



2018 Disparity Study

City and County of Denver

FINAL REPORT

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2018 City and County of Denver Disparity Study

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CHAPTER ES.

Executive Summary

CHAPTER ES.

Executive Summary

The City and County of Denver (The City) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help refine the organization’s implementation of the Minority- and Women-owned Business Enterprise (MWBE) Program, the Emerging Business Enterprise (EBE) Program, and the Small Business Enterprise (SBE) Program for its locally-funded contracts and the Federal Disadvantaged Business Enterprise (DBE) Program for the Federal Aviation Administration (FAA)-funded contracts that the Denver International Airport (DEN) awards. The primary objectives of those programs revolve around encouraging the participation of small businesses and minority- and woman-owned businesses in City contracting.¹ To meet that objective, the City uses a combination of *race- and gender-neutral* and *race- and gender-conscious* program measures as part of its contracting practices. In the context of contracting, race- and gender-neutral measures are measures 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 specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting, such as MWBE contract goals.

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

- The percentage of contract dollars that the City spent with minority- and woman-owned businesses during the *study period* between January 1, 2012 and December 31, 2016 (i.e., *utilization*, or *participation*); and
- The percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of the City’s prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework related to the City’s implementation of the MWBE, EBE, SBE, and Federal DBE Programs;
- Local marketplace conditions for minority- and woman-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 MWBE, EBE, SBE, and Federal DBE Programs, including setting aspirational goals for the participation of minority- and woman-owned businesses in City contracting; determining which program measures to use to encourage the participation of minority- and woman-owned businesses in

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.

City contracting; and, if appropriate, determining which racial/ethnic and gender groups would be eligible to participate in any race- or gender-conscious program measures that the City might continue using in the future.

BBC summarizes key information from the 2018 City of Denver Disparity Study in five parts:

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

A. Analyses in the Disparity Study

Along with measuring disparities between the participation and availability of minority- and woman-owned businesses in City contracts, BBC also examined other information related to the City's implementation of the MWBE, EBE, SBE, and Federal DBE Programs:

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of legal requirements related to small business and minority- and woman-owned business programs, including the MWBE, EBE, SBE, and Federal DBE Programs (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities; women; and minority- and woman-owned businesses throughout the *relevant geographic market area*.² In addition, the study team collected qualitative information about potential barriers faced by minorities; women; and minority- and woman-owned businesses in the local marketplace through in-depth interviews, telephone surveys, public meetings, and written testimony (see Chapter 3, Appendix C, and Appendix D).
- BBC analyzed the percentage of relevant City contracting dollars that minority- and woman-owned businesses are available to perform. That analysis was based on telephone surveys that the study team completed with nearly 900 businesses that work in industries related to the specific types of construction; professional services; and goods and services contracts that the City awards (see Chapter 5 and Appendix E).
- BBC analyzed the dollars that minority- and woman-owned businesses received on more than 22,000 construction; professional services; and goods and 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- and woman-owned businesses on construction; professional

² BBC identified the relevant geographic market area for the disparity study as Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson Counties in Colorado.

services; and goods and 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- and woman-owned businesses in its contracting as well as measures that other organizations in the region use (see Chapter 8).
- BBC provided guidance related to additional program options and potential changes to current contracting practices for the City’s consideration (see Chapter 9).

B. Availability Analysis Results

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

Overall. Figure ES-1 presents dollar-weighted availability estimates by relevant racial/ethnic and gender group for all City contracts and procurements. Overall, the availability of minority- and woman-owned businesses for City contracts and procurements is 23.7 percent, indicating that minority- and woman-owned businesses might be expected to receive 23.7 percent of the dollars that the City awards in construction; professional services; and goods and services. Non-Hispanic white woman-owned businesses (10.9%) and Hispanic American-owned businesses (6.2%) exhibited the highest availability percentages among all groups.

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	10.9 %
Asian American-owned	3.2 %
Black American-owned	3.3 %
Hispanic American-owned	6.2 %
Native American-owned	0.1 %
Total Minority- and Woman-owned	23.7 %

Contract goals. During the study period, the City used MWBE and DBE contract goals to award many locally-funded and federally-funded contracts, respectively, to encourage the participation of minority- and woman-owned businesses. The City’s use of such contract goals is a race- and gender-conscious measure. It is useful to examine availability analysis results separately for contracts that the City awards with the use of contract goals (*goals contracts*) and contracts that the City awards without the use of goals (*no-goals contracts*). Figure ES-2 presents availability estimates separately for goals and no-goals contracts. As shown in Figure ES-2, the availability of minority- and woman-owned businesses considered together is approximately equal across goals contracts (23.1%) and no-goals contracts (24.1%).

Figure ES-2.
Availability estimates by contract goal status

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

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

Source:
 BBC Research & Consulting availability analysis.

Business group	Goal Status	
	Goals contracts	No-goals contracts
Non-Hispanic white woman-owned	12.2 %	10.0 %
Asian American-owned	2.0 %	4.0 %
Black American-owned	2.3 %	4.1 %
Hispanic American-owned	6.4 %	6.0 %
Native American-owned	0.2 %	0.1 %
Total Minority- and Woman-owned	23.1 %	24.1 %

Contract role. Many minority- and woman-owned businesses are small businesses and thus often operate as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for prime contracts and subcontracts. Figure ES-3 presents those results. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is similar for City prime contracts (23.6%) and subcontracts (24.4%).

Figure ES-3.
Availability estimates by contract role

Note:
 Numbers rounded to nearest tenth of 1 percent. Numbers may not sum exactly to totals.
 For more detail, see Figures F-8 and F-9 in Appendix F.

Source:
 BBC Research & Consulting availability analysis.

Business group	Contract Role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	10.8 %	11.4 %
Asian American-owned	3.4 %	2.2 %
Black American-owned	3.2 %	3.9 %
Hispanic American-owned	6.1 %	6.4 %
Native American-owned	0.1 %	0.5 %
Total Minority- and Woman-owned	23.6 %	24.4 %

Industry. BBC examined availability analysis results separately for the City’s construction; professional services; and goods and services contracts. The project team combined results for goods and services contracts because the City uses similar procurement processes to award those contracts. As shown in Figure ES-4, the availability of minority- and woman-owned businesses considered together is highest for the City’s professional services contracts (40.4%) and lowest for construction contracts (19.0%).

Figure ES-4.
Availability estimates by relevant industry

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

Source:
 BBC Research & Consulting availability analysis.

Business group	Industry		
	Construction	Professional services	Goods and services
Non-Hispanic white woman-owned	10.8 %	15.8 %	7.6 %
Asian American-owned	1.6 %	2.6 %	8.5 %
Black American-owned	1.9 %	11.5 %	2.2 %
Hispanic American-owned	4.6 %	10.4 %	7.9 %
Native American-owned	0.2 %	0.1 %	0.1 %
Total Minority- and Woman-owned	19.0 %	40.4 %	26.3 %

C. Utilization Analysis Results

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

Overall. Figure ES-5 presents the percentage of contracting dollars that minority- and woman-owned businesses, considered together, received on construction; professional services; and goods and services contracts and procurements that the City awarded during the study period. As shown in Figure ES-5, overall, minority- and woman-owned businesses considered together received 14.8 percent of the relevant contracting dollars that the City awarded during the study period. Hispanic American-owned businesses (6.3%) and non-Hispanic white woman-owned businesses (5.3%) exhibited higher levels of participation in City contracts than all other groups.

Figure ES-5.
Overall utilization results by racial/ethnic and gender group

Note:

Numbers rounded to nearest tenth of 1 percent. Numbers 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	5.3 %
Asian American-owned	1.2 %
Black American-owned	1.6 %
Hispanic American-owned	6.3 %
Native American-owned	0.5 %
Total Minority- and Woman-owned	14.8 %

Contract goals. During the study period, the City used MWBE and DBE contract goals to award many locally-funded and federally-funded contracts, respectively, to encourage the participation of minority- and woman-owned businesses. It is useful to examine utilization analysis results separately for goals contracts and no-goals contracts, because doing so provides information about outcomes for minority- and woman-owned businesses on contracts that the City awarded in a *race- and gender-neutral environment* and the efficacy of MWBE and DBE contract goals in encouraging the participation of minority- and woman-owned businesses in City contracts and procurements.

As shown in Figure ES-6, minority- and woman-owned businesses considered together showed higher participation in goals contracts (24.1%) than in no-goal contracts (8.4%). Those results might indicate the effectiveness of contract goals in encouraging the participation of minority- and woman-owned businesses in City contracts and procurements. However, examining disparity analysis results provides a better assessment of the efficacy of contract goals, because those results also take into account the availability of minority- and woman-owned businesses for goals and no-goals contracts.

Figure ES-6.
Utilization results by contract goal status

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Goal Status	
	Goals contracts	No-goals contracts
Non-Hispanic white woman-owned	8.1 %	3.3 %
Asian American-owned	1.2 %	1.2 %
Black American-owned	1.9 %	1.5 %
Hispanic American-owned	12.1 %	2.1 %
Native American-owned	0.8 %	0.3 %
Total Minority- and Woman-owned	24.1 %	8.4 %

Contract role. Many minority- and woman-owned businesses are small businesses and thus often operate as subcontractors. Because of that tendency, it is useful to examine utilization results separately for prime contracts and subcontracts. As shown in Figure ES-7, the participation of minority- and woman-owned businesses considered together was much higher in the City’s subcontracts (42.9%) than in the City’s prime contracts (8.7%). The vast majority of contracting dollars that the City awarded during the study period were associated with prime contracts.

Figure ES-7.
Utilization results by contract role

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract Role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	3.5 %	13.5 %
Asian American-owned	1.0 %	2.2 %
Black American-owned	1.1 %	3.9 %
Hispanic American-owned	2.7 %	22.4 %
Native American-owned	0.4 %	0.9 %
Total Minority- and Woman-owned	8.7 %	42.9 %

Industry. BBC examined utilization results separately for the City’s construction; professional services; and goods and services contracts. The project team combined results for goods and services contracts, because the City uses similar procurement processes to award those contracts. As shown in Figure ES-8, the participation of minority- and woman-owned businesses considered together was highest in the City’s professional services contracts (19.4%) and lowest in goods and general services contracts (10.6%). The majority of contracting dollars that the City awarded during the study period were in construction, in which the participation of minority- and woman-owned businesses was 15.2 percent.

Figure ES-8.
Utilization results by
relevant industry

Note:
 Numbers rounded to nearest tenth of 1 percent. Numbers may not sum exactly to totals.
 For more detail, see Figures F-5, F-6, and F-7 in Appendix F.
 Source:
 BBC Research & Consulting utilization analysis.

Business group	Industry		
	Construction	Professional services	Goods and services
Non-Hispanic white woman-owned	4.9 %	6.5 %	5.5 %
Asian American-owned	0.6 %	2.0 %	2.9 %
Black American-owned	0.7 %	7.3 %	0.4 %
Hispanic American-owned	8.3 %	3.6 %	1.7 %
Native American-owned	0.8 %	0.0 %	0.1 %
Total Minority- and Woman-owned	15.2 %	19.4 %	10.6 %

D. Disparity Analysis Results

Although information about the participation of minority- and woman-owned businesses in City contracts is useful on its own, it is even more useful when compared with the level of participation that might be expected based on these businesses' availability for City work. BBC calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent participation 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.

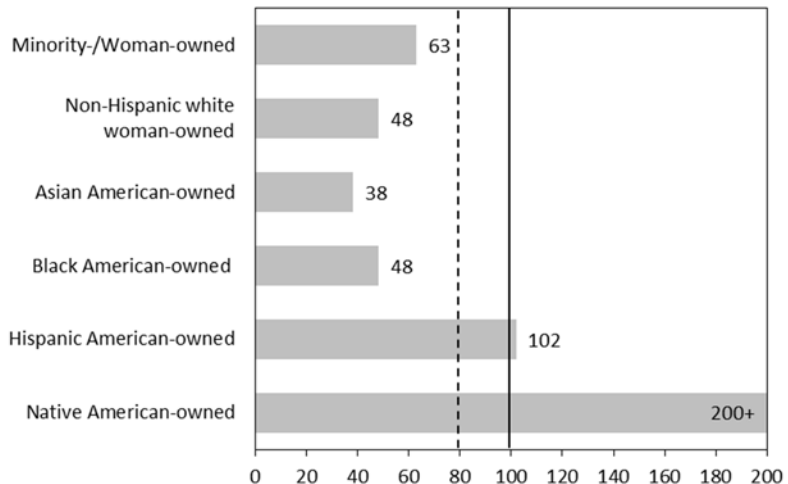
Overall. Figure ES-9 presents disparity indices for all relevant prime contracts and subcontracts that the City awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. For reference, there is a line drawn at a disparity index of 100 (line of parity) and at a disparity index level of 80 (line of substantial disparity). As shown in Figure ES-9, overall, the participation of minority- and woman-owned businesses in contracts that the City awarded during the study period was substantially lower than what one might expect based on their availability for that work. The disparity index of 63 indicates that minority- and woman-owned businesses received approximately \$0.63 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the City awarded during the study period. Disparity analysis results by individual group indicated that:

- Three groups exhibited disparity indices substantially below parity: non-Hispanic white woman-owned businesses (disparity index of 48), Asian American-owned businesses (disparity index of 38), and Black American-owned businesses (disparity index of 48).
- Hispanic American-owned businesses (disparity index of 102) and Native American-owned businesses (disparity index of 200+) did not exhibit a disparity.

