue, just offering help. Which is huge. So, I think San Diego does a pretty good job. I mean, I've lived in a lot of other cities by my husband being military.

And I'm going to tell you that I have not seen this kind of engagement in any other city and I'm born and raised in Washington DC." [#347]

- The non-Hispanic white female owner of a WBE-certified consulting and recruiting firm reported, "I'm sure that there would be [other small business startup assistance], but I don't know what that looks like, there's a lot of information on the web to go out and parse through, but it would be nice if there was, I guess if you will, a handbook or a playbook. I haven't found it, I don't know that it exists, but I haven't really looked for it in 13 years either." [#395]
- A female participant at a public meeting stated, "To help out the Southeastern community and other communities that are challenged to grow that it [the City] will start a really strong incubator program where fledgling new businesses can have not just short-term, one-time train or something of nature, but they train that actually takes them from the point of being fledgling, to a point of being truly, truly viable. That way, you know the adage teach a man how to give a man a fish, he'll eat once, teach him how to fish he'll eat for the rest of his life, because we really would like to see that wealth distributed in the disenfranchised community which it's not, and also in the hiring of people from the disenfranchised community, which that doesn't happen in either. And that impacts families on so many levels in terms of families going into child welfare, serving juvenile justice, criminal justice, all of that, because there isn't anything coming this way. So does the city have a plan of action to really address the disenfranchised community in order to bring them up to a level where they can compete? Long-term permanent plan, not just one that's temporary, but a long-term permanent plan." [PT#4]

11. Information on public agency contracting procedures and bidding opportunities.

Some business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities. Others thought the information is helpful for small and disadvantaged businesses. For example:

- The Hispanic – Chinese American male co-owner of a landscaping services firm stated, "Yeah. I'd like to see that, find a way to get in there and then do a bid. I'd like to make a presentation to the Parks and Rec to tell them what I have going. Yeah, that'd be great. But like I said, I call the people in charge, and all that I do is leave a message and never get back to me." [#346]
- The non-Hispanic white male owner of an SLBE-certified construction firm noted, "Yeah or knowing the books. Like there's a green book, a white book, California codes. There was a guy that used to do this that I heard of. I was going to take his class this year, but when I went to call him, he actually passed away last year. There's one guy in San Diego that supposedly teaches contractors what to look for in the green book and white book, and how to protect themselves, because that's the bible for these inspectors is the green and white book, city codes, California codes. There's so many books and codes you have to know to not get beat up by the city that you have to, it'd be cool if there was a dude who knows your industry and said, Here's what you need to do to break even or get paid." [#416]

12. Online registration with a public agency as a potential bidder. Some business owners and managers thought online registration with public agencies as a potential bidder are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “I think that’s fine, but again, with that rotation list, I registered and didn’t get any work. So, I think, registering is good, but then, I think what ends up happening is you register, but then it doesn’t take away any work or make things more likely. You still have to submit everything on the RFP. If you could register and it took away some of that work, like you could go through a pre-application process that actually reduced the work later on individual projects and yes, but I don’t feel like that’s happening right now.” [#322]

13. Hard copy or electronic directory of potential subcontractors. Some business owners and managers thought a hard copy or electronic directory of potential subcontractors would be helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of a consulting and recruiting firm reported, “Electronic directory would be amazing. It’d be a place for people to reach out to those contractors and to get more community and more visibility to the subcontractors.” [#398]
- The non-Hispanic white female owner of a WBE-certified administrative support firm stated, “Yeah, where is that? I mean, okay, that’s what I was going to say. Once I get into PlanetBids I can’t find a section here or there. And usually, I happened upon it by accident. More clarification on where we’re supposed to go or a directory of where would be great.” [#411]
- The female owner of a professional services firm reported, “My difficulties are specifically in obtaining a contract and or the funding to compete. My service is basically temp or on-call, as-needed temporary administrative services and for some time I have made income. Primarily it is at the start of the contract or to set up a system to train an employee how to report prevailing wages or even at year’s end or tax season. Is there a way to set aside a portion of the contract to be solely for administrative support? I have assisted with many proposals in the past and I know Admin is added into the amount but rarely used appropriately. I think it would be benefit to the city to allot for those services separately per contract perhaps as a subcontract. If this is already done, my apologies because I must have missed it. In all, finding an RFP for my services is nowhere to be found on PlanetBids but I know it is always a needed.” [PT1]

14. Pre-bid conferences where subs and primes meet. Some business owners and managers thought pre-bid conferences where subs and primes meet are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of a consulting and recruiting firm reported, “Oh yeah, that’d be good. Be a great opportunity for again, the subs and primes to meet and to make business relationships.” [#398]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Yes. Any projects I’m interested in that has a pre-bid I go to, because you can learn a lot about that project in the pre-bid. It’s too late to ask the project manager or anything, because by that point it’s already been advertised. But you can ask questions, sometimes you’ll get an answer, but you can also see who else is in the room and who else is interested. Most teams have already formed by that time, though.

It's very competitive out there. You really have to know well in advance what's coming out.” [#410]

- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Well, since COVID, that's kind of come to a bit of a standstill. We did electronic versions of that through Go-To meeting and what have you with Caltrans recently, I know their SLB solicitation that has come out. The last in person one that we did, I'm trying to think what that was. I can't even think, so long ago, but yeah, the online one with Caltrans was pretty good. There were appointments, you had a time for this general and a time for that general and a time for that general, so it took place over two days, a couple of different meetings, so that went well.” [#426]

15. Distribution list of plan holders or other lists of possible prime bidders to potential subcontractors. Some business owners and managers thought distribution list of plan holders or other lists of possible prime bidders to potential subcontractors are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Yeah. That'd be awesome. Since I'm usually a sub, if I knew who was interested in a certain pursuit, I could begin talking to them about it well in advance.” [#410]
- The female owner of a landscape architect firm reported, “The value we can bring to a design team is important to getting chosen to join a team. If we haven't worked for the City before, it's hard to know what their concerns, expectations and design issues are. Without knowing those things, it's hard to get on teams, or win work. So, we need access to the City to learn what their, and the project issues are. We have found that the City project managers who lead the team selections are not available to talk to us about upcoming work. So, if we don't have access to them, how are they supposed to know us and how are we to have familiarity? They will always choose to work with a firm they've worked with before, instead of a new firm, especially if they have not had the opportunity to learn about us beforehand.” [PT#2]

16. Other agency outreach. Some business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male owner of a software development firm stated, “I think just disseminating the information to the small businesses registered within San Diego County or residing within San Diego County will be more useful.” [#212]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “I think there's a need for that. I think just the need for better communication and the spreading of resources.” [#311]
- The non-Hispanic white – Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, “Yeah. I do think those [vendor fairs] are important. And I do have experience with them. The California Public Utilities Commission, they put on a great event. But again, one of the reasons why we feel like it's a great event is because we can go there, we are recognized. So, when we talk to companies, they are willing to talk to us they know the importance. They are trying to find

LGBT businesses to spend money with. And so, the conversation and the networking are a lot better than going to like a Caltrans expo, where our certification is not recognized.” [#406]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “I know everybody does that, the school district does it, the city does it, the county does it, different cities do it? I’m not sure how helpful it is. I think people are going through the motions. But it could be, I just don’t know how to maximize that benefit.” [#410]
- The non-Hispanic white female owner of an EDWOSB- and WBE-certified IT consulting and software resale firm stated, “Yes, I have done so many of those. I talk at them. I speak on stage. I do everything. It doesn’t work. People get all these business cards. They go back to their office. They swap with another conference the next week. By the time you send them an email, they received a hundred. And by the time they introduce you internally, people are like, ‘New vendors, who needs new vendors?’ It doesn’t work. It’s just a show.” [#418]
- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “So, there are various small business outreach events out there, that we attend that have been very helpful. San Diego School District does an industry event, an SBE event, every year. It’s well attended with all the state agencies as well. I know the port does one. I know the airport does one. I know Caltrans does one. So, generally it’s like a half day get together where a lot of sister agencies actually get together hosted by one in particular, and I believe the small business programs, agencies are well represented there and information is extremely useful.” [#426]

17. Streamlining/simplification of bidding procedures. Some business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, “Yeah, for us bidding takes a large amount of time, could be 20, 30 hours or more so it’s a lot of work to not get it so if... we have to decide if it’s worth putting that type of effort into a project. If we have a reasonable shot at getting it then of course but if we feel like we’re just getting used to provide a price, then it’s not.” [#231]
- The non-Hispanic white male owner of a consulting and recruiting firm reported, “Yes. I think the current process is a little long and over complicated. I think simplifying it would allow more people to enter bids. I think the whole thing needs to be looked at, revamped, and streamlined.” [#398]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, “Yeah, that is always going to be valuable to us and to other small businesses. And I look at it from the perspective of, if their agency could streamline what they’re asking for, so that it’s maybe uniquely specific to the project that they’re selecting for so that there’s not additional effort that’s needed.” [#410]

18. Breaking up large contracts into smaller pieces. Some business owners and managers thought breaking up large contracts into smaller pieces could be helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Yeah. I think that’d be good. I think that kind of falls under the category of, offering smaller dollar contracts to small businesses who, are more likely honestly, to even want them. But only on the other hand, I know that costs money. Because there’s process, that should be dollars that could be going towards those projects is now going towards multiple bids. So, as a citizen, I would want to be careful that we’re not... If it could be done in a reasonable, efficient way then yes. But not if it’s just going to cause us to pay all our tax dollars to distribute these small contracts and negate the whole cost.” [#322]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “So there’s a couple of school districts that are trying that out right now. And what ends up happening is that the responsibility of contractors just does not...you don’t have anybody that’s actually physically responsible for anything. So, like one contractor, it gets signed off that they’re done, but even though they’re... So that they’re off-site, but then some time it gets down like I’ve messed, but they’ll go, Well, you already signed off on and I’m done. So, I’m not coming back to help you out. And so even the CMs, the Construction Managers they get hired to do that, they can’t do anything because it’s all in the city’s hands to say something, they’re just there managing the paperwork.” [#324]
- The Native American male owner of an MBE-certified metal working firm stated, “I don’t think it’s a good idea to split it up, especially the way they package it. Because they’ll send it out as like here’s the things you’re bidding on. And when they pick and choose, like I said, it affects the price. If they’re not ordering everything, especially in this industry, everything’s done by weight. So, for example, if you quote them on 50,000 pounds of material and that freight that you were factoring into the price is 4,000 dollars for that shipment. You break it down by pounds. So, each pound would get that broken up where if they now come back and only order half of it, you still have that same freight cost, whether it was half the truck load or the full truck load. So now that freight cost per piece has gone up. So, your actual costs that you originally quoted them wouldn’t be valid anymore, but now that they’ve purchased it at that price, you’re either going to be losing money or breaking even because you’ve just now absorbed all that extra freight costs. So those are things that need to be considered because most people don’t consider freight. I mean, the government kind of does because they specifically have us put the freight into the price, but when they break it up, is where it completely kills all the other pricing, which is why on some of the larger orders we have to put on there like it’s all or nothing, if you’re going to buy part of it from somebody else, you need to buy the whole thing with them because we will lose out on the freight. And sometimes they’ll go with us even with the higher price in other items, just because overall it would be cheaper since the vast majority of the stuff, we would have would be cheaper to offset it, but those are things they don’t take into consideration.” [#427]
- A female participant at a public meeting stated, “So, I see the contracts come through and I’m like, oh wow, this looks great! Like there was a contract for laying water facilities pipe underground and I knew that there’s going to be a lot of environmental studies for it. But the bid came through as a single bid to an engineering company that can provide services in so many engineering aspects. And I knew that almost all of those jobs would require an environmental study. But there wasn’t anything there for my NAICS code or if there was, it looked really limited. And then it was written for somebody who could do the whole contract.