Figure ES-9.
Disparity indices by racial/ethnic and gender group

Note:
Numbers rounded to nearest whole number.
For more detail, see Figure F-2 in Appendix F.

Source:
BBC Research & Consulting disparity analysis.



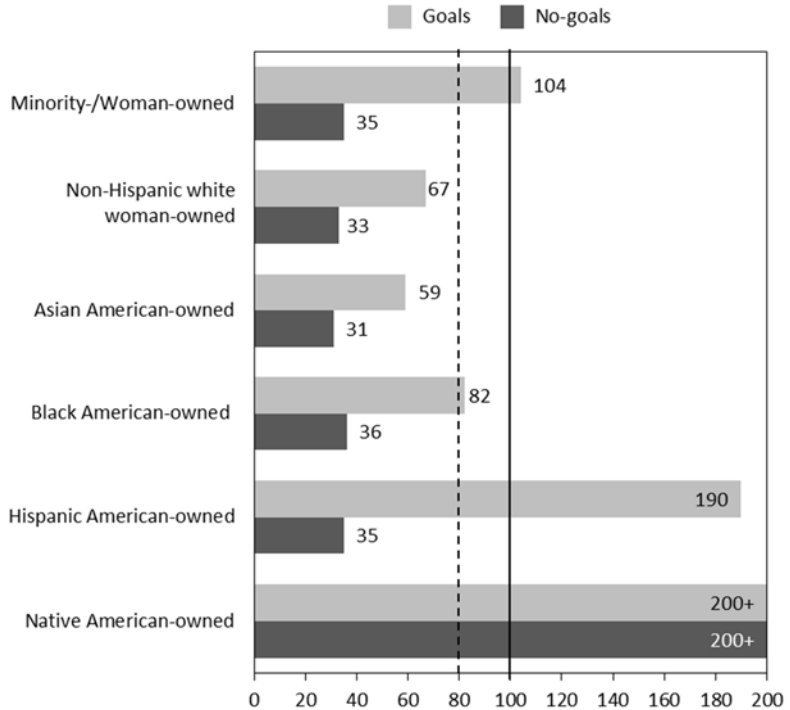
Contract goals. During the study period, the City used MWBE and DBE contract goals to award many locally-funded and federally-funded contracts, respectively, to encourage the participation of minority- and woman-owned businesses. It is useful to examine disparity analysis results separately for goals contracts and no-goals contracts. Assessing whether any disparities exist for no-goal contracts provides useful information about outcomes for minority- and woman-owned businesses on contracts that the City awarded in a *race- and gender-neutral environment* and whether there is evidence that certain groups face barriers as part of the agency’s contracting. As shown in Figure ES-10, minority- and woman-owned businesses considered together showed parity on goals contracts (disparity index of 104), but exhibited a substantial disparity on no-goals contracts (disparity index of 35). Disparity analysis results by individual group indicated that:

- Non-Hispanic white woman-owned businesses (disparity index of 67) and Asian American-owned businesses (disparity index of 59) exhibited substantial disparities on goals contracts. Black American-owned business also exhibited a disparity that was close to the threshold of being considered substantial (disparity index of 82) on goals contracts; and
- All groups except Native American-owned businesses (disparity index of 200+) exhibited substantial disparities on no-goals contracts.

Figure ES-10.
Disparity indices by
contract goal status

Note:
 Numbers rounded to nearest whole number.
 For more detail, see Figures F-16 and F-17 in Appendix F.

Source:
 BBC Research & Consulting disparity analysis.



Taken together, the results presented in Figure ES-10 show that the City’s use of MWBE and DBE contract goals is somewhat effective in encouraging the participation of minority- and woman-owned businesses in its contracts. Moreover, the results indicate that when the City does not use race- and gender-conscious measures, nearly all relevant business groups suffer from substantial underutilization in City contracting and procurement.

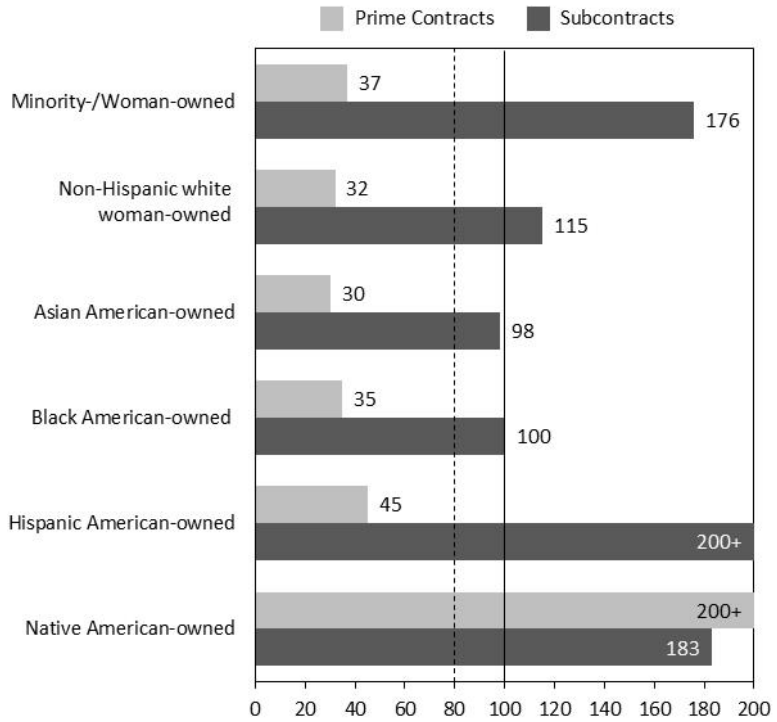
Contract role. Subcontracts tend to be much smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to minority- and woman-owned businesses. In addition, the City used MWBE and DBE contract goals when awarding many contracts during the study period, which primarily affect subcontract opportunities for minority- and woman-owned businesses. Thus, it might be reasonable to expect better outcomes for minority- and woman-owned businesses on subcontracts than on prime contracts. Figure ES-11 presents disparity indices for all relevant groups separately for prime contracts and subcontracts. As shown in Figure ES-11, minority- and woman-owned businesses considered together showed a substantial disparity for prime contracts (disparity index of 37) but not for subcontracts (disparity index of 176). Results for individual groups indicated that:

- All groups showed substantial disparities on prime contracts except for Native American-owned businesses (disparity index of 200+).
- No groups exhibited substantial disparities on subcontracts.

Figure ES-11.
Disparity indices by
contract role

Note:
 Numbers rounded to nearest whole
 number.
 For more detail, see Figures F-8 and F-9
 in Appendix F.

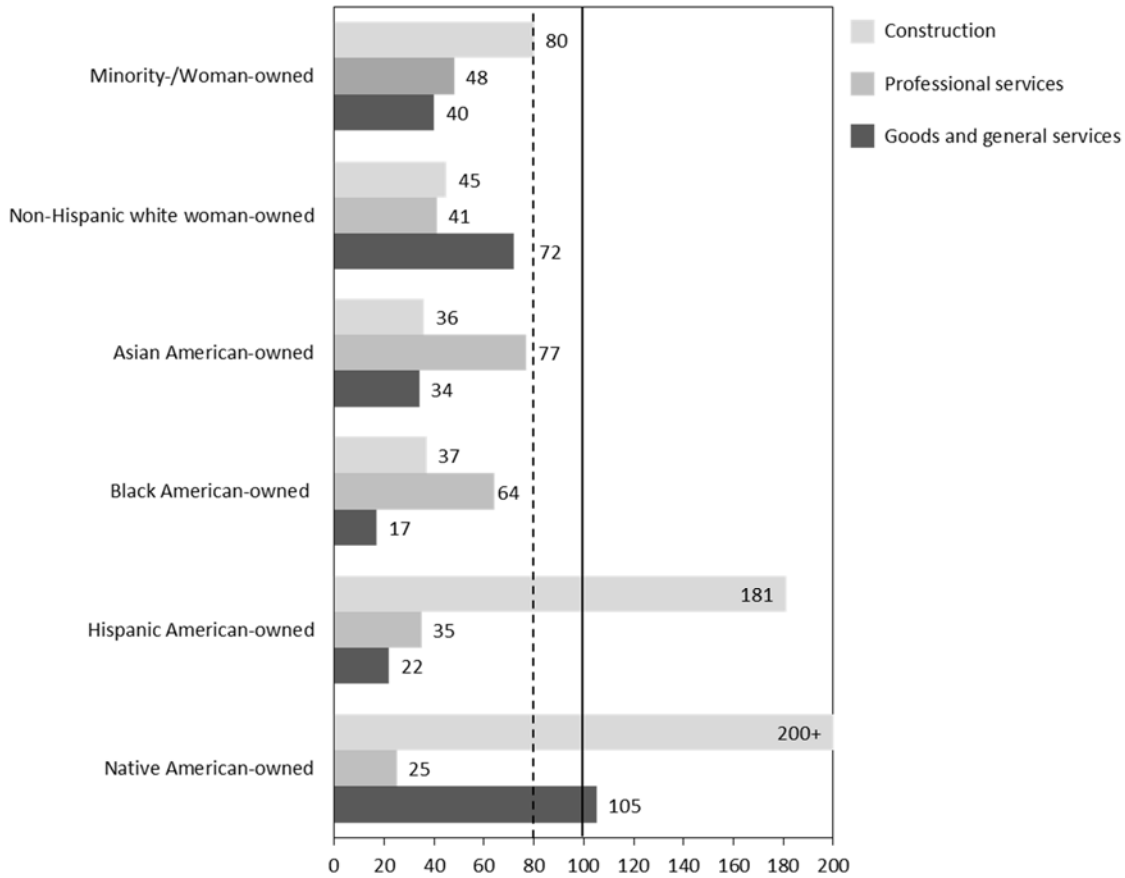
Source:
 BBC Research & Consulting disparity
 analysis.



Industry. BBC examined disparity analysis results separately for the City’s construction; professional services; and goods and services contracts. The project team combined results for goods and services contracts because the City uses similar procurement processes to award those contracts. Figure ES-12 presents disparity indices for all relevant groups by contracting area. Disparity analyses results differed by contracting area and group:

- Minority- and woman-owned businesses considered together showed a disparity on construction contracts (disparity index of 80). Three individual groups showed substantial disparities: non-Hispanic white woman-owned businesses (disparity index of 45), Asian American-owned businesses (disparity index of 36), and Black American-owned businesses (disparity index of 37).
- Minority- and woman-owned businesses considered together showed a substantial disparity on professional services contracts (disparity index of 48). All individual groups showed substantial disparities on those contracts.
- Minority- and woman-owned businesses considered together showed a substantial disparity on goods and services contracts (disparity index of 40). All individual groups showed substantial disparities except for Native American-owned businesses (disparity index of 105).

Figure ES-12.
Disparity indices by relevant industry



Note: Numbers rounded to nearest whole number.
 For more detail, see Figures F-5, F-6, and F-7 in Appendix F.
 Source: BBC Research & Consulting disparity analysis.

E. Program Implementation

The City should review study results and other relevant information in connection with making decisions concerning its implementation of the MWBE, EBE, SBE, and Federal DBE Programs. Key considerations of potential refinement are discussed below. In making those considerations, the City should also assess whether additional resources, changes in internal policy, or changes in state law may be required.

Aspirational MWBE and DBE goals. The City establishes aspirational annual goals for the participation of certified MBEs and WBEs as part of the MWBE Program and for the participation of certified DBEs as part of its implementation of the Federal DBE Program. Results from the disparity study—particularly the availability analysis and analyses of marketplace conditions—can be helpful to the City in setting its next aspirational MWBE and DBE goals.

Aspirational MWBE goals. The City sets aspirational annual MWBE goals separately for its locally-funded construction; professional services; and goods and services contracts and procurements. Currently, the City has set those goals at 24 percent for construction, 33 percent

for professional services, and 8 percent for goods and services. Information from the availability analysis provided information that the City can use as a basis for its aspirational MWBE goals. For the purposes of aspirational goal-setting, BBC calculated the availability of potential MWBEs—minority- and woman-owned businesses that are currently MWBE-certified or appear that they could be MWBE-certified based on revenue requirements set forth in the City’s MWBE Program—for locally-funded prime contracts and subcontracts that the City awarded during the study period. That analysis indicated that potential MWBEs might be expected to receive 20.5 percent of the City’s locally-funded contracting dollars based on their availability for that work. The availability of potential MWBEs is 16.5 percent for locally-funded construction contracts; 39.5 percent for locally-funded professional services contracts; and 19.8 percent for locally-funded goods and general services contracts. The City should consider that information as it sets its next aspirational MWBE goals.

Overall DBE goal. The City also sets an overall annual DBE goal for the FAA-funded contracts that DEN awards. Currently, the City has set that goal at 14.04 percent. For the purposes of helping the City determine a basis for its overall DBE goal, BBC calculated the availability of potential DBEs—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements set forth in 49 Code of Federal Regulations Part 26.65—for FAA-funded prime contracts and subcontracts that DEN awarded during the study period. That analysis indicated that potential DBEs might be expected to received 16.2 percent of the City’s FAA-funded prime contract and subcontract dollars based on their availability for that work. The City should consider that information as it sets its next overall DBE goals for DEN’s FAA-funded contracts.

Goal adjustments. In setting aspirational annual goals, organizations often examine available evidence to determine whether an adjustment to availability is necessary to account for past participation of minority- and woman owned businesses in their contracting; current conditions in the local marketplace for minorities, women, minority-owned businesses, and woman-owned businesses; and other relevant factors. The Federal DBE Program—which organizations often use as a model to set and adjust their aspirational annual goals—outlines several factors that organizations might consider when assessing whether to adjust their goals:

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

BBC completed an analysis of each of the above factors. Much of the information that BBC examined was not easily quantifiable but is still relevant to the City as it determines whether to adjust its aspirational MWBE and DBE goals. Detailed information about those analyses are presented in Chapter 9.

³ 49 CFR Section 26.45.

Data collection. The City maintains comprehensive data on the prime contracts and procurements that it awards and maintains those data in a well-organized and intuitive manner. However, the City only maintains data on those subcontracts that are associated with prime contracts that it awards using MWBE or DBE contract goals. The City should consider collecting comprehensive data on *all* subcontracts, regardless of whether they are performed by minority- and woman-owned businesses and regardless of whether they are associated with goals contracts. Collecting data on all subcontracts will help ensure that the City monitors the participation of minority- and woman-owned businesses as accurately as possible. 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; and
- Subcontract paid amount.

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

Monitoring minority- and woman-owned business participation. The City only monitors minority- and woman-owned business participation on goals contracts, which results in a skewed representation of the participation of minority- and woman-owned businesses in City contracting overall. Disparity study results indicate that, during the study period, the participation of minority- and woman-owned businesses was much lower in contracts that the City awarded without the use of MWBE or DBE contract goals than in goals contracts, despite the availability of minority- and woman-owned businesses being very similar for both contract sets. That result underscores the importance for the City to monitor the participation of minority- and woman-owned businesses in all contracts, regardless of whether contract goals are used to award them. Doing so will help ensure that the City monitors the participation of minority- and woman-owned businesses as accurately as possible.

Prime contract opportunities. Disparity analysis results indicated substantial disparities for most racial/ethnic and gender groups on the prime contracts that the City awarded during the study period. The City has established a Defined Selection Pool Program, which limits competition on certain construction and goods and services prime contracts to certified SBEs or EBEs. The City should consider continuing and even expanding the use of the program to further encourage the participation of small businesses, including many minority- and woman-owned businesses.

Subcontract opportunities. Overall, minority- and woman-owned businesses did not show disparities on the subcontracts that the City awarded during the study period. However, subcontracting accounted for a relatively small percentage of the total contracting dollars that the City awarded during the study period. To increase the number of subcontract opportunities, the City could consider implementing a program that requires prime contractors to subcontract a certain amount of project work as part of their bids and proposals, regardless of the

race/ethnicity or gender of subcontractor owners. For specific types of contracts where subcontracting or partnership opportunities might exist, the City could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed this threshold in order for their bids to be considered responsive. If the City were to implement such a program, it should include flexibility provisions such as a *good faith efforts* process.

Contract goals. The City uses MWBE and DBE contract goals on many of the contracts that it awards. Prime contractors can meet those goals by either making subcontracting commitments with certified MWBE or DBE subcontractors at the time of bid or by submitting waivers showing that they made reasonable good faith efforts to fulfill the goals but could not do so. Disparity analysis results showed that outcomes for minority- and woman-owned businesses were better on goals contracts than no-goals contracts during the study period, indicating that the use of contract goals is an effective measure in encouraging the participation of minority- and woman-owned businesses in City contracts, particularly for Hispanic American-owned businesses. The City should consider continuing its use of MWBE and DBE contract goals in the future. The City will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B). It is also important for the City to continue to treat contract goals as only one tactic among many to encourage minority- and woman-owned business participation in its contracting and to not treat the use of such goals as a substitute for other measures that might help build the capacity of minority- and woman-owned businesses for City work, such as technical assistance programs, mentor-protégé programs, and financial assistance.

Unbundling large contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that the City awarded during the study period. In addition, as part of in-depth interviews and public forums, several minority- and woman-owned businesses reported that the size of government contracts often serves as a barrier to their success (for details, see Appendix D). To further encourage the participation of small businesses, including many minority- and woman-owned businesses, the City should consider making efforts to unbundle relatively large prime contracts and even subcontracts into several smaller contracts. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontracting opportunities into smaller contract pieces that are more feasible for small businesses and minority- and woman-owned businesses to work on and accepts such attempts as good faith efforts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation.

Prompt payment. As part of in-depth interviews, several businesses, including many minority- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on City contracts, both when working as prime contractors and as subcontractors (for details, see Appendix D). Many businesses also commented that having capital on hand is crucial to small business success. The City should consider reinforcing its prompt payment policies with its procurement staff and prime contractors and could also consider automating payments directly to subcontractors. Doing so might help ensure that both prime contractors and subcontractors receive payment in a timely manner. It may also help ensure that minority- and woman-owned businesses have enough operating capital to remain successful.

CHAPTER 1.

Introduction

CHAPTER 1.

Introduction

With a population of nearly 3 million people in its metropolitan area, Denver, Colorado is one of the largest and fastest growing cities in the United States. With its close proximity to the Rocky Mountains, Denver has a national reputation for being an active, outdoor-oriented city with a bustling economy. The city's primary industries include aerospace and aviation; energy; financial services; information technology; and telecommunications. It also boasts a substantial government presence with many federal agencies having offices in the region.

The City and County of Denver (The City) provides myriad services to the residents who live and work in the region. To provide those services, the City typically spends nearly \$1 billion each year in contract dollars to procure various goods and services in construction; professional services; and goods and services. As part of its contracting and procurement, the City uses various strategies and efforts to encourage the participation of small businesses and minority- and woman-owned businesses, including implementing the Minority- and Women-owned Business Enterprise (MWBE) Program, the Emerging Business Enterprise (EBE) Program, and the Small Business Enterprise (SBE) Program for its locally-funded contracts and the Federal Disadvantaged Business Enterprise (DBE) Program for the Federal Aviation Administration (FAA)-funded contracts that the Denver International Airport (DEN) awards.^{1, 2}

The City retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its implementation of the MWBE, EBE, SBE, and Federal DBE Programs in encouraging the participation of minority- and woman-owned businesses in its contracts and procurements. As part of the study, BBC examined whether there are any disparities between:

- The percentage of contract dollars that the City spent with minority- and woman-owned businesses during the study period (i.e., *utilization*); and
- The percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of the City's 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 MWBE, EBE, SBE, and Federal DBE Programs;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that the City currently has in place.

¹ https://library.municode.com/co/denver/codes/code_of_ordinances?nodeId=TITIIREMUICO_CH28HURI_ARTIINOCOCORER_EPRDECOSE

² https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl

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

- The disparity study provides an independent review of the participation of minority- and woman-owned businesses in the City’s contracting and procurement, which will be valuable to City leadership and external stakeholders;
- Information from the disparity study will be useful to the City as it makes decisions about the MWBE, EBE, SBE, and Federal DBE Programs (e.g., determining whether the use of race- and gender-conscious goals might still be appropriate in the future);
- The disparity study provides insights into how to increase contracting opportunities for minority- and woman-owned businesses; and
- Organizations that have successfully defended their implementations of minority- and woman-owned business programs in court have typically relied on information from disparity studies.

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

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

A. Background

The City implements the MWBE Program for locally-funded contracts and the Federal DBE Program for FAA-funded contracts that DEN awards. The disparity study includes information that is relevant to refining the City’s implementation of both programs.

MWBE Program. Since 1991, the City has made various efforts to determine whether race- or gender-based discrimination affects the success of minority- and woman-owned businesses attempting to participate in City contracts and procurements. In 1996, the Denver City Council enacted a set of ordinances to promote nondiscrimination in the City’s construction; professional services; and goods and services contracts and procurements. That program—referred to herein as the MWBE Program—is designed to prevent race- and gender-based discrimination against minority- and woman-owned businesses and encourage their participation in City contracts and procurements.

As part of the program, the City sets aspirational annual goals for the participation of minority- and woman-owned businesses in its construction; professional services; and goods and services contracts and procurements. Currently, the City has set a 24 percent goal for construction contracts, a 33 percent goal for professional services contracts, a 5 percent goal for goods procurements, and an 8 percent goal for services procurements. Those goals are based on information from an availability analysis that the City conducted in 2012. Failure to meet those goals does not automatically cause changes in how the City implements the MWBE Program. However, the City continuously considers ways to further encourage the participation of minority- and woman-owned businesses in its contracting and procurement.

Federal DBE Program. The Federal DBE Program is a program designed to increase the participation of minority- and woman-owned businesses in United States Department of Transportation (USDOT)-funded contracts. The City receives funds from the FAA to operate DEN and is thus required to implement the Federal DBE Program.³ Similar to the MWBE Program, a key component of the City’s implementation of the Federal DBE Program is setting an overall aspirational goal for DBE participation in its FAA-funded contracts. The City is required to set the goal every three years, but the goal is an *annual* goal in that the City must monitor DBE participation in its FAA-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the City must analyze the reasons for the difference and establish specific measures to address the difference and enable it to meet the goal in the next year.

The Federal DBE Program describes the steps an agency must follow in establishing its overall goal. To begin the goal-setting process, an organization must develop a base figure based on demonstrable evidence of the availability of DBEs to participate in its USDOT-funded contracts. Then, after considering various relevant factors, the organization can make an upward, downward, or no adjustment to its base figure as it determines its overall DBE goal (referred to as a *step-2* adjustment). Currently, the City has set its overall DBE goal at 11.9 percent, based on information from an availability analysis that the City conducted in 2012.

Program measures. In an effort to meet its aspirational annual goals as part of the MWBE and Federal DBE Programs, the City uses a combination of *race- and gender-neutral measures* and *race- and gender-conscious measures* to encourage the participation of minority- and woman-owned businesses in its contracting. Race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in an organization’s contracting, regardless of the race/ethnicity or gender of businesses’ owners. The underlying logic of using such measures is that, because most minority- and woman-owned businesses are small businesses, implementing measures that encourage the participation of all small businesses in an organization’s contracting will result in the increased participation of a large number of minority- and woman-owned businesses. 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).⁴

Race- and gender-neutral measures. The City uses various race- and gender-neutral measures as part of the MWBE, EBE, SBE, and Federal DBE Programs. Those measures are designed to encourage the participation of small businesses—including many minority- and woman-owned businesses—in City contracting and procurement. Specific types of race- and gender-neutral measures that the City uses include:

³ The City also implements the Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program to encourage the participation of minority- and woman-owned businesses in concessions agreements at DEN, but analyses around concessions were outside the scope of this study.