So, there was no way that I could get in, unless I already had a relationship with the winning contractor. There's no way that I could bid it. And I didn't really know how to reach out to those other businesses. When I tried, I didn't get responses. What do I do? How do I get in?" [PT#3]

- A participant at a public meeting sent the following comments via email, "I realize it is a lot of work to draft RFQs and go through the vetting process to award a contract. As a result, the contracting group lumps different things together into one contract. The chances that a DBE can do all of these things is low. One example was the biohazard contract for San Diego Airport Commission. They lumped this with the trash and recycling contract. I would need to buy garbage trucks to take on this contract, so I did not bid. Had they done a contract for biohazard only, I would have been able to bid. Another example is the City Homeless Camp Cleanup RFP. They lumped this with tree/brush trimming. I would need to hire landscapers, get a landscaper contract, and get all the equipment needed to do landscaping work to bid on the homeless camp cleanup contract. This should have been two contracts. Because these contracts entail so many functions, only the 800 lb gorilla prime contractors can bid on these projects. Then the City passes the buck to them and tells them they have to have a certain percentage of subcontractors be DBEs. What these prime contractors then do is send you an email for every subcontractor need they have even if it has nothing to do with your line of business. The City makes them call you 3 times or get in writing that you won't bid on the contract before they stop bothering you. Because of this, you just reply "no" so they don't call you 3 times and just assume there is no relevant work for you because you have spent the time to look through the documents and find nothing relevant enough times that you stop making the time to do that. Some contracts have odd requirements that make it seem they have a preferred company in mind and structured the contract to match their abilities." [PT#7]

19. Price or evaluation preferences for small businesses. Some business owners and managers thought price or evaluation preferences for small businesses are helpful. For example:

- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, "I think it's good to an extent. I think that there's sometimes that, like we were talking about like the diversity thing ends up costing more. And so, like if one contract that recently I even bid to a school, I didn't have a DVBE and so I lost the contract because I didn't have that 3 percent in there. So, I don't know. It's, you're damned if you do, you're damned if you don't type of situation." [#324]
- The non-Hispanic white male owner of a landscape materials supply firm stated, "Yeah. And I've seen that in a couple of things. I think that's one way of doing it, isn't it? That's one way of saying, if you're 200,000,000 you don't get this kind of discount, but if you're 2,000,000 you do. And that'd be an advantage to me in that case." [#387]
- The non-Hispanic white male president at a specialty construction firm reported, "I'm not really a believer... I don't know. I don't think there's any big advantages that some... I think that if you go do the work for a certain price, you can do it. I think the small businesses have advantages already anyways, because they have low overheads and stuff. I don't see why they would need anything special." [#423]

- The non-Hispanic white male owner of an SLBE-certified construction management firm noted, “Being an Owner's Representative Construction Management firm, our solicitations are always considered best value, where price is not a factor. In fact, for most solicitations, they require the pricing component of the proposal to be in a separate sealed envelope that's actually not opened until the very end, so it's not a determining factor of whether one is going to be awarded the contract or not. With that being said, the agency should recognize that a small business can offer a more economical proposal to them than a large business merely because one has less overhead.” [#426]

20. Small business set-asides. Some business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses. For example:

- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “I think that the threshold for what the small business can make. I think if it gets closer to what the State of California states it as a small business, that'd be good. And then also having more set aside projects for small businesses. Yes, the [admin load on public contracts] is a burden. Just because you have to double-check, make sure that everybody's getting paid correctly...so you have to do you have to submit it into a tracker, then you have to submit your certified payroll. Some people require wet signatures, some people don't, and then some people require it notarized. So, it ends up being more work to get that completed.” [#324]
- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, “The two things that would really help small businesses anywhere, not just San Diego, would be un-bundling some of the work and not trying to self-perform everything to get paid for everything and set-asides. Those are the two things that would really help small businesses.” [#347]
- The Native American male owner of an ELBE- and SLBE-certified environmental firm reported, “I like them. If I understand what we're talking about. In that the City, because if it weren't for that, the City in these on-calls would just be saying, Hey dude. Or, Hey, all you guys, bid on this big on-call project. And they would have literally no small businesses on there unless they needed some little niche, something like that. So, I'm all for it because again, small businesses are never going to compete with big business head-to-head. There has to be that set aside in order to make them even want to talk to us. Without the set asides and the specifics for the small businesses, there are no meet the prime fairs, there are no need for vendors. We'll just all go away.” [#357]
- The non-Hispanic white female small business coordinator at a large construction firm stated, “Yeah, we don't use federal set aside, but what we do is we will take packages and we will split them out and make them smaller and set them up so that the dollar value is low enough to where we don't have to formally bid it out to anybody on the street. We can pick three small businesses to bid it.” [#369]
- The non-Hispanic white male owner of a landscape materials supply firm stated, “I think there's ample opportunities for any city to break out a portion of its bids in certain fields for that. I think that would make perfect sense.” [#387]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, “If they would have true set asides for minorities

and women. A threshold, a dollar amount that we can bid on, however, make sure it's inclusive to the point of the barriers are lifted. Don't ask me for 10 million insurance, like you would ask a large prime to do. They're asking me for that, right? Don't ask me for past performance when I don't have five or ten years of past performance. Those are all barriers. Why would you put so many barriers in my way?" [#405]

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, SBE-, and WBE-certified landscape architecture design consulting firm noted, "I think there's ways of using the SLBE list more proactively instead of just telling your SLBEs they can submit, and we'll keep it in a file. I'd recommend that the City should be more proactive about its engagement with SLBEs on projects. And maybe there's a set aside that might be a way for project managers to say, Okay, well, these 10 projects here we consider them small. We're going to do them as set asides. We're going to work with firms we haven't worked with before. We're going to check it out, make a commitment to that." [#410]
- The Native American male owner of an MBE-certified metal working firm stated, "I think that's beneficial, but only to the extent that, there's so many businesses out there that claim to be small businesses and whether they're truly a small business or not, it's a self-certified thing. There's no real regulation on it. So, it's kind of hard to say whether that would be beneficial or not, because whether it's going to a business or not is yet to be seen." [#427]
- A female participant at a public meeting stated, "I'm very familiar with the federal contracting elements, as well as their ability to really drive small business and specialty business participation by effectively having some accountability, whether it be by procurement officer or department amongst their goals. And it was an interesting way ... I know a lot of the large contract recommends you reach out to various small businesses, but it doesn't require it. And I've noticed that the targets actually get a lot closer to being met by the contracting, the final contracting, because each department is held to certain targets. And if they keep selecting large businesses who make an effort, but never contract with these smaller businesses, then they never meet their targets. And so I put some links to federal programs and scorecards and different things. I'm sure you're familiar with it, but they've done a really good job to drive specialty businesses, as well as having some amount of set aside programs for smaller contracts where it doesn't have to be classic low bid. It can be best value and set aside for again, small businesses or specialty small businesses, whichever the city decides is a priority, which categories and how, I mean, that's really also the city's discretion, but it's been a very successful way to approach it. So, I just wanted to see if there was an intent to add or mirror any of those elements." [PT#5]

21. Mandatory subcontracting minimums. Some business owners and managers thought mandatory subcontracting minimums are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white male account manager at an SLBE-certified professional services firm noted, "Yeah. I like this idea [mandatory subcontractor minimums]. It gives opportunity to people to have small business, to engage with city." [#111]

22. Small business subcontracting goals. Some business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses. For example:

- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Where not only is there a percentage, but you actually have to show that you're meeting that goal. Yeah. I think that would be very good.” [#322]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, “Yeah. It would be cool... I don't know if this is related or not, but we've got a program... And I think the City might be talking about this, but just maybe a recognition that a lot of these small businesses are not going to be competing. Make it a separate category for contracts under 200,000 dollars, where maybe there could be a different process, that's not quite as onerous to get the work. I mean, big companies don't want to go after a lot of those small contracts anyways. So, is there a way to connect small businesses and certified businesses, with those smaller contracts. It could be game changers for them in terms of staying in business and moving forward that they just can't access right now, except through the prime contractors like I do.” [#357]

23. Formal complaint/grievance procedures. Some business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses. For example:

- The Native American male owner of an MBE-certified metal working firm stated, “I think that would be helpful if there was some type of way to voice your concern, especially like for my type of industry, if we were constantly bidding on something. So, say we did start trying to do work with the city and if we were constantly losing out on bids, I would like some type of justification. Why is it straight price related? Or like, how did we lose the bid, especially being a minority small business? Like what considerations were taken into account for us to lose the bid?” [#427]

M. Other Insights and Recommendations

Interviewees provided other suggestions to the City of San Diego and surrounding City agencies about how to improve their certification programs. Interviewees also shared other insights and recommendations. For example:

1. Enhance the availability and participation of small businesses; and
2. Other recommendations for the City of San Diego or other public agencies in the San Diego area.