⁴ As part of the Federal DBE Program, the City is required to meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. If the City can meet its goal solely through the use of race- and gender-neutral measures, it cannot implement race- or gender-conscious measures as part of the program.

- Contracting information and assistance;
- Monitoring, evaluation, and reporting;
- Technical assistance and training;
- Finance and bonding assistance; and
- Networking and outreach.

Race- and gender-conscious measures. As part of both the MWBE and Federal DBE Programs, the City sets goals for the participation of minority- and woman-owned businesses as subcontractors on certain individual contracts (i.e., MWBE or DBE contract goals). Prime contractors bidding on contracts that include such goals must either meet the goals by making subcontracting commitments to minority- or woman-owned businesses or by requesting *good faith efforts* waivers. The Division of Small Business Opportunity (DSBO) reviews waiver requests and will grant waivers if prime contractors demonstrate good faith efforts towards compliance with the goals. If prime contractors do not meet the goals through subcontracting commitments and do not submit acceptable good faith effort waivers, then DSBO may reject their bids.

If the City determines that the continued use of race- or gender-conscious measures is appropriate for its implementation of the MWBE and Federal DBE Programs, then it must also determine which racial/ethnic or gender groups are eligible for participation in those measures. Eligibility for such measures is limited to only those racial/ethnic or gender groups for which compelling evidence of discrimination exists in the local marketplace.

B. Study Scope

Information from the disparity study will help the City continue to encourage the participation of minority- and woman-owned businesses in its contracting and procurement. In addition, it will help the City implement the MWBE, EBE, SBE, and Federal DBE Programs effectively and in a legally-defensible manner.

Definitions of minority- and woman-owned businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how BBC treated minority- and woman-owned businesses and businesses that are certified as minority-owned business enterprises (MBEs) and woman-owned business enterprises (WBEs) in the study. It is also important to understand how BBC treated businesses owned by minority women.

Minority- and woman-owned businesses. BBC focused its analyses on the minority- and woman-owned business groups that are included as part of the City's MWBE Program: Asian American-, Black American-, Hispanic American-, Native American-, and woman-owned businesses. BBC analyzed the possibility that race- or gender-based discrimination affected the participation of minority- and woman-owned businesses in City contracts and procurements based specifically on the race/ethnicity and gender of business ownership. Therefore, BBC counted businesses as minority- or woman-owned regardless of whether they were, or could be, certified as MBEs, WBEs, or DBEs. Analyzing the participation and availability of minority- and woman-owned businesses regardless of certification status allowed BBC to assess whether there

are barriers affecting minority- and woman-owned businesses specifically because of the race/ethnicity and gender of their owners and not their certification.

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

- 1) Classifying those businesses as both minority-owned and woman-owned;
- 2) Creating unique groups of minority woman-owned businesses;
- 3) Classifying minority woman-owned businesses with other woman-owned businesses; and
- 4) Classifying minority woman-owned businesses with their corresponding minority groups.

Regarding Option 1, BBC chose not to code businesses as both woman-owned and minority-owned to avoid double-counting certain businesses when reporting disparity study results. BBC also chose against Option 2—creating groups of minority woman-owned businesses that were distinct from businesses owned by minority men (e.g., Black American woman-owned businesses versus businesses owned by Black American men)—because the population sizes of some business groups were already so low that further disaggregation by gender would have made it even more difficult to interpret results. BBC then considered whether to group minority woman-owned businesses with all other woman-owned businesses (Option 3) or with their corresponding minority groups (Option 4). BBC chose Option 4 (e.g., grouping Black American woman-owned businesses with all other Black American-owned businesses). As a result, in this report, the term *woman-owned businesses* refers specifically to *non-Hispanic white woman-owned businesses*.

MBE and WBEs. MBE and WBEs are minority-owned businesses and woman-owned businesses that are specifically certified as such by the City. A determination of MWBE eligibility includes assessing businesses' gross revenues and business owners' personal net worth. Some minority- and woman-owned businesses do not qualify as MWBEs because of gross revenue or net worth requirements set forth by the United States Small Business Administration (SBA). Businesses seeking MWBE certification are required to submit an application to DSBO. The application is available online and requires businesses to submit various information including business name; contact information; license information; financial information; work specializations; and race/ethnicity and gender of their owners. DSBO reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

DBEs. DBEs are minority- and woman-owned businesses that are specifically certified as such through the Colorado Unified Certification Program (UCP).⁵ As with MWBE certification, a determination of DBE eligibility includes assessing businesses' gross revenues and business owners' personal net worth. Businesses seeking DBE certification in Colorado are required to submit an application to either DSBO or the Colorado Department of Transportation (CDOT). The application is available online and requires businesses to submit various information, including

⁵ Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 Code of Federal Regulations Part 26.

business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. DSBO or CDOT reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

Potential MWBE/DBEs. Potential MWBE/DBEs are minority- and woman-owned businesses that are MWBE/DBE-certified or appear that they could be certified based on revenue requirements set forth by the SBA (regardless of actual certification). The study team did not count businesses that have been decertified or have graduated from the MWBE or Federal DBE Programs as potential MWBE/DBEs in the study. BBC examined the availability of potential MWBE/DBEs as part of helping the City establish aspirational annual goals for the MWBE and Federal DBE Programs.

Majority-owned businesses. Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white men).

Analyses in the disparity study. The study team examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on City contracts. In addition, the study team also conducted:

- A review of legal issues related to the City's implementation of the MWBE, EBE, SBE, and Federal DBE Programs;
- An analysis of local marketplace conditions for minority- and woman-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 MWBE, EBE, SBE, and Federal DBE Programs.

The disparity study focused on construction; professional services; and goods and services contracts and procurements that the City awarded between January 1, 2012 and December 31, 2016 (i.e., the study period). Information from the disparity study is organized as follows:

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

Marketplace conditions. BBC conducted quantitative analyses of the success of minorities and women as well as minority- and woman-owned businesses in the local contracting and procurement industries. BBC compared business outcomes for minorities and women as well as minority- and woman-owned businesses to outcomes for non-Hispanic white men and businesses owned by non-Hispanic white men. In addition, the study team collected qualitative information about potential barriers that minority- and woman-owned businesses face in the Denver region through in-depth interviews and public meetings. Information about marketplace conditions is presented in **Chapter 3, Appendix C, and Appendix D**.

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

Availability analysis. BBC assessed the degree to which minority- and woman-owned businesses are *ready, willing, and able* to perform on City prime contracts and subcontracts. That analysis was based on City data and telephone surveys that the study team conducted with thousands of businesses that are located in the Denver 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**.

Utilization analysis. BBC analyzed prime contract and subcontract dollars that the City spent with minority- and woman-owned businesses on contracts that it awarded during the study period. Results from the utilization analysis are presented in **Chapter 6**.

Disparity analysis. BBC examined whether there were any disparities between the utilization and availability of minority- and woman-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**.

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

Aspirational annual goals. Based on information from the availability analysis and other research, BBC provided the City with information that will help set aspirational annual goals in connection with the MWBE and Federal DBE Programs, including base figure calculations and considerations of step-2 adjustments. Information about the City's aspirational annual goals is presented in **Chapter 9**.

Program implementation. BBC reviewed the City's contracting practices and program measures that are part of its implementation of the MWBE, EBE, SBE, and Federal DBE Programs. BBC provided guidance related to additional program options and changes to current contracting practices. The study team's review and guidance for both programs is presented in **Chapter 10**.

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 minority- and woman-owned business programs.

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

Zann & Associates. Zann & Associates is a Black American woman-owned management consulting firm based in Denver. Zann & Associates conducted in-depth interviews with business located in the Denver region as part of the study team’s qualitative analyses of marketplace conditions. In addition, the firm helped facilitate various community engagement efforts.

KDJK Strategies. KDJK Strategies is a Hispanic American woman-owned professional services firm based in Denver. The firm conducted in-depth interviews with business located in the Denver region as part of the study team’s qualitative analyses of marketplace conditions.

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

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

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

CHAPTER 2.

Legal Analysis

CHAPTER 2.

Legal Analysis

The City and County of Denver (The City) operates the Minority- and Woman-owned Business Enterprise (MWBE) Program and the Federal Disadvantaged Business Enterprise (DBE) Program to encourage the participation of minority- and woman-owned businesses in its locally-funded and Federal Airport Administration (FAA)-funded contracts, respectively.¹ To do so, the City relies on a combination of *race- and gender-neutral measures* and *race- and gender-conscious measures* as part of its implementation of both programs. Race- and gender-neutral measures are measures that are designed to encourage the participation of small businesses in an organization's contracting, regardless of the race/ethnicity or gender of businesses' owners. In contrast, *race- and gender-conscious measures* are designed to specifically encourage the participation of minority- and woman-owned businesses in the organization's contracting.

The City's use of MWBE and DBE goals on individual contracts is considered a race- or gender-conscious measure. It is instructive to review legal standards surrounding their use, because there are different legal standards for determining the constitutionality of minority- and woman-owned business programs depending on whether they rely only on race- and gender-neutral measures or a combination of both race- and gender-neutral and race- and gender-conscious measures.

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

Programs that Rely on Race- and Gender-Neutral and Race- and Gender-Conscious Measures

The United States Supreme Court has established that contracting programs that include both race- and gender-neutral and race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.² In contrast to a rational basis review, the strict scrutiny standard presents the highest threshold for evaluating the legality of government contracting

¹ The City also implements the Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program to encourage the participation of minority- and woman-owned businesses in concessions agreements at DEN, but analyses around concessions were outside the scope of this study.

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

programs short of prohibiting them altogether. The two key United States Supreme Court cases that established the strict scrutiny standard for such programs are:

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

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

Compelling governmental interest. 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 minority- or woman-owned business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. 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 act. 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.”

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

- The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;

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 relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.⁶

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

Meeting the strict scrutiny standard. Many programs have failed to meet the strict scrutiny standard, because they have failed to meet the compelling governmental interest requirement, the narrow tailoring requirement, or both. However, many other programs have met the strict scrutiny standard and courts have deemed them to be constitutional. One such program is the City of Denver’s MWBE Program, which was challenged in *Concrete Works, Inc. v. City and County of Denver*. In the case, Concrete Works, Inc. challenged the constitutionality of an *affirmative action* ordinance that established participation goals for minority- and woman-owned businesses for certain City construction and professional services contracts. The ordinance and subsequent ordinances were based in part on information from a series of disparity studies that the City conducted beginning in 1989.

The district court ruled in favor of Concrete Works, Inc. and concluded that the ordinances violated the Fourteenth Amendment. However, the City appealed the ruling to the Tenth Circuit Court of Appeals, and the Court of Appeals held that the City had established a compelling governmental interest to have a race- and gender-conscious program to limit race- and gender-based discrimination.⁷ *Concrete Works, Inc. v. City and County of Denver* is instructive, because it is one of the only decisions to uphold the validity of a local minority- and woman-owned business program. Appendix B presents the *Concrete Works* case and other relevant case law in greater detail.

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).

⁷ The Court of Appeals did not address the issue of whether the ordinances were 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 Concrete Works, Inc. after they had lost that issue on summary judgment in an earlier decision.

CHAPTER 3.

Marketplace Conditions

CHAPTER 3.

Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.^{1, 2, 3, 4} Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.⁵

In the 19th and early 20th centuries, minorities in Colorado faced barriers that were similar to those that minorities faced nationwide. Discriminatory treatment was common for minorities in Denver. Black Americans were forced to live in racially-segregated neighborhoods; send their children to segregated schools; and use separate facilities at area restaurants and cultural institutions. Disparate treatment also extended into the labor market. Minorities were concentrated in low wage work with few opportunities for advancement.^{6, 7, 8}

In the middle of the 20th century, many legal and workplace reforms opened up new opportunities for minorities and women nationwide. *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of race- and gender-based discrimination. Workplaces adopted formalized personnel policies and implemented programs to diversify their staffs.⁹ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women^{10, 11, 12, 13} 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.^{14, 15, 16}

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

establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{20, 21, 22}

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

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

The information in Chapter 3 comes from existing research in the area of race- and gender-based discrimination as well as from primary research that the study team conducted of current marketplace conditions. Additional quantitative and qualitative analyses of marketplace conditions are presented in Appendix C and Appendix D, respectively.