1. Enhance the availability and participation of small businesses.

- The non-Hispanic white male owner of a landscape materials supply firm stated, “I would say that simplifying the process, is one. And that's too broad a comment. I would say it's more to do with recognizing that there are really a lot of good small businesses, truly small businesses, that one to five million range, where the government is not getting a fair share representation of those businesses in their supply chain. And they should in my view, target them, because they are the growth vehicles for the future. Changing the definition of small business. I think is one that should be looked at.” [#387]

Community Outreach

- The Native American male owner of an MBE-certified metal working firm stated, “If the City of San Diego is concerned about doing business with minority businesses, then I think they should be able to take it upon themselves to say here's a list of small businesses in my area that we would like to do businesses with, reach out to them and see what we could do to get them to bid on something or to get them to do some type of work with us. And to maybe if they could create that, like how the other vendors, the prime contractors with the government, how they have those qualified vendors lists, if they could do something similar to that and say, you know, we want to do business with you. Here's the documentation we need to just get you set up. Once you're in there, then we can then let you bid on things or we can send you requisitions for things that we need and that could help you grow your business.” [#427]
- The non-Hispanic white – Asian American female owner of a consulting and outsourcing firm reported, “So I have some ideas on that for sure. And I've heard our clients even suggest it to me, but I'm not quite sure how I would go about it. But, from the perspective of a small business standpoint, I'd love to connect with the SBA and, and suggest ways to where we can provide more outreach to small businesses that are emerging, or being formed, so that they know and have access to at least, we have a turnkey solution for companies that can use so that they have their HR infrastructure in place. So, they're not vulnerable. What scares me with, when I talk to small businesses and we realize how vulnerable they really are and how much they don't know, and they don't know where to get this information. But it would be amazing if they had resources where... When I registered my business with the city, nothing was given to me in terms of, are you set up? You're going to need this, this and that to be in a better position to protect yourself and be less vulnerable but be also compliant with the laws and regulations. So, providing a resource and education to businesses so that they can get more dialed in and at least know where to go find things.” [#311]

2. Other recommendations for the City of San Diego or other public agencies in the San Diego area

Contracting/ Bidding Procedure

- The non-Hispanic white male owner of a general engineering firm reported, “I think more preference should be given for local contractors. I think a lot of these public entities don't give a crap about where the contractor comes from. I think there should be some more preference for contractors that are within that district, or locality should be given a better opportunity than out of town contractors. I think we need to keep the business - we need to help the local contractors and local businesses - not just minorities, but all.” [#101]
- The Black American female owner of an ELBE-, SLBE, DBE-, MBE-, and WBE-certified construction staffing agency firm stated, “Other than... I was going to say this, other than I've been pushing for local requirements, hire people locally. Don't allow them to come in from different states and different cities to work on our jobs and they take our money, and they recycle it back where they came from instead of recycling here in San Diego. That's why homeless population is so high. Because we allow for people to come from all over and work our jobs. And when you do that, you leave a huge deficit because that money is not being

recycled here. Then you're relying on the tourism industry to make up the difference and where the regular recycle of funds should have been coming from." [#405]

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "Give more priority to qualification. Qualification is not whether the company's name is [well-known Company A] or [well-known Company B] or [well-known Company C]. It's always the individual... If you don't want lawsuit, it's not the liability insurance that would save you. It's the good quality plan and good quality people." [#202]
- The non-Hispanic white male co-owner of a commercial and office building contractor firm reported, "I think the best thing would be one, to make it simple so that the bidding process is not onerous, and two, to give high preference to smaller subcontractors." [#231]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, "I think just the idea of pre-qualification I think it needs to be the only people that recognize officially a veteran owned business is the VA, Service-Disabled Veteran Owned that's recognized by the state. I don't know about the City, but I know the state is recognized. But a veteran owned, I don't know of any certification that's available by the City or anybody like that." [#306]
- The Hispanic American male owner of an MBE- and VBE-certified general contracting firm reported, "The federal government does something that I think is pretty good. They send out what they call a 'sources sought'. So, if you're listed with federal government for certain kinds of work or not even, they'll just send out this thing. And they'll say, 'We're planning on doing this 5 million dollar project, and this is the basis of the project, or this is an example of a project are you interested, can you qualify to do this work?' So then if they get at least three bidders that come back and say, yes. Let's say if they get three Service-Disabled Veteran Owned Businesses that say they qualify, then they set it aside for only service-disabled veteran owned or only women owned businesses or only SBA businesses. But it lets companies know that this work is coming out so they can jump in there and keep it, then they can limit it to a smaller group." [#306]
- The non-Hispanic white - Asian American male business operations manager at a DBE-, LGBTBE-, and SBE-certified construction management firm stated, "You could ask me should LGBT be considered a DBE in the City of San Diego? Yes. I can actually think of probably something that is on the NGLCC.org's website. But I know that New York City, Los Angeles, Long Beach, Pennsylvania, I mean, Philadelphia, Boston [have done it successfully]." [#406]
- The non-Hispanic white male owner of a professional services consulting firm noted, "Actually, I do have one, if they [City of San Diego] were required to have independent third parties, that would play a role in procuring the bids... these independent third parties that have no kind of relationship with any prospective bidders, et cetera. We have seen companies that sort of do that in our world, they're more or less just clearing houses for people who need marketing help. Then based on where you're based, or what your need is, we'll say, 'Hey, here are the three firms you should talk to.' I'd love to see more of that, as opposed to throwing an RFP out there, fishing for people to send them their info when you've already cherry picked who you want to work with anyway, and you're just going through the motions. The other thing I would say is having realistic budgets, and even listing the budget and not having the expectation that work be submitted along with a bid, which is also problematic in

our world as well. AKA free ideas. If the City of San Diego says, Hey, the airport authority is putting out a bid for public relations, we want to hear what your plan would be or what you would do. That's code for, we want free ideas. So, imagine 20 bids come in, and they all have ideas. Then the airport authority has got all these great ideas, and maybe they'd pick one bid, but now they have 20 some odd ideas that they can work with that one bid. You kind of see how my... through the lens of being a marketing and PR firm through an RFP process, how you can get used and abused pretty quickly." [#352]

Overcoming Barriers

- The Sub-Saharan white male co-owner of a construction and engineering firm stated, "But if the City is really interested in getting a bigger pool of qualified people, and don't just say for minority or anything like that. Let's just say, make it one sided. That they want to get qualified people at a good price. They could take care of the liability insurance for the project. Get an insurance that will cover everyone. If you want to go design a condominium, the developer will go get an insurance for the entire condominium that will cover everyone. That is for the life of the condominium, for the 10 years that they are liable. Well, there's one advantage is, first of all, everybody doesn't have to go buy insurance for it. Two, you get a bigger pool of engineers, architects who don't have insurance, who can work on it. Three, if there is a lawsuit, you won't have everybody at each other's throats... This is where you begin. You make your pool. The qualification is not based on liability insurance. Qualification is that what you've done. It's the qualification that will save you from liability, lawsuits and things like that. People who will see things, a better product. Prevention is not the main goal. You don't have to provide financing for me to get insurance. You don't have to do any of that. Just like condominium. Every condominium is done this way now. City wants to do a capital improvement, go buy insurance for that capital improvement, for the life of that project, for 10 years. Done." [#202]

Community Outreach and Communication

- The Hispanic male principal engineer at an MBE-certified geotechnical and environmental science business reported, "I'm also on a bunch of liaison groups for the AGC here in San Diego. So, the communication lines just need to be kept open all the time, be aware, and ask the industry, where are we going? But at the same time, the engineering and so forth departments need to work with the city council. One of the biggest issues that we see down here is that San Diego essentially is at the bottom of the state, in the very far corner, and Sacramento and everything else doesn't look at what happens down here, and they treat us differently than - what they decide up in Sacramento affects us down here and they don't understand it. And the local agencies need to understand that they have to work with the bureaucracy up there in the state level." [#108]
- The non-Hispanic white female owner of a consulting firm stated, "Belonging to the SBA or going to SBA workshops, you do meet other people, who have small businesses, but it's a social thing and then you leave. I think that, for example, some kind of monthly meetings and maybe monthly meetings that integrate, not just this organization and not just that kind of organization, but integrate these different clients that you're talking about, so people are talking to one another and getting to know one another on a more personal level, personal

professional level, able to form relationships, professional relationships where they link up with people. I think that would be a great thing, whether it's virtual or whether it's in person." [#335]

- A female member of a civil rights organization stated, "The City's been operating in a way that they have enough applicants, so why go out and reach out to other communities when they're already making it happen the way that they've always done business, if that makes sense? So, access, because just to the point that she [another participant] mentioned, the money's run out quick because certain people knew about it and other people did not, and that's a disparity. And so, that access, and knowing that it's even available. But, again, as we discussed in the last few meetings that... a lot of people are not answering your phone calls because they don't have phones. There are a lot of things that have impacted those businesses when they were struggling ordinarily in normal operations." [FG#5]
- A female member of a civil rights organization stated, "I had stated earlier, part of the problem of the lack of communication is a lack from the city council, the city council president and the council members that requested this [the disparity study], it got lost in translation because it was said during budget times. And so, we never circled back." [FG#5]
- A male member of a civil rights organization reported, "It kind of seems like there's no empathy for certain communities where some, you get those standing meetings with those high elected officials, but with others, you just get a rinky-dinky PowerPoint presentation that hasn't been updated since the '90s. So, it was kind of like who are you investing in?" [FG#5]
- A female member of a civil rights organization stated, "We have many local newspapers, and I'm just going to speak on the black media right now since I'm a black woman, we [Public Agencies] don't utilize our black media. We have a 60 year plus paper that goes throughout the county. Since COVID, they have been giving out over 4,000 free newspapers a week at all the food distributions so that people can get the latest and greatest COVID information on what is occurring. The County has gone to *La Presa*, they've gone to the *Voice & Viewpoint*, they've gone to *The Monitor*, the local neighborhood, this is a community, a city that is Wi-Fi deficient. So many people, they're not paying their cable bills, so they don't have cable. The school has shown who needs a hotspot so the children can pull up their class, but they can't hear because the children next door is using their hotspot, they get to hear, but they can't see on their computer. So, I want to make sure that that's also in the disparity study, that we don't use what the City of San Diego calls for to distribute information. We have a radio station, G.O.D. 1 Radio, that does PSA's and SDGE...the City of San Diego does not utilize the things that we need as a community, the Asian Paper." [FG#5]
- A male member of a civil rights organization stated, "The goal aspect is only one side of it, there's a whole other side as far as programs, as far as reaching out to the community, getting that information to organizations like the Urban League, and the NAACP and the Central Black Chambers, that's where the disconnect has been, there's not a flow of information or even programs that help encourage the growth of these businesses." [FG#5]
- A female member of a chamber of commerce reported, "And so no one speaks for one size fits all. If I hire a Latina or a Latino organization, Oh my God. They can represent all the minorities in the county. That does not fly either. So, we really have to understand what inclusion means,

right? And the process of trying to get to the answers and a defined strategic plan around this and execute that plan has to be where you have diverse people at the table, right? My recommendation: form a committee that's about this, from people, from the businesses, from the community that can really say, 'Hey, here's what we need. Hey, here's how we're going to resolve this.' And not just that they're giving recommendations, but that the city will take three of the recommendations, right?... form a committee of diverse businesses only, right? And have them give recommendations, approve three of give seven recommendations, five, I don't care, but approve three of them for the year, execute on that, make sure there's metrics behind it, and then do AB testing even, right?" [FG#3]

Funding Local Community Groups

- The Black American female owner of an ACDBE- and DBE-certified consulting firm reported, "I think that we should, as a whole, San Diego County, City, every agency should be working their butts off to see to it that these small businesses are getting more. And I think there should be a more cohesive... A group should be put together of some sort. Mentorship programs. And I think that part of it's going to be putting more money to the different agencies so that they have the flexibility and the ability to even put these things together. Because a lot of it, like I said, is money. If you don't have a staff and it's only one person, well, you might think this is great to have a mentorship/protege program, but do you have the staff, the capacity to even do it?" [#347]
- A female member of an equality organization stated, "We have a well-intentioned program, but the resources, the human capital, the accountability, the political commitment, then barriers of access and barriers that reflect onerous amounts of time and attention make it so that, it's only partially as successful as it could be. Our staff are quite extraordinary and have story after story after story. They are highly talented, deeply professionally invested in the success and we here get a lot of feedback from them on what they hear the subs and prime say as they're trying to get into our processes." [FG#1]

Concluding Thoughts about Working with The City of San Diego and Other Public Agencies

- The Black American female owner of a towing service firm stated, "I don't know of any public agency in the San Diego area that's working with people like me. I know of none." [#302]
- The non-Hispanic white female owner of an ELBE-, SLBE-, DBE-, and WBE-certified environmental consulting firm reported, "No. In conclusion, I would like to say that, in terms of working with staff at the City and other agencies, I've had a great experience. I love working with city staff. So, anything that I said that may have come off, not quite as positive or whatever, it's not based on my personal experiences. I think I love working with the City. Like I said, I work with Stormwater and they are great people, I have a good relationship with them. I think they care about their work. And, in general, I think we're very... SANDAG to me is the best MPO in the city. And I think we're extremely fortunate in the city, in the state not the city, in the state. I think we're very fortunate in San Diego to have a really strong, motivated group of agencies working down here and it's been really awesome to work. So, I just want to put that positive message in here to make sure that comes through as well." [#322]

- The non-Hispanic white female owner at an DBE- and WBE-certified engineering consulting firm reported, “Well, for public agencies, I think the harassment and treatment of women and people of color has to improve. That's just horrific what's happening and has always been happening. As a nation, I think we're really starting to understand how institutions have given a pass to discrimination and how it is baked into our culture. People are going to have to be accountable. People in positions of power need to be personally accountable.” [#407]

COVID-19

- The Hispanic American female owner of a human resources consulting firm noted, “What I personally think the city could do to help all businesses is to find better ways to enforce measures to help us get a handle on COVID, because the only way to get the economy moving in a sustainable way again is to somehow have people change their behavior and stop that this level of spreading. So, what I just wish is I am willing to do my part, and I wish that the city would be stricter in enforcing health orders to make the situation better. Until that happens, I don't think the businesses are really going to be recovering in a sustainable way.” [#308]
- The [refused to identify race] male owner of an SBE-certified wrecking and demolition firm noted, “I think honestly, I really to go back to what I'm saying is that that skilled workforce thing needs to get really looked back at, and then also the requirements because unfortunately, San Diego does not have the workforce to be able to mandate that. Unfortunately, right now, it seems like, and that's for a while until Governor Newsom put that in place, San Diego is exempted from that, and now we have businesses that are getting fined for up to 5,000 dollars a month because they can't comply with that. I think just if it's going to be required for generals to do that.” [#324]

Appeal to Small Companies

- The non-Hispanic white female small business coordinator at a large construction firm stated, “Well, it's the small businesses are going to see this [study report] and the minority businesses are going to see this. The only thing I ever tell people in on all of my panels, when I'm speaking to these groups is respond, respond, respond, you'd have more opportunity if you just picked up the phone and responded to a general contractor calling you. And all of my counterparts say the same thing. So, we're all having the same problem.” [#369]
- The female owner of an engineering firm wrote, “I had a contract with the [XYZ] Department to plan check projects for the [ABC Project]. A new manager was hired, who has had a long history of pushing plans out to bid, ready or not, and dealing with the issues in the field. I was one of the consultants doing plan review to be let go. The insurance requirements are so high for a small office that it makes compensation low. To reduce costs, it makes sense to purchase insurance on an annual basis which I did. Since I was working full time for the City, I did not have other clients to spread overhead. Even though I was contracted to work a year, the City would not reimburse me for the portion of the required insurance that was not refunded upon termination of the contract. It was also questionable if the cancelled insurance would cover me for the work I had completed. Because of the high level of insurance required, I ended up making almost nothing for months of effort. Most of the insurance requirements should have been waived because I was not the engineer of record but only reviewing their

work and not dictating changes but making recommendations that could have been rejected by the design engineer. If anything, my efforts reduced both the design engineer and the City of San Diego's risk. In addition, the contracting process was effort consuming and disproportional to the amount of work contracted. These are major obstacles and risks that I believe keep small business from participating in City of San Diego professional contracts." [WT#1]

APPENDIX E.

Availability Analysis Approach

APPENDIX E.

Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of minority-, woman-, and service-disabled veteran-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts that the City of San Diego (the City) awards.¹ Appendix E expands on the information presented in Chapter 5 to further describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

A. Availability data

BBC partnered with Customer Research International (CRI) and Davis Research to conduct telephone and online surveys with hundreds of business establishments throughout the *relevant geographic market area* (RGMA) for City contracting, which BBC identified as San Diego County. Business establishments that CRI and Davis Research surveyed were businesses with locations in the RGMA that the study team identified as doing work in fields closely related to the types of contracts and procurements the City awarded between July 1, 2014 and June 30, 2019 (i.e., *the study period*). The study team began the survey process by determining the work specializations, or *subindustries*, for each relevant City prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations.

As part of the telephone survey effort, the study team attempted to contact 1,919 local business establishments that perform work that is relevant to City contracting. The study team was able to successfully contact 638 of those business establishments (363 business establishments did not have valid phone listings). Of business establishments the study team contacted successfully, 268 establishments that completed availability surveys.

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business that is operating in the relevant geographic market area. Instead, it was to collect information from a large, unbiased subset of local businesses that appropriately represents the

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

entire relevant business population. That approach allowed BBC to estimate the availability of minority-, woman-, and service-disabled veteran-owned businesses in an accurate, statistically-valid manner. In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction, professional services, or goods and other services work. Instead, BBC determined the types of work most relevant to City contracting by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period.

Figure E-1 lists the 8-digit work specialization codes within construction, professional services, and goods and other services that were most related to the contract and procurement dollars the City awarded during the study period and that BBC included as part of the availability analysis. The study team grouped those specializations into distinct *subindustries*, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect information from relevant business establishments located in the RGMA. As an example, the survey instrument that the study team used with construction establishments is presented at the end of Appendix E. The study team modified the construction survey instrument slightly for use with establishments working in other industries in order to reflect terms more commonly used in those industries (e.g., the study team substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying construction design and other professional services establishments).²

1. Survey structure. The availability survey included 14 sections, and CRI and Davis Research attempted to cover all sections with each business establishment that the study team successfully contacted and that was willing to complete a survey.

a. Identification of purpose. The surveys began by identifying the City as the survey sponsor and describing the purpose of the study. (e.g., “The City of San Diego is conducting a survey to develop a list of companies interested in providing construction-related services to the City and other local public agencies.”)

b. Verification of correct business name. The surveyor verified that he or she had reached the correct business. If the business name was not correct, surveyors asked if the respondent knew how to contact the correct business. CRI and Davis Research then followed up with the correct business based on the new contact information (see areas “X” and “Y” of the availability survey instrument).

c. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

² BBC also developed fax and online versions of the survey instrument for business establishments that preferred to complete the survey in those formats.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		Electrical work	
17990100	Athletic and recreation facilities construction	17310100	Electric power systems contractors
15420100	Commercial and office building contractors	17310403	Fire detection and burglar alarm systems specialization
15420101	Commercial and office building, new construction	17319903	General electrical contractor
15420103	Commercial and office buildings, renovation and repair	17319904	Lighting contractor
15429902	Design and erection, combined: non-residential		
15419905	Industrial buildings, new construction, nec	Excavation, drilling, wrecking, and demolition	
16290500	Industrial plant construction	17959902	Demolition, buildings and other structures
15420000	Nonresidential construction, nec	16290106	Dredging contractor
15420400	Specialized public building contractors	16299902	Earthmoving contractor
17910000	Structural steel erection	17949901	Excavation and grading, building construction
16290505	Waste water and sewage treatment plant construction	17940000	Excavation work
		16110203	Grading
		17950000	Wrecking and demolition work
Concrete work		Fencing, guardrails, barriers, and signs	
17959901	Concrete breaking for streets and highways	17999912	Fence construction
16110202	Concrete construction: roads, highways, sidewalks, etc.	16110102	Highway and street sign installation
17719901	Concrete pumping	17999929	Sign installation and maintenance
17919902	Concrete reinforcement, placing of		
17719902	Concrete repair	Heavy construction	
17710000	Concrete work	17710301	Blacktop (asphalt) work
76929903	Cracked casting repair	16229901	Bridge construction
17710200	Curb and sidewalk contractors	16220000	Bridge, tunnel, and elevated highway construction
17719904	Foundation and footing contractor	16119901	General contractor, highway and street construction
17410100	Foundation and retaining wall construction	16290000	Heavy construction, nec
17710103	Gunite contractor	16110000	Highway and street construction
17710202	Sidewalk contractor	16110204	Highway and street paving contractor
Concrete, asphalt, sand, and gravel products		16110205	Resurfacing contractor
50329901	Aggregate	16110200	Surfacing and paving
14420000	Construction sand and gravel		
32730000	Ready-mixed concrete	Heavy construction equipment rental	
Electrical equipment and supplies		50820300	General construction machinery and equipment
50630000	Electrical apparatus and equipment	73530000	Heavy construction equipment rental
50630206	Electrical supplies, nec		
36480000	Lighting equipment, nec	Landscape services	
50630400	Lighting fixtures	7829903	Landscape contractors
57190202	Lighting fixtures	7820203	Lawn care services