A. Human Capital

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

Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{27, 28} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education that they receive.^{29, 30} Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³¹ In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.³² For those and other reasons, minorities are far less likely than non-Hispanic whites to attend college; enroll at highly- or moderately selective four-year institutions; or earn college degrees.³³

Educational outcomes for minorities in Denver are similar to those for minorities nationwide. The study team’s analyses of the Denver labor force indicate that certain minority groups are far less likely than non-Hispanic whites to earn a college degree. Figure 3-1 presents the percentage of Denver workers that have earned a four-year college degree by racial/ethnic and gender group. As shown in Figure 3-1, Black American, Asian Pacific American, Hispanic American, and Native American workers in Denver are substantially less likely than non-Hispanic white workers to have four-year college degrees.

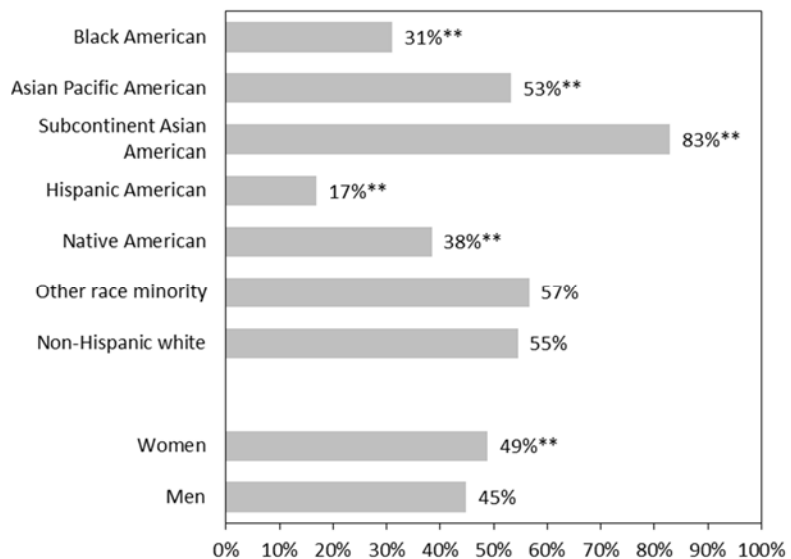
Figure 3-1.
Percentage of workers 25 and older with at least a four-year college degree, Denver, 2012-2016

Note:

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

Source:

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

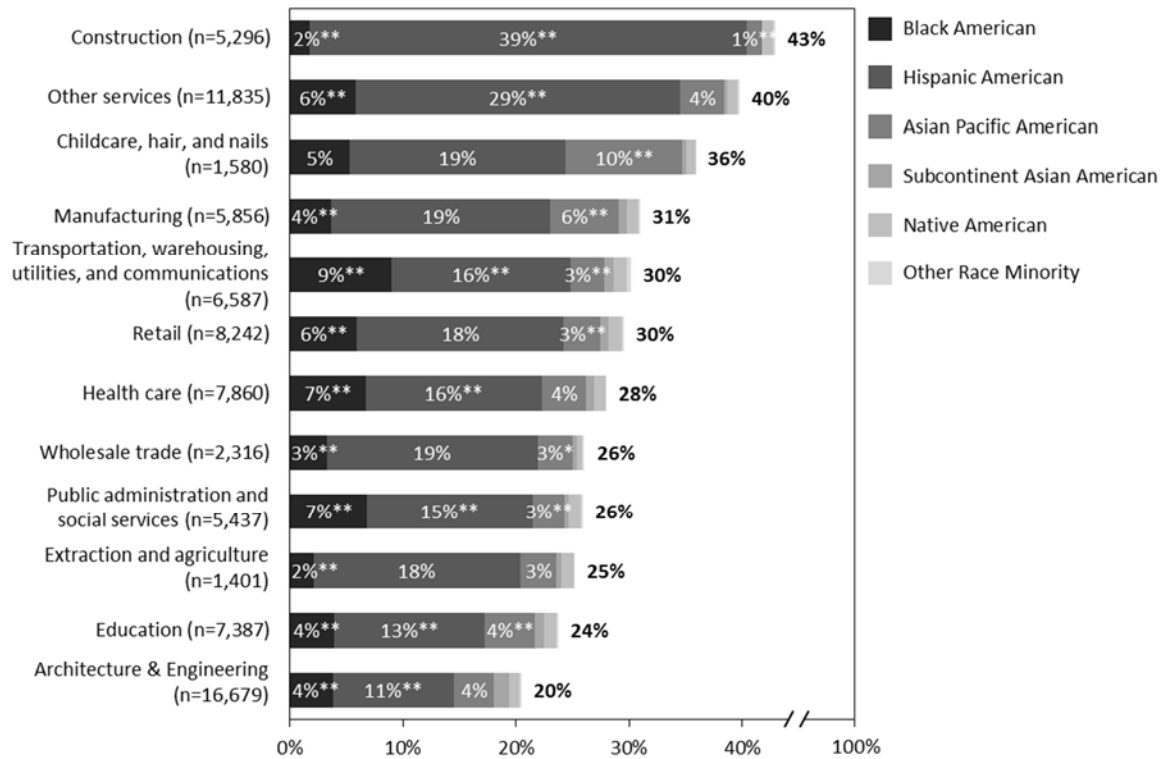


Employment and management experience. An important precursor to business ownership and success is acquiring direct work and management experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related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

Employment. On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire relevant work experience. Minorities and women are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{34, 35, 36} When employed, minorities and women are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.^{37, 38, 39, 40, 41} In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in Colorado and nationwide, which contributes to a number of labor difficulties, including difficulties finding jobs and relatively slow wage growth.^{42, 43, 44, 45}

The study team’s analyses of the labor force in Denver are largely consistent with those findings. Figures 3-2 and 3-3 present the representations of minority and women workers in various Denver industries. As shown in Figure 3-2, the Denver industries with the highest representations of minority workers are construction; other services; and childcare, hair, and nails. The Denver industries with the lowest representations of minority workers are extraction and agriculture; education; and architecture and engineering.

Figure 3-2.
Percent representation of minorities in various industries, Denver, 2012-2016



Note: *,** 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 Denver workers is 5 percent for Black Americans, 19 percent for Hispanic Americans, 4 percent for Asian Pacific Americans, 1 percent for Subcontinent Asian Americans, 1 percent for Native Americans, 0 percent for Other race minorities, and 30 percent for all minorities considered together.

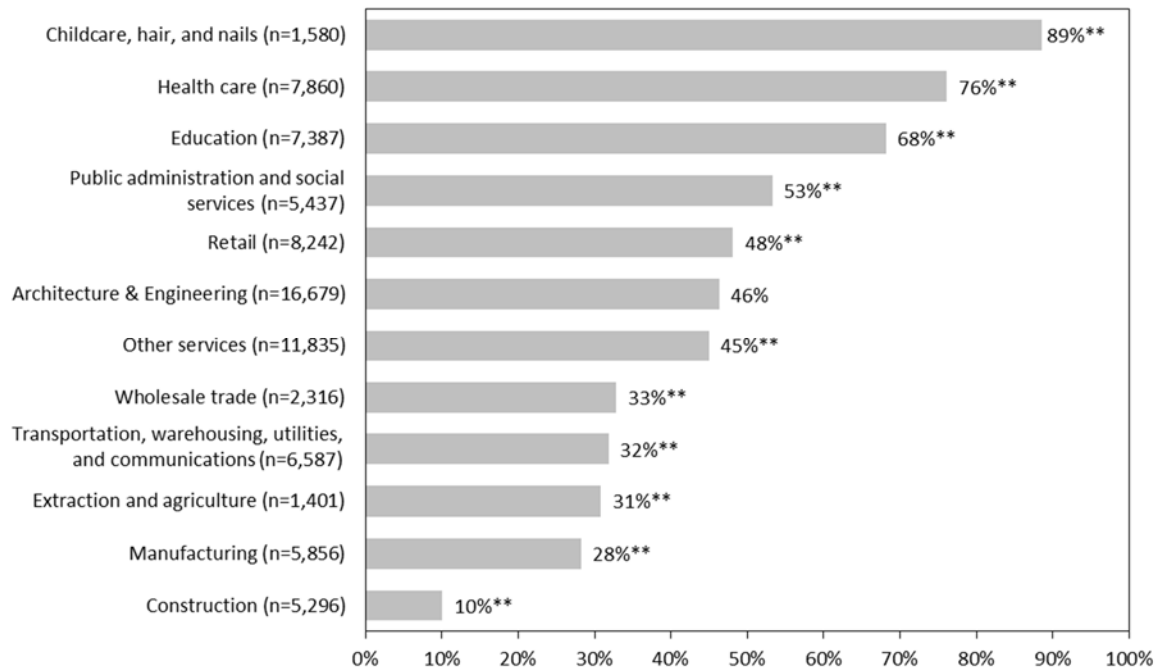
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, and scientific research industries were combined to one category of Professional Services. Workers in the rental and leasing; travel; investigation; waste remediation; arts; entertainment;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

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

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

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

Figure 3-3.
Percent representation of women in various industries, Denver, 2012-2016



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

The representation of women among all Denver workers is 46 percent.

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

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

As shown in Figure 3-4:

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

Figure 3-4.
Percentage of workers who worked as a manager in Denver, 2012-2016

Note:

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

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

Source:

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

Denver	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	5.6 % **	6.2 % **	3.7 % **
Asian Pacific American	12.2 %	5.8 % **	4.4 % **
Subcontinent Asian American	0.0 % †	9.0 %	9.7 %
Hispanic American	2.6 % **	6.4 % **	2.5 % **
Native American	3.9 % **	11.3 %	3.3 % **
Other Race Minority	6.9 % †	0.0 % †	0.0 % *
Non-Hispanic white	16.8 %	9.8 %	8.6 %
Gender			
Women	14.5 % **	8.7 %	6.3 % *
Men	10.5 %	9.5 %	7.3 %
All individuals	10.9 %	9.2 %	6.9 %

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

B. Financial Capital

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

Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various factors unrelated to race and gender.^{56, 57, 58} For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.^{59, 60} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 84 percent the median hourly wage of men.⁶¹ Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

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

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

Figure 3-5.
Mean annual wages, Denver, 2012-2016

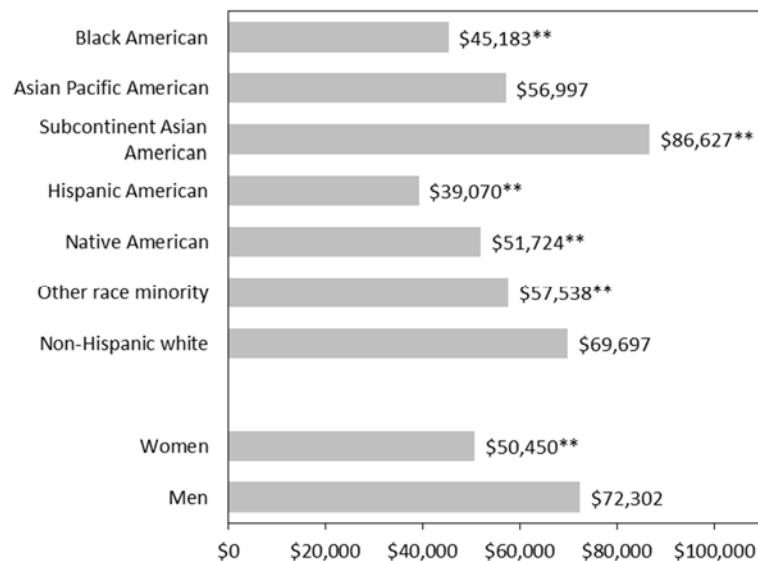
Note:

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

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

Source:

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



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

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

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

Figure 3-6.
Home Ownership Rates, Denver, 2012-2016

Note:
The sample universe is all households.
** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.