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)		Trucking, hauling and storage (continued)	
Landscaping supplies and equipment		42129905	Dump truck haulage
50830202	Landscaping equipment	42129909	Light haulage and cartage, local
01819902	Sod farms	42140000	Local trucking with storage
Other construction materials		42130000	Trucking, except local
34460301	Fences or posts, ornamental iron or steel	Water, sewer, and utility lines	
34460300	Fences, gates, posts, and flagpoles	16230201	Cable laying construction
Other construction services		17310301	Cable television installation
17969901	Elevator installation and conversion	16230202	Cable television line construction
76992501	Elevators: inspection, service, and repair	16230200	Communication line and transmission tower construction
17930000	Glass and glazing work	17999906	Core drilling and cutting
Painting, striping, and marking		16290105	Drainage system construction
17210200	Commercial painting	16239901	Electric power line construction
Plumbing and HVAC		17310302	Fiber optic cable installation
17110400	Heating and air conditioning contractors	17990301	Gasoline pump installation
17110401	Mechanical contractor	17990208	Insulation of pipes and boilers
Railroad construction		16230102	Natural gas compressor station construction
47890400	Railroad maintenance and repair services	16230103	Oil and gas pipeline construction
Rebar and reinforcing steel		17999935	Petroleum storage tank installation, underground
34410000	Fabricated structural Metal	16239903	Pipe laying construction
Remediation and cleaning		16239904	Pipeline construction, nsk
87449904	Environmental remediation	17999941	Protective lining installation, underground (sewage, etc.)
Traffic control and safety		16239905	Pumping station construction
36690200	Transportation signaling devices	17110201	Septic system construction
Trucking, hauling and storage		17990300	Service station equipment
42139903	Contract haulers	17990302	Service station equipment installation, maint., and repair
		76992211	Service station equipment repair
		76990403	Sewer cleaning and rodding
		16230302	Sewer line construction
		16230203	Telephone and communication line construction
		16239906	Underground utilities contractor
		16230300	Water and sewer line construction
		16230000	Water, sewer, and utility lines

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional Services			
Advertising, marketing and public relations		Human resources and job training services	
87439903	Public relations and publicity	87420200	Human resource consulting services
Architecture and Engineering		IT and data services	
87120100	Architectural engineering	73790100	Computer related maintenance services
87120101	Architectural engineering	73710100	Custom computer programming services
87110401	Building construction consultant	Landscape architecture	
87110402	Civil engineering	7810102	Horticultural counseling services
87110400	Construction and civil engineering	7810201	Landscape architects
73891801	Design, commercial and industrial	Surveying and mapmaking	
87110000	Engineering services	87130000	Surveying services
87110404	Structural engineering	13890200	Testing, measuring, surveying, and analysis services
Construction management		Testing and inspection	
87419902	Construction management	73890200	Inspection and testing services
87420402	Construction project management consultant	Transportation and urban planning	
87419903	Industrial management	87420410	Transportation consultant
Environmental services		87480200	Urban planning and consulting services
89990700	Earth science services	Goods and Services	
87489905	Environmental consultant	Automobiles, parts, and services	
89990703	Natural resource preservation service	55310100 Auto and truck equipment and parts	
87110101	Pollution control engineering	50840602 Engines and parts, diesel	
Goods and Services		50840605 Lift trucks and parts	
Automobiles, parts, and services		55110000 New and used car dealers	
55310100 Auto and truck equipment and parts		50120208 Trucks, commercial	
50840602 Engines and parts, diesel		Cleaning and janitorial services	
50840605 Lift trucks and parts		73490101 Building cleaning service	
55110000 New and used car dealers		Industrial equipment and machinery	
50120208 Trucks, commercial		35610000 Pumps and pumping equipment	

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Services (continued)			
Office equipment		Safety equipment	
50440207	Photocopy machines	50870500	Firefighting equipment
		50849912	Safety equipment
		50990300	Safety equipment and supplies
Other goods		Security guard services	
50640000	Electrical appliances, television and radio	73810105	Security guard service
51720000	Petroleum products, nec		
73829903	Protective devices, security		
Other services		Transit services	
75490300	Towing services	41110000	Local and suburban transit
		41190000	Local passenger transportation, nec
Petroleum and petroleum products		Waste and recycling services	
59830000	Fuel oil dealers	49530201	Garbage: collecting, destroying, and processing
		42129907	Hazardous waste transport
Portable toilet rental		49530200	Refuse collection and disposal services
73599904	Portable toilet rental	49590300	Toxic or hazardous waste cleanup

d. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B's work specialization codes were incorrect, businesses described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work that they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

e. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4). The study team also asked business owners or managers if their businesses were subsidiaries or affiliates of other businesses (Questions A5 and A6).

6. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past government and private sector contracts. CRI and Davis Research asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).³

g. Interest in future work. The surveyor asked businesses about their interest in future work with the City and other government agencies. CRI and Davis Research asked those questions in connection with both prime contracts and subcontracts (Questions B3 through B7).⁴

h. Geographic area. The surveyor asked businesses where they perform work or serve customers (Questions C1a through C1k).

i. Year established. The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

j. Largest contracts. The study team asked businesses about the value of the largest contracts on which they had bid or had been awarded during the past five years. (Questions D2 and D3).

k. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities, women, veterans, individuals with disabilities, or lesbian, gay, bisexual, or transgender individuals (Questions E1 through E6). If businesses indicated they were minority-owned, they were also asked about the race/ethnicity of their businesses' ownership (Question E3). The study team confirmed that information through several other data sources, including:

- The City's directory of certified businesses;
- Office of Equal Opportunity Contracting certification and ownership lists;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- State of California Unified Certification Program certification and ownership lists;

³ Goods and services providers were not asked questions about subcontract work.

⁴ Goods and services providers were not asked questions about their interest in subcontract work.

- State of California Public Utilities Supplier Diversity certification and ownership lists;
- City vendor data; and
- Information from other available certification directories and business lists.

l. Business revenue. The surveyor asked several questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also included questions about their revenues and number of employees across all locations (Questions F1 through F2).

m. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning working with the City and other local government agencies and 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).

n. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

D. Survey Execution

CRI and Davis Research conducted all availability surveys in 2020. The firm made up to eight attempts during different times of the day and on different days of the week to successfully reach each business establishment. The firms attempted to survey a company representative such as the owner, manager, or other officer who could provide accurate and detailed responses to survey questions.

1. Establishments that the study team successfully contacted. Figure E-2 presents the disposition of the 1,919 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 638 establishments that the study team was able to successfully contact.

a. Non-working or wrong phone numbers. Some of the business listings that the study team purchased from D&B and that CRI and Davis Research attempted to contact were:

- Duplicate phone numbers (11 listings);
- Non-working phone numbers (286 listings); or
- Wrong numbers for the desired businesses (66 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 D&B listed them and the time that the study team attempted to contact them.

b. Working phone numbers. As shown in Figure E-2, there were 1,556 business establishments with working phone numbers that CRI and Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after eight attempts at different times of the day and on different days of the week for 821 establishments.
- The firm could not reach a responsible staff member after eight attempts at different times of the day on different days of the week for 93 establishments.
- The firm could not conduct the availability survey due to language barriers for four businesses.

Thus, CRI and Davis Research were able to successfully contact 638 business establishments.

Figure E-2.
Disposition of attempts to survey business establishments

Source:
2020 availability surveys.

	Number of Establishments
Beginning list	1,919
Less duplicate phone numbers	11
Less non-working phone numbers	286
Less wrong number/business	66
Unique business listings with working phone numbers	1,556
Less no answer	821
Less could not reach responsible staff member	93
Less language barrier	4
Establishments successfully contacted	638

2. Establishments included in the availability database. Figure E-3 presents the disposition of the 638 business establishments that CRI and Davis Research successfully contacted and how that number resulted in the 395 businesses that the study team included in the availability database and that the study team considered potentially available for City work.

a. Establishments not interested in discussing availability for City work. Of the 638 business establishments that the study team successfully contacted, 307 establishments were not interested in discussing their availability for City work. In addition, BBC sent hardcopy fax availability surveys or invitations to complete the survey online upon request but did not receive completed surveys from 63 establishments. In total, 268 successfully contacted business establishments completed availability surveys.

b. Establishments available for City work. The study team deemed only a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that the City 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 one establishment that indicated it was a not for-profit organization.
- BBC excluded 33 establishments that reported they were not interested in either prime contracting or subcontracting opportunities with the City.
- BBC excluded three establishments that indicated their main lines of business were outside of the study scope.

- 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.

**Figure E-3.
Disposition of
successfully
contacted business
establishments**

Source:
2020 availability surveys.

Note:

¹ BBC included information on 173 businesses from the 2019 San Diego Association of Governments (SANDAG) Disparity Study in the availability database.

	Number of Establishments
Establishments successfully contacted	638
Less establishments not interested in discussing availability for work	307
Less unreturned fax/online surveys	63
Establishments that completed surveys	268
Less not a for-profit business	1
Less no interest in future work	33
Less line of work outside of study scope	3
Less multiple establishments	9
Establishments potentially available for City work	222
Additional establishments potentially available for entity work¹	173
Total establishments potentially available for entity work	395

After those exclusions, BBC compiled a database of 222 businesses that were considered potentially available for City work. BBC also included information on 173 businesses from the 2019 San Diego Association of Governments (SANDAG) Disparity Study in the availability database. BBC only included information businesses from the SANDAG disparity study that can perform work in San Diego County that is relevant to the City’s construction, professional services, or goods and other services contracts. Thus, in total, BBC considered 395 businesses as potentially available for City work.

Coding responses from multi-location businesses. Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work (i.e., prime contractor or subcontractor) that establishments of the same business reported into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.⁵

⁵ Goods and other services businesses were not asked questions about subcontract work.

- 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 coded businesses as minority-, woman-, or service-disabled veteran-owned if the majority of its establishments reported such status.

E. Additional Considerations

BBC made several additional considerations related to its approach to measuring availability to ensure that estimates of the availability of businesses for City work were accurate and appropriate.

1. Providing representative estimates of business availability. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of City contracting dollars for which minority- and woman-owned businesses are ready, willing, and able to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for City work and should not be used in that way. Federal courts have approved BBC's approach to measuring availability. In addition, federal regulations around minority- and woman-owned business programs recommend similar approaches to measuring availability for organizations implementing business assistance programs.

2. Using a custom census approach to measuring availability. Federal guidance around measuring the availability of minority- and woman-owned businesses recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when measuring the availability of businesses for City work is that dividing a simple headcount of certified businesses by the total number of businesses does not account for business characteristics that are crucial to estimating availability accurately. The methodology that BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple headcount approach. For example, the availability surveys that the study team conducted provided data on qualifications, relative capacity, and interest in City work for each business, which allowed BBC to take a more detailed approach to measuring availability. Court cases involving implementations of minority- and woman-owned business programs have approved the use of such approaches to measuring availability.

3. Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. Specifically, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify their main lines of business, they often

gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

Non-response. An analysis of non-response considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response due to:

- Research sponsorship; and
- Work specializations.

a. Research sponsorship. Surveyors introduced themselves by identifying the City as the survey sponsor, because businesses may be less likely to answer somewhat sensitive business questions if the surveyor was unable to identify the sponsor. In past survey efforts—particularly those related to availability analyses—BBC has found that identifying the sponsor substantially increases response rates.

b. Work specializations. Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate the availability of small disadvantaged businesses would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone. However, work specialization as a potential source of non-response bias in the BBC availability analysis is minimized, because the availability analysis examines businesses within particular work fields before calculating overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

4. 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.

a. Certification lists. BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from the City. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses. The study team compared survey responses concerning business ownership with such information.

b. Contract data. BBC examined City contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual City contract data.

c. City review. The City reviewed contract and vendor data that the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

DRAFT Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the City of San Diego.

This is not a sales call. The City of San Diego is conducting a survey to develop a list of companies who have worked with or are interested in providing construction-related services to the City and other local public agencies.

The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES WHO HAVE WORKED WITH OR ARE INTERESTED IN WORKING WITH THE CITY OF SAN DIEGO]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

- 1=RIGHT COMPANY – **SKIP TO A2**
- 2=NOT RIGHT COMPANY
- 99=REFUSE TO GIVE INFORMATION – **TERMINATE**

Y1. What is the name of this firm?

- 1=VERBATIM

Y2. Is [new firm name] associated with [old firm name] in anyway?

- 1=Yes, same owner doing business under a different name – **SKIP TO Y4**
- 2=Yes, can give information about named company
- 3=Company bought/sold/changed ownership
- 98=No, does not have information – **TERMINATE**
- 99=Refused to give information – **TERMINATE**

Y3. Can you give me the complete address or city for [new firm name]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

Y4. Do you work for [firm name / new firm name]?

1=YES

2=NO – TERMINATE

A2. Let me confirm that [firm name/new firm name] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other – TERMINATE

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is that correct?

[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 A3c

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of business at [firm name/new firm name]?

[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

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

A4. 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)

A5. 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**

A6. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or received an award-for either the public or private sector-for any part of a contract as either a prime contractor or subcontractor?

[NOTE TO INTERVIEWER – THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]

1=Yes

2=No – **SKIP TO B3**

98=(DON'T KNOW) – **SKIP TO B3**

99=(REFUSED) – **SKIP TO B3**

B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

5= Other - SPECIFY _____

98=(DON'T KNOW)

99=(REFUSED)

B3. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company *interested* in working with government or public agencies in the San Diego area?

1=Yes

2=No – **SKIP TO B7**

98=(DON'T KNOW) – **SKIP TO B7**

99=(REFUSED) – **SKIP TO B7**

B4. Is your company *interested* in working with government or public agencies in the San Diego area as a prime contractor; a subcontractor/trucker/supplier; or both?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 98= (DON'T KNOW)
- 99=(REFUSED)

B5. Is your company *interested* in working with the City of San Diego specifically in the future?

- 1=Yes – **SKIP TO B7**
- 2=No
- 98=(DON'T KNOW) – **SKIP TO B7**
- 99=(REFUSED) – **SKIP TO B7**

B6. Please tell me why your company is not interested in future work with the City of San Diego?

[ENTER VERBATIM RESPONSE]

- 1=VERBATIM

B7. Is your company *interested* in working with the California Department of Transportation, also known as Caltrans, in the future?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

Now I want to ask you about the geographic areas your company serves within California.

C1. Is your company able to serve all regions of California or only certain regions of the state?

1=All of the state– **SKIP TO D1**

2=Only parts of the state

98=(DON'T KNOW)

99=(REFUSED)

C1a. Could your company do work or serve customers in the San Diego Region, extending from San Diego and Oceanside east to the Arizona border?

[NOTE TO INTERVIEWER: IF ASKED, THE SAN DIEGO AREA INCLUDES SAN DIEGO AND IMPERIAL COUNTIES.]

1=Yes – **SKIP to C1c**

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1b. Could your company do work or serve customers in San Diego County?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1c. Could your company do work or serve customers in the North Coast Region, extending from Mendocino through Eureka to the Oregon border?

[NOTE TO INTERVIEWER: IF ASKED, THE NORTH COAST REGION INCLUDES DEL NORTE, HUMBOLDT, LAKE, AND MENDOCINO COUNTIES]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1d. Could your company do work or serve customers in the Shasta-Redding Area, extending from Red Bluff through Redding to the Oregon border?

[NOTE TO INTERVIEWER: IF ASKED, THE SHASTA-REDDING AREA INCLUDES LASSEN, MODOC, PLUMAS, SHASTA, SISKIYOU, TEHAMA, AND TRINITY COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1e. Could your company do work or serve customers in the Sacramento-Tahoe Region, extending from Sacramento Valley to Lake Tahoe and up to Chico?

[NOTE TO INTERVIEWER: IF ASKED, THE SACRAMENTO-TAHOE AREA INCLUDES BUTTE, COLUSA, EL DORADO, GLENN, NEVADA, PLACER, SACRAMENTO, SIERRA, SUTTER, YOLO, AND YUBA COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1f. Could your company do work or serve customers in the San Francisco Bay Area, extending from San Jose to Santa Rosa?

[NOTE TO INTERVIEWER: IF ASKED, THE SAN FRANCISCO BAY AREA INCLUDES ALAMEDA, CONTRA COSTA, SONOMA, MARIN, SAN FRANCISCO, SAN MATEO, SANTA CLARA, SOLANO, AND NAPA COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1g. Could your company do work or serve customers in the Central Coast Region, extending from Santa Barbara to Salinas?

[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL COAST REGION INCLUDES MONTEREY, SAN BENITO, SAN LUIS OBISPO, SANTA BARBARA, AND SANTA CRUZ COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1h. Could your company do work or serve customers in the Central Valley, extending from Bakersfield to Stockton?

[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL VALLEY INCLUDES ALPINE, AMADOR, CALAVERAS, FRESNO, KERN, KINGS, MADERA, MARIPOSA, MERCED, SAN JOAQUIN, STANISLAUS, TUOLUMNE, AND TULARE COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1i. Could your company do work or serve customers in the Bishop Region, extending from Bishop to Mono Lake along the Nevada border?

[NOTE TO INTERVIEWER: IF ASKED, THE BISHOP AREA INCLUDES INYO AND MONO COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1j. Could your company do work or serve customers in the San Bernardino-Riverside Region, including San Bernardino and Riverside and extending east to Arizona?

[NOTE TO INTERVIEWER: IF ASKED, THE SAN BERNARDINO-RIVERSIDE AREA INCLUDES RIVERSIDE AND SAN BERNARDINO COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1k. Could your company do work or serve customers in the Los Angeles Basin, extending from San Clemente to Ventura and east to Pomona?

[NOTE TO INTERVIEWER: IF ASKED, THE LOS ANGELES BASIN INCLUDES LOS ANGELES, VENTURA, AND ORANGE COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. About what year was your firm established?

1=NUMERIC (1600-2020)

9998 = (DON'T KNOW)

9999 = (REFUSED)

D2. What was the largest prime contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.

[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)/(NO PRIME BIDS) |
| 8=More than \$10 million to \$20 million | |

D3. What was the largest subcontract or supply contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.

[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)/(NO SUB BIDS) |
| 8=More than \$10 million to \$20 million | |

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [*firm name / new firm name*] a woman-owned business?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by Black American, Asian American, Hispanic American, or Native American individuals. By this definition, is [*firm name/new firm name*] a minority-owned business?

1=Yes

2=No – **SKIP TO E4**

98=(DON'T KNOW) – **SKIP TO E4**

99=(REFUSED) – **SKIP TO E4**

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

E4. A business is defined as veteran-owned if more than half—that is, 51 percent or more—of the ownership and control is by a veteran of the U.S. military. By this definition, is [*firm name/new firm name*] a veteran-owned business?

[NOTE TO INTERVIEWER – U.S. MILITARY SERVICES INCLUDE THE U.S. ARMY, AIR FORCE, NAVY, MARINES, OR COAST GUARD.]

1=Yes

2=No – **SKIP TO E6**

98=(DON'T KNOW) – **SKIP TO E6**

99=(REFUSED) – **SKIP TO E6**

E5. Does that veteran owner have a physical or mental disability that resulted directly from their service in the U.S. military?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E6. A business is defined as LGBT-owned if more than half—that is, 51 percent or more—of the ownership and control of the business is by people that identify as Lesbian, Gay, Bisexual, or Transgender. By this definition, is [firm name/new firm name] a LGBT-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

F1. Dun & Bradstreet lists the average annual gross revenue of your company to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue, including all locations, over the last three years?

1=Yes – **SKIP TO F3**

2=No

98=(DON'T KNOW) – **SKIP TO F3**

99=(REFUSED) – **SKIP TO F3**

F2. What was the average annual gross revenue of your company, including all locations, over the last three years? Would you say . . .