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

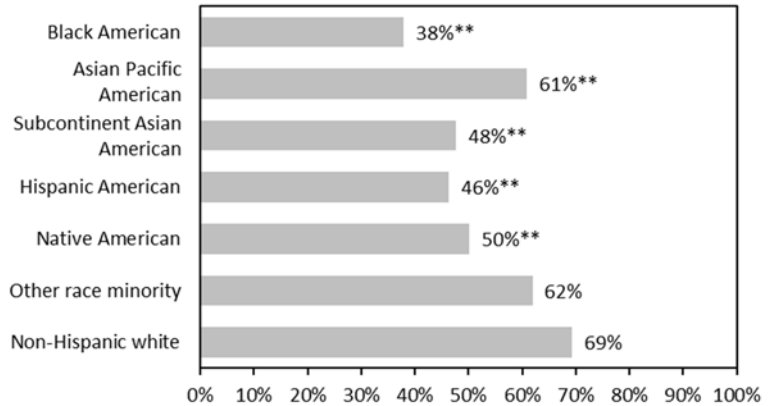
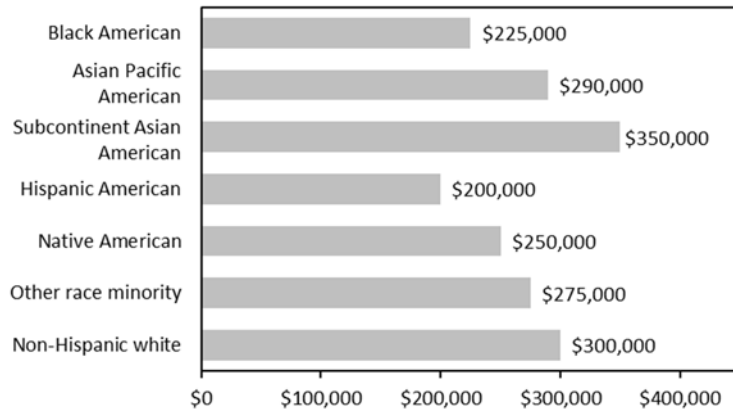


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Denver. Consistent with national trends, homeowners of certain minority groups—Black Americans, Hispanic Americans, Native Americans, and other race minorities—own homes that, on average, are worth substantially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

Figure 3-7.
Median home values, Denver Region, 2012-2016

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

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



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

Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.^{81, 82, 83, 84, 85} Race- and gender-based barriers in home credit

markets, as well as the recent foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{86, 87, 88, 89}

To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for Denver and the United States as a whole. As shown in Figure 3-8, all relevant minority groups exhibit higher home loan denial rates than non-Hispanic whites when considering both the United States and Denver in particular. In addition, the study team’s analyses indicate that certain minority groups in Denver are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-14 in Appendix C).

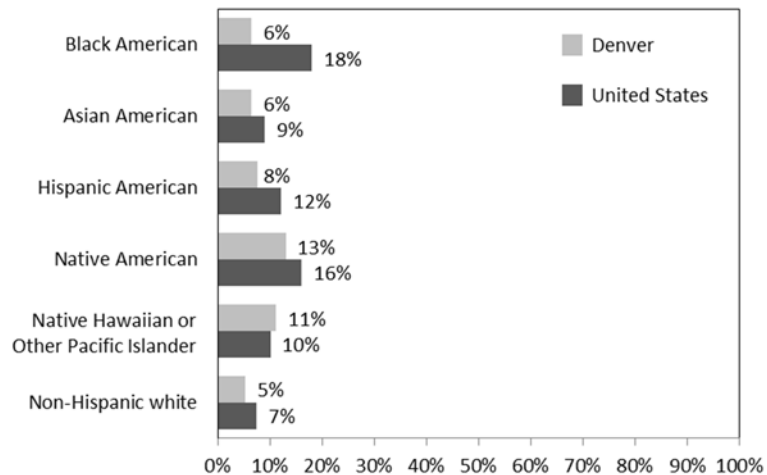
Figure 3-8.
Denial rates of conventional purchase loans for high-income households, Denver and the United States, 2016

Note:

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

Source:

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



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

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, the number of Black American-owned businesses increased by 35 percent, and the number of Hispanic American-owned businesses increased by 46 percent.¹⁰⁰ 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.^{101, 102, 103, 104} In addition, although rates of business ownership have increased among

minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.^{105, 106, 107} The study team examined rates of business ownership in the Denver construction; professional services; and goods and services industries by race/ethnicity and gender. As shown in Figure 3-9:

- Black Americans, Asian Pacific Americans, and Hispanic Americans exhibit lower rates of business ownership than non-Hispanic whites in the Denver construction industry. In addition, women exhibit lower rates of business ownership than men.
- Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and Hispanic Americans exhibit lower rates of business ownership than non-Hispanic whites in the Denver professional services industry.
- Black Americans, Subcontinent Asian Americans, and Hispanic Americans exhibit lower rates of business ownership than non-Hispanic whites in the Denver goods and services industry.

Figure 3-9.
Self-employment rates in Denver, 2012-2016

Note:

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

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

Source:

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

Denver	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	14.3 % **	7.9 % **	6.8 % **
Asian Pacific American	17.9 % *	7.8 % **	11.3 %
Subcontinent Asian American	0.0 % †	3.3 % **	5.8 % **
Hispanic American	11.8 % **	11.8 % **	10.3 % **
Native American	18.2 %	15.5 %	16.3 %
Other Race Minority	23.9 % †	4.8 % †	6.6 %
Non-Hispanic white	27.3 %	20.0 %	14.2 %
Gender			
Women	16.4 % **	19.4 % **	13.3 %
Men	21.4 %	16.9 %	12.5 %
All individuals	20.9 %	17.9 %	12.8 %

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

Figure 3-10.
Statistically significant relationships between race/ethnicity and gender and business ownership in study-related industries in Denver, 2012-2016

Source:

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

Industry and Group	Coefficient
Construction	
Hispanic American	-0.3820
Women	-0.4076
Professional Services	
Black American	-0.3617
Asian Pacific American	-0.4676
Subcontinent Asian American	-0.7729
Goods and Services	
Black American	-0.3303
Subcontinent Asian American	-0.4132

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

- Being Hispanic American or a woman was associated with lower rates of business ownership in the construction industry.
- Being Black American, Asian Pacific American, or Subcontinent Asian American was associated with lower rates of business ownership in the professional services industry.
- Being Black American or Subcontinent Asian American was associated with lower rates of business ownership in the goods and services industry.

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

D. Business Success

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

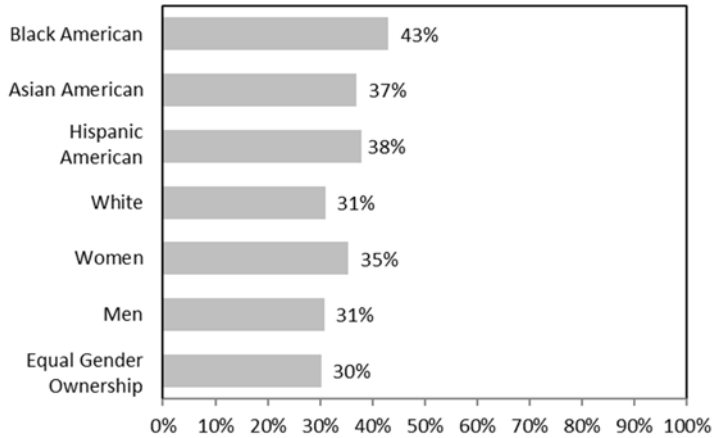
Business closure. The study team examined the rates of closure among Colorado businesses by the race/ethnicity and gender of the owners. Figure 3-11 presents those results. As shown in Figure 3-11, Black American-owned businesses, Asian American-owned businesses, and Hispanic American-owned businesses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

minority- and woman-owned businesses may have important effects on their availability for government contracts in Colorado and Denver.

Figure 3-11.
Rates of business closure in Colorado, 2002-2006

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

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

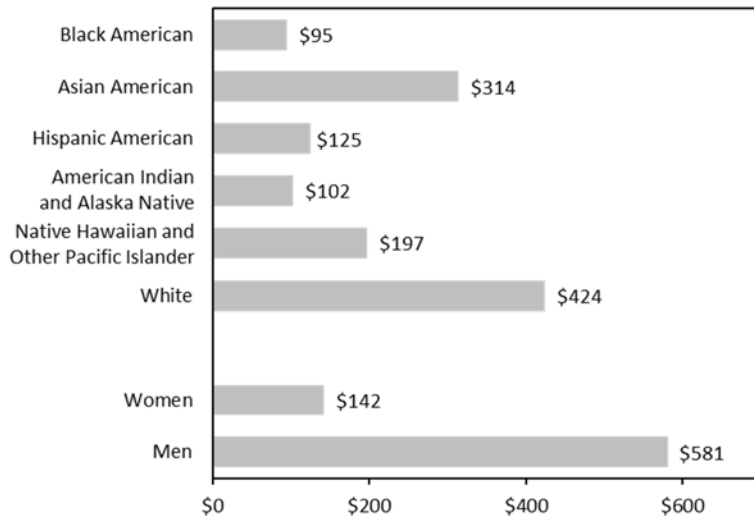


Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in Denver earn as much as businesses owned by whites or businesses owned by men, respectively. Figure 3-12 shows mean annual receipts for Denver businesses by the race/ethnicity and gender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

Figure 3-12.
Mean annual business receipts (in thousands), Denver-Aurora, CO CSA, 2012

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

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



Business owner earnings. The study team analyzed business owner earnings to assess whether minorities and women in Denver earn as much from the businesses that they own as non-Hispanic whites and men do. As shown in Figure 3-13, Black Americans, Hispanic Americans, and Native Americans earned less on average from their businesses than non-Hispanic whites earned from their businesses. In addition, women in Denver earned less from their businesses than men earned from their businesses. BBC also conducted regression analyses to determine whether earnings disparities in Denver exist even after statistically controlling for

various race- and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that being Black American or a woman was associated with substantially lower business owner earnings (for details, see Figure C-27 in Appendix C).

Figure 3-13.
Mean annual business owner earnings, Denver, 2012-2016

Note:

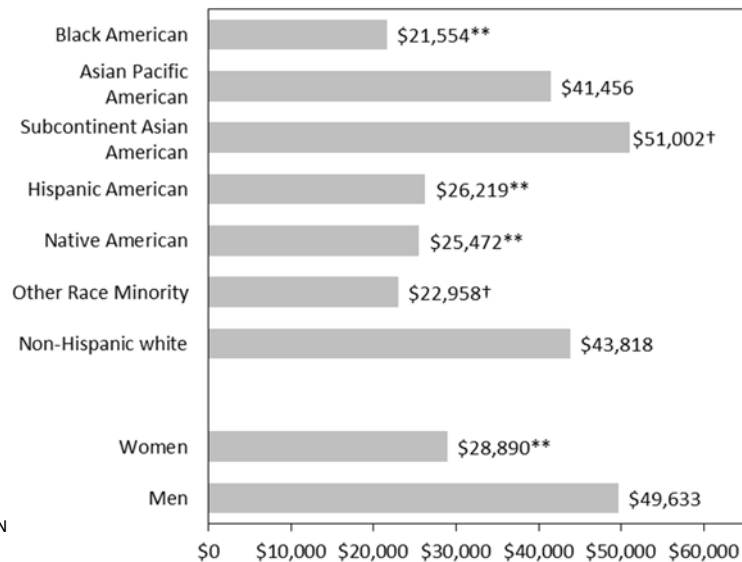
The sample universe is business owners age 16 and older who reported positive earnings. All amounts in 2016 dollars.

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

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

Source:

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



E. Summary

BBC’s analyses of marketplace conditions indicate that minorities; women; and minority- and woman-owned businesses face substantial barriers nationwide and in Denver. Existing research, as well as primary research that the study team conducted, indicate that race-and gender-based disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence that those disparities exist even after accounting for various race- and gender-neutral factors such as age, income, education, and familial status. There is also evidence that many disparities are due—at least, in part—to race- and gender-based discrimination.

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in relevant Denver industries—construction; professional services; and goods and services—and operating those businesses successfully. Any difficulties that minorities and women face in starting and operating businesses may reduce their availability for government agency work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in the Denver marketplace indicates that government agencies in the state are passively participating in race- and gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for their contracts. Many courts have held that passive participation in any race- or gender-based discrimination establishes a compelling governmental interest for agencies to take remedial action to address such discrimination.

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CHAPTER 4.

Collection and Analysis of Contract Data

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Collection and Analysis of Contract Data

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

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

A. Overview of Contracting and Procurement Policies

The City and County of Denver’s Division of Small Business Opportunity (DSBO) provides guidance to all departments and contracting officers to ensure consistency in procurement procedures and compliance with City code regarding contracting and procurement. The City has developed detailed guidelines for procuring construction and design services as well as goods and services. Those guidelines were last updated in May 2011 and are found in Executive Order 8, Memorandum A.

Several departments within the City award contracts within construction; professional services; and goods and services. However, the majority of those contracts are procured through the Department of Public Works, Denver International Airport (DEN), and the Purchasing Department. Contracts that those three departments awarded during the study period accounted for 88 percent of the contracts that the study team analyzed as part of the disparity study. The contracting policies of those three departments are described below.

Public Works. City Council and the Mayor’s Office provide oversight on all contracts and procurements that Public Works awards. For all construction and design services contracts, Public Works advertises solicitations in the Daily Journal; on Work4Denver, which is the Public Works Contract Administration webpage; and through QwestCDN, which is an online bid platform. Vendors must download solicitations through QwestCDN and are charged a fee to do so. Solicitations include a description of the required services, evaluation criteria, submission information, and contact information for a City representative.

Construction. Public Works awards construction solicitations through hard bid, construction manager/general contractor, design/build, or master on-call/integrated contracting processes,

although the majority of Public Works contracts are awarded through a hard bid process (i.e., to the lowest responsive and responsible bidder). As part of a hard bid process, the contract administrator and project manager are responsible for preparing each construction solicitation and advertising it through the appropriate channels. They begin each solicitation by conducting a pre-bid conference to bring together potential bidders and subcontractors to learn more about the opportunity. All qualified bidders are then required to submit a sealed bid by the due date to be considered for the contract. Public Works collects all bids and sends them to the project manager and DSBO. The department then awards the contract to the lowest responsive and responsible bidder.

Professional services. Professional services solicitations are awarded through qualifications-based selection processes (i.e., factors other than cost are taken into consideration). A qualifications-based selection process allows Public Works to negotiate a contract for professional services at a fair and reasonable price with the best qualified firm. There are two types of qualifications-based selection processes that Public Works uses:

- Public Works sometimes uses a direct selection process by which the department selects an awardee from written proposals and does not require interviews; or
- Public Works uses a multi-step selection process by which interested consultants submit proposals, and then the department develops a shortlist of the three most qualified firms and interviews them before selecting an awardee.

Regardless of whether Public Works uses a direct selection process or a multi-step selection process, the contract administrator is responsible for preparing each solicitation and advertising it through the appropriate channels. Public Works collects all responses and sends them to the project manager and DSBO. A selection committee convenes to review each proposal in order to ensure a fair and open selection process. The committee develops evaluation criteria and scores each proposal based on those criteria. Once the committee selects a consultant, the project manager negotiates fair and reasonable compensation for the desired services.

DEN. City Council and the Mayor's Office also provide oversight on all contracts and procurements that DEN awards. The City has set the following thresholds for when City Council approval is required for DEN contracts and procurements:

- Construction contracts worth \$5 million or more;
- Professional services contracts worth \$500,000 or more; and
- All revenue agreements, grants, land agreements.

DEN currently awards three types of contracts and procurements: expenditure contracts, which include both large construction and professional services contracts; informal procurements, which include small professional services contracts; and revenue contracts. Revenue contracts were not included as part of the disparity study and so are not discussed further.

Expenditure contracts. Expenditure contracts include large construction and professional service contracts and are awarded using formal bid processes. Formal bid processes include different procurement vehicles such as requests for proposals (RFPs), requests for information

(RFIs), invitations for bids (IFBs), and requests for quotes (RFQs), which are all referred to herein as RFxs. Prior to the release of an RFx, DEN hosts outreach sessions to inform the community of the upcoming opportunity. Four to six weeks prior to the due date, the RFx is advertised on DEN's website. If necessary, a pre-proposal conference is held two weeks after RFx advertising to explain procurement requirements and answer potential proposers' questions. In addition, there is a question-and-answer period to allow interested businesses to submit questions pertaining to the RFx. RFx responses can be submitted in person to the Airport Office Building, by mail to the DEN Copy Center, or through DEN's electronic portal.

To ensure a fair and open process, the Contract Administrator for the RFx will convene community members and airline members to serve on an evaluation panel. The list of panel members is submitted to DEN's Chief Executive Officer (CEO) for approval. Panel members then participate in a training to provide guidance on their roles and the evaluation process. The evaluation panel reviews and scores each proposal based on the criteria set by the contract administrator. In some instances, the evaluation panel will interview responders and score their interviews as part of the evaluation process. The contract administrator will compute scores and conduct a meeting with the project manager, sponsoring Senior Vice President, and other stakeholders. The group will draft a Selection Recommendation Memo, which it then submits to the CEO for approval. The successful respondent will then be notified of contract award.

Informal procurements. DEN awards professional services contracts worth less than \$100,000 using information processes. As part of the process, the contract administrator collects at least three bids from vendors who are known to perform the desired work. All bids are reviewed and evaluated by the project management team, and it then selects the bid from the most qualified vendor.

Purchasing. The City's Purchasing Division is responsible for the purchases of goods and services. Purchasing follows the procurement policies outlined in the Charter, Denver Revised Municipal Code (D.R.M.C.), Executive Orders, and the Fiscal Accountability Rules. Goods and general service purchases can be categorized into three categories:

- Procurements worth \$10,000 or less (open market);
- Procurements worth more than \$10,000 but less than \$50,000 (informal solicitations); and
- Procurements worth \$50,000 or more (formal solicitations).

Open market. For goods and services worth \$10,000 or less, a City buyer determines whether a solicitation is necessary. Open market procedures do not require formal advertising nor are they required to be open to the public. In many cases, open market procurements do not require proof of insurance or bonding.

Informal solicitations. For goods and services worth more than \$10,000 but less than \$50,000, Purchasing uses an informal solicitation process. A City buyer can solicit vendors for bids via e-mail, fax, mail, or telephone. Informal solicitations are not required to be advertised nor are they open to the public. In many cases, informal solicitations do not require proof of insurance or bonding.

Formal solicitations. For goods and services worth \$50,000 or more, formal solicitations are required. A formal solicitation includes a sealed proposal, a formal advertisement, and, in many cases, proof of insurance and bonding. Purchasing advertises all formal solicitations in the Office City Notice or other appropriate media. Information regarding formal solicitations can be found on BidNet. Alternatively, vendors can obtain formal solicitations from the Purchasing office or can request that solicitations be mailed to them. Purchasing awards formal solicitations to the lowest responsive, responsible, and qualified bidder.

Other procurements. The Purchasing department procures several other types of goods and services using one of the following processes.

Individual purchase order. Individual purchase orders can be requested by a City department for any kind of solicitation. Individual purchase orders are the primary way in which Purchasing procures goods and services on behalf of the City.

Contracts. Purchasing uses contracts for the procurement of either one-time or recurring services that City departments might request. When Purchasing creates a contract, it is then held and managed by the City department that requested the associated services.

Master purchase order. Purchasing uses master purchase orders to contract with vendors for goods or services in connection with another good that has already been purchased (e.g., installation of the already-purchased good). Master purchase orders are considered open-ended and thus allow the City to purchase from a successful vendor on an as-needed basis during the contract's effective dates. Master purchase orders are only used for purchases worth \$50,000 or more using a formal solicitation process.

Blanket purchase order. Purchasing uses blanket purchase orders that City departments can use on an as-needed basis for products that are part of a particular family of products. As part of that process, Purchasing requests a firm price from a vendor and then issues a blanket purchase order covering the amount, although the total amount may not be spent.

Procurement cards (p-cards). Some City personnel have p-cards, which are used to purchase certain goods and services worth less than \$2,000 and that have been identified and approved by the Manager of General Services. Those purchases are typically on a non-recurring basis and usually cannot be covered by an existing master purchase order, blanket purchase order, or contract.¹ P-card purchases were not included as part of disparity study analyses.

Cooperative purchasing. Under the Code of Ordinance Section 20-64.5, Purchasing can authorize the procurement of a good or general service that is part of an intergovernmental agreement, should that purchase be in the best interest of the City.

¹ Under certain circumstances, p-cards can become part of a master purchase order that covers goods that the City department is purchasing.

B. Collection and Analysis of Contract Data and Procurement Data

BBC Research & Consulting (BBC) collected contracting and vendor data from the City's Alfresco, B2Gnow, and PeopleSoft 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 that was available on prime contracts and subcontracts that the City awarded between January 1, 2012 and December 31, 2016. BBC sought data that included information about prime contractors and subcontractors, regardless of the race/ethnicity and gender of their owners or their statuses as certified minority-owned business enterprises (MBEs) or woman-owned business enterprises (WBEs). The study team collected data on construction; professional services; and goods and services prime contracts and subcontracts that the City awarded during the study period. The study team's analyses included all contracts and payments worth \$5,000 or more.²

Prime contract data collection. The City provided the study team with electronic data on construction; professional services; and goods and services prime contracts that the agency awarded during the study period. 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 MWBE or Disadvantaged Business Enterprise contract goals were used;
- Funding source (federal or local funding);
- Prime contractor name; and
- Prime contractor identification number, such as a vendor number.

The City also provided the study team with information about payments that the City made during the study period on contracts that were awarded using contract goals (i.e., *goals contracts*) and on all procurements. 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 into larger, related purchases. In instances where payment information could not be aggregated, the study team treated payment records as individual purchases.

Subcontract data collection. The City provided the study team with electronic data on subcontracts related to goals contracts that it awarded during the study period. To gather

² The study team chose \$5,000 as its analysis threshold because many purchases worth less than \$5,000 represented a relatively small amount of the contracting dollars that the City spent during the study period. Purchases worth \$5,000 or more accounted for more than 99 percent of all City contracting dollars that the City spent during the study period.

comprehensive subcontract data on contracts that the City awarded without the use of contract goals (i.e., *no-goals contracts*), the study team conducted surveys with prime contractors to collect information on the subcontracts that were associated with the contracts on which they worked during the study period. BBC sent out surveys to request subcontract data on 325 no-goals contracts that the City awarded during the study period. After the first round of surveys, BBC worked with the City to contact the remaining unresponsive prime contractors with the highest valued contracts. BBC collected the following information about each relevant subcontract as part of the survey process:

- Associated prime contract number;
- Amount awarded on the subcontract;
- Amount paid on the subcontract;
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

Those contracts accounted for approximately \$858 million contract dollars during the study period. Through the survey effort, BBC collected subcontract data associated with more than \$595 million, or 69 percent, of those contract dollars.

Contracts included in study analyses. The study team collected information on 18,799 relevant prime contract elements and 2,991 associated subcontracts that the City awarded during the study period in the areas of construction; professional services; and goods and services. Those contracts accounted for approximately \$3.5 billion of contracting dollars awarded by the City during the study period. Figure 4-1 presents dollars by relevant contracting area for the prime contract and subcontract elements that the study team included in its analyses. The study team combined its analyses for goods and services contracts because the City uses similar procurement processes to award those contracts.

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

Note:
Numbers rounded to nearest dollar and thus may not sum exactly to totals.
Source:
BBC Research & Consulting from City contract and payment data.

Contract Type	Number of Contract Elements	Dollars (in thousands)
Construction	9,218	\$2,233,136
Construction-related professional services	4,480	\$520,234
Goods and general services	8,092	\$744,182
Total	21,790	\$3,497,551

C. Collection of Vendor Data

The City maintains a comprehensive list of all businesses that have done business or expressed interest in doing business with the City. The study team compiled vendor data that the City Attorney’s Office provided. The study team compiled the following information on businesses that participated in relevant City contracts during the study period:

- Business name;

- Physical addresses, email addresses, and phone numbers;
- Ownership status (i.e., whether each business was minority-owned or woman-owned);
- Ethnicity of ownership (if minority-owned);
- MWBE 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 certified firm directory;
- State of Colorado Unified Certification Program directory;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Telephone surveys that the study team conducted with business owners and managers as part of the utilization and availability analyses; and
- Business websites.

D. Relevant Geographic Market Area

The study team used the City’s contracting and vendor data to help determine the relevant geographic market area—the geographical area in which the agency spends the 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 the seven-county Denver Metropolitan Statistical Area (MSA), indicating that the Denver MSA should be considered the relevant geographic market area for the study.³ BBC’s analyses focused on the Denver MSA.

E. Relevant Types of Work

For each prime contract and subcontract, 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 data; telephone surveys that BBC conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-2 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.

³ The Denver MSA includes Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson counties in Colorado.