[READ LIST]

1=Less than \$1 Million

2=\$1.1 Million - \$2.25 Million

3=\$2.3 Million - \$3.5 Million

4=\$3.6 Million - \$4.5 Million

5=\$4.6 Million - \$6 Million

6=\$6.1 Million - \$8 Million

7=\$8.1 Million - \$12 Million

8=\$12.1 Million - \$16.5 Million

9=\$16.6 Million - \$19.5 Million

10=\$19.6 Million - \$22 Million

11=\$22.1 Million - \$24 Million

12=\$24.1 Million or more

98= (DON'T KNOW)

99= (REFUSED)

G1. We're interested in whether your company has experienced barriers or difficulties in San Diego 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 – SKIP TO END

98=(DON'T KNOW) – SKIP TO END

99=(REFUSED) – SKIP TO END

H1. What is your name?

1=VERBATIM NAME

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _____

99=(REFUSED)

H3. And at what email address can you be reached?

1=VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact Christian Silva from the City of San Diego at (619)236-6069.

APPENDIX F.

Disparity Tables

Figure F-1.

Table	Characteristics					
	Time period	Contract area	Contract role	Department	Contract size	Funding
F-2	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	P&C and E&CP	N/A	State and local
F-3	07/01/14 - 06/30/17	All industries	Prime contracts and subcontracts	P&C and E&CP	N/A	State and local
F-4	07/01/17 - 06/30/19	All industries	Prime contracts and subcontracts	P&C and E&CP	N/A	State and local
F-5	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	P&C	N/A	State and local
F-6	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	E&CP	N/A	State and local
F-7	07/01/14 - 06/30/19	Construction	Prime contracts and subcontracts	P&C and E&CP	N/A	State and local
F-8	07/01/14 - 06/30/19	Professional services	Prime contracts and subcontracts	P&C and E&CP	N/A	State and local
F-9	07/01/14 - 06/30/19	Goods and services	Prime contracts and subcontracts	P&C and E&CP	N/A	State and local
F-10	07/01/14 - 06/30/19	All industries	Prime contracts	P&C and E&CP	N/A	State and local
F-11	07/01/14 - 06/30/19	All industries	Subcontracts	P&C and E&CP	N/A	State and local
F-12	07/01/14 - 06/30/19	All industries	Prime contracts	P&C and E&CP	Large	State and local
F-13	07/01/14 - 06/30/19	All industries	Prime contracts	P&C and E&CP	Small	State and local
F-14	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	P&C and E&CP	N/A	Federal

Figure F-2.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,016	\$2,171,712	\$2,171,712				
(2) Minority and woman-owned businesses	1,709	\$415,176	\$415,176	19.1	31.0	-11.8	61.7
(3) Non-Hispanic white woman-owned	628	\$129,172	\$129,172	5.9	16.6	-10.7	35.8
(4) Minority-owned	1,081	\$286,004	\$286,004	13.2	14.4	-1.2	91.7
(5) Asian Pacific American-owned	104	\$24,307	\$24,307	1.1	1.2	-0.1	94.4
(6) Black American-owned	41	\$4,888	\$4,888	0.2	1.1	-0.9	19.8
(7) Hispanic American-owned	757	\$204,313	\$204,313	9.4	10.0	-0.6	93.8
(8) Native American-owned	72	\$7,514	\$7,514	0.3	1.7	-1.4	19.8
(9) Subcontinent Asian American-owned	107	\$44,982	\$44,982	2.1	0.3	1.8	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	1,182	\$184,885	\$184,885	8.5			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	348	\$56,504	\$56,504	2.6			
(13) Minority-owned (SLBE/ELBE certified)	834	\$128,381	\$128,381	5.9			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	28	\$3,128	\$3,128	0.1			
(16) Hispanic American-owned (SLBE/ELBE certified)	573	\$72,828	\$72,828	3.4			
(17) Native American-owned (SLBE/ELBE certified)	65	\$7,029	\$7,029	0.3			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	99	\$32,452	\$32,452	1.5			
(19) Unknown minority-owned (SLBE/ELBE certified)	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Time period: 07/01/2014 - 06/30/2017
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,920	\$1,537,347	\$1,537,347				
(2) Minority and woman-owned businesses	1,223	\$257,483	\$257,483	16.7	32.4	-15.6	51.7
(3) Non-Hispanic white woman-owned	451	\$92,197	\$92,197	6.0	18.7	-12.7	32.0
(4) Minority-owned	772	\$165,285	\$165,285	10.8	13.7	-2.9	78.7
(5) Asian Pacific American-owned	82	\$14,973	\$14,973	1.0	0.9	0.0	103.3
(6) Black American-owned	35	\$4,416	\$4,416	0.3	1.1	-0.8	25.4
(7) Hispanic American-owned	529	\$119,094	\$119,094	7.7	9.5	-1.8	81.5
(8) Native American-owned	55	\$6,444	\$6,444	0.4	1.8	-1.4	23.5
(9) Subcontinent Asian American-owned	71	\$20,359	\$20,359	1.3	0.3	1.0	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	839	\$123,820	\$123,820	8.1			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	242	\$41,509	\$41,509	2.7			
(13) Minority-owned (SLBE/ELBE certified)	597	\$82,311	\$82,311	5.4			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	24	\$2,681	\$2,681	0.2			
(16) Hispanic American-owned (SLBE/ELBE certified)	402	\$47,213	\$47,213	3.1			
(17) Native American-owned (SLBE/ELBE certified)	48	\$5,959	\$5,959	0.4			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	67	\$19,071	\$19,071	1.2			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-4.
Time period: 07/01/2017 - 07/01/2019
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,096	\$634,365	\$634,365				
(2) Minority and woman-owned businesses	486	\$157,693	\$157,693	24.9	27.5	-2.7	90.3
(3) Non-Hispanic white woman-owned	177	\$36,975	\$36,975	5.8	11.5	-5.6	50.9
(4) Minority-owned	309	\$120,719	\$120,719	19.0	16.1	3.0	118.5
(5) Asian Pacific American-owned	22	\$9,335	\$9,335	1.5	1.8	-0.3	82.9
(6) Black American-owned	6	\$471	\$471	0.1	1.1	-1.1	6.5
(7) Hispanic American-owned	228	\$85,219	\$85,219	13.4	11.3	2.2	119.1
(8) Native American-owned	17	\$1,070	\$1,070	0.2	1.6	-1.5	10.3
(9) Subcontinent Asian American-owned	36	\$24,623	\$24,623	3.9	0.2	3.7	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	343	\$61,065	\$61,065	9.6			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	106	\$14,995	\$14,995	2.4			
(13) Minority-owned (SLBE/ELBE certified)	237	\$46,071	\$46,071	7.3			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	4	\$446	\$446	0.1			
(16) Hispanic American-owned (SLBE/ELBE certified)	171	\$25,614	\$25,614	4.0			
(17) Native American-owned (SLBE/ELBE certified)	17	\$1,070	\$1,070	0.2			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	32	\$13,381	\$13,381	2.1			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-5.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: Purchasing & Contracting

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	256	\$467,407	\$467,407				
(2) Minority and woman-owned businesses	56	\$56,041	\$56,041	12.0	49.5	-37.5	24.2
(3) Non-Hispanic white woman-owned	26	\$15,339	\$15,339	3.3	39.3	-36.1	8.3
(4) Minority-owned	30	\$40,702	\$40,702	8.7	10.2	-1.4	85.8
(5) Asian Pacific American-owned	4	\$3,015	\$3,015	0.6	0.3	0.3	196.9
(6) Black American-owned	0	\$0	\$0	0.0	4.6	-4.6	0.0
(7) Hispanic American-owned	21	\$25,604	\$25,604	5.5	4.9	0.6	111.6
(8) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(9) Subcontinent Asian American-owned	5	\$12,083	\$12,083	2.6	0.1	2.5	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	9	\$6,289	\$6,289	1.3			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	4	\$2,358	\$2,358	0.5			
(13) Minority-owned (SLBE/ELBE certified)	5	\$3,931	\$3,931	0.8			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(16) Hispanic American-owned (SLBE/ELBE certified)	5	\$3,931	\$3,931	0.8			
(17) Native American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-6.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: Engineering & Capital Projects

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,760	\$1,704,306	\$1,704,306				
(2) Minority and woman-owned businesses	1,653	\$359,136	\$359,136	21.1	25.9	-4.8	81.4
(3) Non-Hispanic white woman-owned	602	\$113,833	\$113,833	6.7	10.4	-3.7	64.4
(4) Minority-owned	1,051	\$245,302	\$245,302	14.4	15.5	-1.1	92.8
(5) Asian Pacific American-owned	100	\$21,293	\$21,293	1.2	1.4	-0.2	87.9
(6) Black American-owned	41	\$4,888	\$4,888	0.3	0.2	0.1	155.7
(7) Hispanic American-owned	736	\$178,709	\$178,709	10.5	11.4	-0.9	91.8
(8) Native American-owned	72	\$7,514	\$7,514	0.4	2.2	-1.7	20.4
(9) Subcontinent Asian American-owned	102	\$32,899	\$32,899	1.9	0.3	1.6	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	1,173	\$178,596	\$178,596	10.5			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	344	\$54,146	\$54,146	3.2			
(13) Minority-owned (SLBE/ELBE certified)	829	\$124,451	\$124,451	7.3			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	28	\$3,128	\$3,128	0.2			
(16) Hispanic American-owned (SLBE/ELBE certified)	568	\$68,897	\$68,897	4.0			
(17) Native American-owned (SLBE/ELBE certified)	65	\$7,029	\$7,029	0.4			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	99	\$32,452	\$32,452	1.9			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-7.
Time period: 07/01/2014 - 06/30/2019
Contract area: Construction
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,366	\$1,353,567	\$1,353,567				
(2) Minority and woman-owned businesses	942	\$322,978	\$322,978	23.9	27.2	-3.3	87.8
(3) Non-Hispanic white woman-owned	360	\$91,141	\$91,141	6.7	11.3	-4.6	59.7
(4) Minority-owned	582	\$231,836	\$231,836	17.1	15.9	1.3	107.9
(5) Asian Pacific American-owned	17	\$10,393	\$10,393	0.8	1.3	-0.6	57.9
(6) Black American-owned	25	\$4,206	\$4,206	0.3	0.2	0.1	154.4
(7) Hispanic American-owned	461	\$184,698	\$184,698	13.6	12.7	1.0	107.8
(8) Native American-owned	14	\$4,246	\$4,246	0.3	1.7	-1.4	18.7
(9) Subcontinent Asian American-owned	65	\$28,294	\$28,294	2.1	0.0	2.1	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	565	\$140,288	\$140,288	10.4			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	150	\$37,082	\$37,082	2.7			
(13) Minority-owned (SLBE/ELBE certified)	415	\$103,206	\$103,206	7.6			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	15	\$2,464	\$2,464	0.2			
(16) Hispanic American-owned (SLBE/ELBE certified)	326	\$64,309	\$64,309	4.8			
(17) Native American-owned (SLBE/ELBE certified)	7	\$3,761	\$3,761	0.3			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	63	\$27,770	\$27,770	2.1			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-8.
Time period: 07/01/2014 - 06/30/2019
Contract area: Professional services
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,481	\$672,268	\$672,268				
(2) Minority and woman-owned businesses	738	\$82,647	\$82,647	12.3	41.3	-29.0	29.8
(3) Non-Hispanic white woman-owned	257	\$32,826	\$32,826	4.9	30.7	-25.8	15.9
(4) Minority-owned	481	\$49,820	\$49,820	7.4	10.6	-3.2	69.9
(5) Asian Pacific American-owned	84	\$11,007	\$11,007	1.6	1.2	0.5	141.2
(6) Black American-owned	16	\$682	\$682	0.1	0.1	0.0	123.5
(7) Hispanic American-owned	284	\$19,079	\$19,079	2.8	6.3	-3.4	45.4
(8) Native American-owned	58	\$3,268	\$3,268	0.5	2.3	-1.8	21.5
(9) Subcontinent Asian American-owned	39	\$15,785	\$15,785	2.3	0.8	1.5	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	610	\$44,540	\$44,540	6.6			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	197	\$19,413	\$19,413	2.9			
(13) Minority-owned (SLBE/ELBE certified)	413	\$25,127	\$25,127	3.7			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	13	\$663	\$663	0.1			
(16) Hispanic American-owned (SLBE/ELBE certified)	241	\$8,470	\$8,470	1.3			
(17) Native American-owned (SLBE/ELBE certified)	58	\$3,268	\$3,268	0.5			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	36	\$4,682	\$4,682	0.7			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-9.
Time period: 07/01/2014 - 06/30/2019
Contract area: Goods and services
Contract role: Prime contracts and subcontracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	169	\$145,877	\$145,877				
(2) Minority and woman-owned businesses	29	\$9,552	\$9,552	6.5	18.5	-12.0	35.3
(3) Non-Hispanic white woman-owned	11	\$5,204	\$5,204	3.6	0.9	2.7	200+
(4) Minority-owned	18	\$4,348	\$4,348	3.0	17.7	-14.7	16.9
(5) Asian Pacific American-owned	3	\$2,907	\$2,907	2.0	0.0	2.0	200+
(6) Black American-owned	0	\$0	\$0	0.0	14.7	-14.7	0.0
(7) Hispanic American-owned	12	\$537	\$537	0.4	3.0	-2.6	12.4
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	3	\$904	\$904	0.6	0.0	0.6	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	7	\$57	\$57	0.0			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	1	\$9	\$9	0.0			
(13) Minority-owned (SLBE/ELBE certified)	6	\$49	\$49	0.0			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(16) Hispanic American-owned (SLBE/ELBE certified)	6	\$49	\$49	0.0			
(17) Native American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-10.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Prime contracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	767	\$1,653,745	\$1,653,745				
(2) Minority and woman-owned businesses	180	\$214,311	\$214,311	13.0	30.3	-17.3	42.8
(3) Non-Hispanic white woman-owned	63	\$60,367	\$60,367	3.7	17.5	-13.8	20.9
(4) Minority-owned	117	\$153,944	\$153,944	9.3	12.8	-3.5	72.6
(5) Asian Pacific American-owned	13	\$7,216	\$7,216	0.4	0.5	-0.1	87.0
(6) Black American-owned	5	\$1,255	\$1,255	0.1	1.3	-1.2	5.7
(7) Hispanic American-owned	70	\$122,843	\$122,843	7.4	9.7	-2.2	77.0
(8) Native American-owned	0	\$0	\$0	0.0	1.2	-1.2	0.0
(9) Subcontinent Asian American-owned	29	\$22,630	\$22,630	1.4	0.1	1.3	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	69	\$46,574	\$46,574	2.8			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	28	\$27,188	\$27,188	1.6			
(13) Minority-owned (SLBE/ELBE certified)	41	\$19,387	\$19,387	1.2			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	1	\$318	\$318	0.0			
(16) Hispanic American-owned (SLBE/ELBE certified)	17	\$8,676	\$8,676	0.5			
(17) Native American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	23	\$10,392	\$10,392	0.6			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-11.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Subcontracts
Funding source: State and Local
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,249	\$517,968	\$517,968				
(2) Minority and woman-owned businesses	1,529	\$200,865	\$200,865	38.8	33.2	5.6	116.9
(3) Non-Hispanic white woman-owned	565	\$68,805	\$68,805	13.3	13.9	-0.6	95.6
(4) Minority-owned	964	\$132,060	\$132,060	25.5	19.3	6.2	132.2
(5) Asian Pacific American-owned	91	\$17,092	\$17,092	3.3	3.4	-0.1	97.9
(6) Black American-owned	36	\$3,633	\$3,633	0.7	0.6	0.1	127.2
(7) Hispanic American-owned	687	\$81,470	\$81,470	15.7	11.2	4.5	140.3
(8) Native American-owned	72	\$7,514	\$7,514	1.5	3.4	-1.9	43.0
(9) Subcontinent Asian American-owned	78	\$22,352	\$22,352	4.3	0.8	3.5	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	1,113	\$138,311	\$138,311	26.7			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	320	\$29,316	\$29,316	5.7			
(13) Minority-owned (SLBE/ELBE certified)	793	\$108,995	\$108,995	21.0			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	27	\$2,809	\$2,809	0.5			
(16) Hispanic American-owned (SLBE/ELBE certified)	556	\$64,152	\$64,152	12.4			
(17) Native American-owned (SLBE/ELBE certified)	65	\$7,029	\$7,029	1.4			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	76	\$22,059	\$22,059	4.3			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-12.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Prime contracts
Funding source: State and Local
Department: All purchasing departments

Large contracts (>\$500,000)

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	466	\$1,598,743	\$1,598,743				
(2) Minority and woman-owned businesses	94	\$198,671	\$198,671	12.4	30.1	-17.7	41.2
(3) Non-Hispanic white woman-owned	31	\$55,150	\$55,150	3.4	17.6	-14.2	19.6
(4) Minority-owned	63	\$143,521	\$143,521	9.0	12.5	-3.5	71.8
(5) Asian Pacific American-owned	6	\$6,347	\$6,347	0.4	0.5	-0.1	84.1
(6) Black American-owned	1	\$607	\$607	0.0	1.3	-1.2	3.0
(7) Hispanic American-owned	47	\$118,063	\$118,063	7.4	9.5	-2.1	78.1
(8) Native American-owned	0	\$0	\$0	0.0	1.2	-1.2	0.0
(9) Subcontinent Asian American-owned	9	\$18,504	\$18,504	1.2	0.1	1.1	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	30	\$39,982	\$39,982	2.5			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	12	\$24,769	\$24,769	1.5			
(13) Minority-owned (SLBE/ELBE certified)	18	\$15,213	\$15,213	1.0			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(16) Hispanic American-owned (SLBE/ELBE certified)	10	\$7,519	\$7,519	0.5			
(17) Native American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	8	\$7,694	\$7,694	0.5			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-13.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Prime contracts
Funding source: State and Local
Department: All purchasing departments

Small contracts (<\$500,000)

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	301	\$55,002	\$55,002				
(2) Minority and woman-owned businesses	86	\$15,640	\$15,640	28.4	34.4	-5.9	82.8
(3) Non-Hispanic white woman-owned	32	\$5,217	\$5,217	9.5	12.2	-2.7	78.0
(4) Minority-owned	54	\$10,423	\$10,423	19.0	22.2	-3.2	85.4
(5) Asian Pacific American-owned	7	\$869	\$869	1.6	1.4	0.2	116.5
(6) Black American-owned	4	\$648	\$648	1.2	2.5	-1.4	46.4
(7) Hispanic American-owned	23	\$4,780	\$4,780	8.7	15.2	-6.5	57.1
(8) Native American-owned	0	\$0	\$0	0.0	2.1	-2.1	0.0
(9) Subcontinent Asian American-owned	20	\$4,126	\$4,126	7.5	1.0	6.5	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	39	\$6,593	\$6,593	12.0			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	16	\$2,419	\$2,419	4.4			
(13) Minority-owned (SLBE/ELBE certified)	23	\$4,174	\$4,174	7.6			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	1	\$318	\$318	0.6			
(16) Hispanic American-owned (SLBE/ELBE certified)	7	\$1,157	\$1,157	2.1			
(17) Native American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	15	\$2,698	\$2,698	4.9			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-14.
Time period: 07/01/2014 - 06/30/2019
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: Federal
Department: All purchasing departments

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	102	\$31,560	\$31,560				
(2) Minority and woman-owned businesses	34	\$8,763	\$8,763	27.8	35.4	-7.7	78.4
(3) Non-Hispanic white woman-owned	10	\$1,730	\$1,730	5.5	13.4	-7.9	41.0
(4) Minority-owned	24	\$7,033	\$7,033	22.3	22.1	0.2	101.0
(5) Asian Pacific American-owned	0	\$0	\$0	0.0	1.0	-1.0	0.0
(6) Black American-owned	3	\$882	\$882	2.8	0.6	2.2	200+
(7) Hispanic American-owned	16	\$2,055	\$2,055	6.5	18.6	-12.1	35.0
(8) Native American-owned	1	\$35	\$35	0.1	1.6	-1.5	6.8
(9) Subcontinent Asian American-owned	4	\$4,061	\$4,061	12.9	0.3	12.6	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned (SLBE/ELBE certified)	18	\$6,892	\$6,892	21.8			
(12) Non-Hispanic white woman-owned (SLBE/ELBE certified)	4	\$1,424	\$1,424	4.5			
(13) Minority-owned (SLBE/ELBE certified)	14	\$5,468	\$5,468	17.3			
(14) Asian Pacific American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(15) Black American-owned (SLBE/ELBE certified)	2	\$466	\$466	1.5			
(16) Hispanic American-owned (SLBE/ELBE certified)	8	\$942	\$942	3.0			
(17) Native American-owned (SLBE/ELBE certified)	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned (SLBE/ELBE certified)	4	\$4,061	\$4,061	12.9			
(19) Unknown minority-owned (SLBE/ELBE certified)	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 certified minority-owned businesses were allocated to minority and certified subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.