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	
Building construction	\$541,639
Parking services	\$333,582
Highway and street construction	\$314,758
Bridge construction	\$141,087
Heavy construction	\$96,123
Wrecking, demolition, excavation, drilling	\$90,589
Electrical work	\$80,738
Concrete and related products	\$67,298
Plumbing and HVAC	\$56,885
Heavy construction equipment	\$54,581
Other construction services	\$51,594
Elevators and conveyors	\$46,347
Landscape services	\$39,753
Water, sewer, and utility lines	\$35,331
Other construction materials	\$34,821
Electrical equipment and supplies	\$32,671
Industrial equipment and machinery	\$23,734
Environmental cleaning	\$22,289
Trucking, hauling and storage	\$20,412
Traffic flagging and safety	\$19,434
Lawn, garden, and irrigation supplies	\$18,937
Landscape architecture	\$18,393
Fencing, guardrails and signs	\$17,057
Carpet and floors	\$15,663
Painting	\$14,757
Masonry, drywall and stonework	\$11,633
Roofing	\$10,814
Windows and doors	\$10,115
Structural metals	\$10,014
Street cleaning	\$2,088
Total construction	\$2,233,136
Professional services	
Engineering	\$198,477
Business services and consulting	\$108,015
Architectural and design services	\$65,291
Advertising, marketing and public relations	\$47,715
Construction management	\$31,217
Environmental services and transportation planning	\$25,342
Human resources and job training services	\$17,753
Finance and accounting	\$16,172
Testing services	\$5,683
Medical testing, laboratories, and pharmaceutical services	\$2,953
Surveying and mapmaking	\$1,617
Total other professional services	\$520,234

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

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)
Goods and services	
Computer and IT services	\$175,157
Cleaning and janitorial services	\$135,595
Automobiles	\$59,136
Communications equipment	\$47,173
Catering	\$43,652
Petroleum and petroleum products	\$41,692
Other services	\$40,031
Security guard services	\$39,497
Security systems	\$30,831
Vehicle parts and supplies	\$25,387
Other goods	\$18,124
Furniture	\$16,232
Food	\$15,425
Office equipment and supplies	\$14,996
Vehicle repair shops	\$11,754
Uniforms	\$9,889
Printing and copying	\$9,575
Towing services	\$5,101
Cleaning and janitorial supplies	\$4,249
Communication services	\$685
Total other services	\$744,182
GRAND TOTAL	\$3,497,551

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

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

- The City awarded to universities, government agencies, or other nonprofit organizations (\$650 million of associated dollars);
- 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 Denver MSA (\$290 million of associated dollars);⁴

- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate or legal services; \$882 million of associated dollars);
- Represented utilities, broadcast and communications services, and other heavily-regulated industries (\$306 million of associated dollars); or
- Were classified in subindustries that are not typically included in disparity studies and account for small proportions of the City’s contracting dollars (\$65 million of associated dollars).⁵

F. Collection of Bid and Proposal Data

BBC conducted a case study analysis of bids and proposals for a sample of contracts that the City awarded during the study period. The City provided documents related to bid, proposal, and other related information to the study team for those contracts. BBC successfully collected and examined bid and proposal information for 51 Public Works contracts, 84 DEN contracts, and 160 goods and services contracts.

G. Agency Review Process

The City reviewed BBC’s contracting and payment 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. City staff also reviewed contract and vendor information. BBC incorporated the City’s feedback in the final contract and vendor data that the study team used as part of the disparity study.

⁴ Examples of such industries include banking, insurance, transit buses and light rail vehicles, and software.

⁵ Examples of such industries include retail stores, farms, and miscellaneous goods purchases.

CHAPTER 5.

Availability Analysis

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on City and County of Denver (City) construction; professional services; and goods and services prime contracts and subcontracts.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- and woman-owned businesses for City prime contracts and subcontracts to inform its implementation of the Minority- and Women-owned Business Enterprise, the Emerging Business Enterprise, the Small Business Enterprise, and Federal Disadvantaged Business Enterprise (DBE) Program. In addition, BBC used availability analysis results as inputs in the disparity analysis. In the disparity analysis, BBC compared the percentage of City contract dollars that went to minority- and woman-owned businesses during the study period (i.e., participation, or *utilization*) to the percentage of dollars that one might expect those businesses to receive based on their availability for specific types and sizes of City prime contracts and subcontracts. The study period included contracts that the City awarded between January 1, 2012 and December 31, 2016. Comparisons between participation and availability allowed BBC to determine whether any minority- or woman-owned business groups were underutilized during the study period relative to their availability for City work (for details, see Chapter 7).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work (i.e., subindustries) related to the relevant types of contracts and procurements that the City awarded during the study period. 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

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.

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*).²

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

Overview of availability surveys. The study team conducted telephone surveys with business owners and managers to identify local businesses that are potentially available for City prime contracts and subcontracts.³ BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all businesses—regardless of ownership—that perform work in relevant industries and have a location within the relevant geographic market area. BBC developed that phone book based on information from a variety of data sources including Dun & Bradstreet (D&B) Marketplace and the City’s vendor registration list. BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the contracts that the City awarded during the study period. BBC obtained listings on 7,320 local businesses that do work related to those work specializations. Removing a total of 1,168 duplicate, non-working, or incorrect phone numbers resulted in a list of 6,152 businesses with which BBC attempted availability surveys.

Availability survey information. BBC worked with Customer Research International to conduct telephone surveys with the owners or managers of the identified business establishments. Survey questions covered many topics about each business, including:

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

² BBC identified the relevant geographic market area for the disparity study as Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson Counties in Colorado.

³ The study team offered business representatives the option of completing surveys via fax or e-mail if they preferred not to complete surveys via telephone.

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

- Being a private sector business (as opposed to a government organization nonprofit organization);
- Having performed work relevant to City construction; professional services; or goods and services contracting or procurement;
- Having bid on or performed construction; professional services; or good and services prime contracts or subcontracts in either the public or private sector in the relevant geographic market area in the past five years; and
- Being interested in work for the City or other government agencies.⁴

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 with thousands of local businesses, BBC developed a database of information about businesses that are potentially available for City construction; professional services; and goods and services contracts and procurements. Information from the database allowed BBC to assess businesses that are ready, willing, and able to perform work for the City. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The information in Figure 5-1 reflects a simple *head count* of businesses with no analysis of their availability for specific City contracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for City work. The study team’s analysis included 597 businesses that are potentially available for specific construction; professional services; and goods and services contracts and procurements that the City awards. As shown in Figure 5-1, of those businesses, 29.6 percent were minority- or woman-owned.

D. Availability Calculations

BBC analyzed information from the availability database to develop dollar-weighted estimates of the availability of minority- and woman-owned businesses for City work. Those estimates represent the percentage of City 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.

⁴ That information was gathered separately for prime contract and subcontract work.

Figure 5-1.
Percentage of businesses in the availability database that are minority- or woman-owned

Note:

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

Source:

BBC Research & Consulting availability analysis.

Business group	% of businesses
Non-Hispanic white woman-owned	12.4 %
Asian American-owned	2.3 %
Black American-owned	4.2 %
Hispanic American-owned	9.4 %
Native American-owned	1.0 %
Total Minority- and Woman-owned	29.6 %

Steps to calculating availability. BBC used a bottom up, contract-by-contract *matching* approach to calculate availability. Only a portion of the businesses in the availability database was considered potentially available for any given City 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 specific characteristics of each prime contract and subcontract included as part of the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
 - Are interested in performing construction; professional services; or goods and services work in that particular role for that specific type of work for the City; and
 - Have bid on or performed work of that size in the past five years.
2. BBC then counted the number of minority-owned businesses (separately by race/ethnicity) and non-Hispanic white woman-owned businesses among the businesses that met the criteria in Step 1.
3. BBC translated the numeric availability of minority- and woman-owned businesses for the contract element into percentage availability.

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

BBC's availability calculations are based on prime contracts and subcontracts that the City awarded between January 1, 2012 and December 31, 2016. A key assumption of the availability analysis is that the contracts and procurements that the City awarded during the study period are representative of the contracts and procurements that the City 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 those that they awarded in the past, then the City should adjust availability calculations accordingly to account for those differences.

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

BBC's approach accounts for type of work.

Federal regulations suggest calculating availability based on businesses' abilities to perform specific types of work. BBC took type of work into account by examining 65 different subindustries related to construction; professional services; and goods and services as part of estimating availability for City prime contracts and subcontracts.

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

BBC's approach accounts for the relative capacity of businesses. To account for the capacity of businesses to work on City contracts, BBC considered the size—in terms of dollar value—of the prime contracts and subcontracts that a business bid on or received in the previous five years when determining whether to count that business as available for particular prime contracts or subcontracts. For each contract element, BBC considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value. BBC's approach to accounting for capacity is consistent with many recent, key court decisions that have found such measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.*,⁵ *Western States*

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

On a contract that the City awarded in 2012, the prime contractor awarded a subcontract worth \$60,005 for electrical work. To determine the overall availability of minority- and woman-owned businesses for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2016;
- b. Indicated that they performed electrical work;
- c. Reported bidding on work of similar or greater size in the past; and
- d. Reported interest in working as a subcontractor on City or other government agency projects.

The study team found 22 businesses in the availability database that met those criteria. Of those businesses, eight were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 36 percent (i.e., $8/22 \times 100 = 36$).

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

Paving Company v. Washington State DOT,⁶ *Rothe Development Corp. v. U.S. Department of Defense*,⁷ and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*⁸).

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

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

E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for the 21,790 construction; professional services; and goods and services prime contracts and subcontracts that the City awarded between January 1, 2012 and December 31, 2016.

Overall results. Figure 5-3 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for City contracts and procurements. Overall, the availability of minority- and woman-owned businesses for the City’s contracts and procurements is 23.7 percent. Non-Hispanic white woman-owned businesses (10.9%) and Hispanic American-owned businesses (6.2%) exhibited the highest availability percentages among all groups.

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

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	10.9 %
Asian American-owned	3.2 %
Black American-owned	3.3 %
Hispanic American-owned	6.2 %
Native American-owned	0.1 %
Total Minority- and Woman-owned	23.7 %

Contract goals. During the study period, the City used MWBE and DBE contract goals to award many locally-funded and federally-funded contracts, respectively, to encourage the participation of minority- and woman-owned businesses. The City’s use of those contract goals is a race- and gender-conscious measure. It is useful to examine availability analysis results separately for contracts that the City awards with the use of contract goals (*goals contracts*) and contracts that

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

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

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

the City awards without the use of goals (*no-goals contracts*). Figure 5-4 presents availability estimates separately for goals and no-goals contracts. As shown in Figure 5-4, the availability of minority- and woman-owned businesses considered together is approximately equal across goals contracts (23.1%) and no-goals contracts (24.1%).

Figure 5-4.
Availability estimates by contract goal status

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Goal Status	
	Goals contracts	No-goals contracts
Non-Hispanic white woman-owned	12.2 %	10.0 %
Asian American-owned	2.0 %	4.0 %
Black American-owned	2.3 %	4.1 %
Hispanic American-owned	6.4 %	6.0 %
Native American-owned	0.2 %	0.1 %
Total Minority- and Woman-owned	23.1 %	24.1 %

Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for prime contracts and subcontracts. Figure 5-5 presents those results. As shown in Figure 5-5, the availability of minority- and woman-owned businesses considered together is similar for City prime contracts (23.6%) and City subcontracts (24.4%).

Figure 5-5.
Availability estimates by contract role

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract Role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	10.8 %	11.4 %
Asian American-owned	3.4 %	2.2 %
Black American-owned	3.2 %	3.9 %
Hispanic American-owned	6.1 %	6.4 %
Native American-owned	0.1 %	0.5 %
Total Minority- and Woman-owned	23.6 %	24.4 %

Denver international Airport (DEN) contracts. BBC analyzed the availability of minority- and woman-owned businesses for both FAA- and state-funded DEN contracts as well as non-DEN contracts. Figure 5-6 presents the overall availability of minority- and woman-owned businesses for contracts that DEN awarded during the study period (including both prime contracts and subcontracts) compared to those businesses' availability for contracts awarded by other City departments and General Services. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is slightly lower for DEN contracts (20.9%) than non-DEN contracts (26.0%).

Figure 5-6.
Availability estimates by department

Note:
Numbers rounded to nearest tenth of 1 percent.
Numbers 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	Department	
	DEN	Non-DEN
Non-Hispanic white woman-owned	12.7 %	9.5 %
Asian American-owned	1.1 %	4.8 %
Black American-owned	2.6 %	3.9 %
Hispanic American-owned	4.4 %	7.5 %
Native American-owned	0.1 %	0.2 %
Total Minority- and Woman-owned	20.9 %	26.0 %

Industry. BBC examined availability analysis results separately for the City’s construction; professional services; and goods and services contracts. The project team combined results for goods and services contracts, because the City uses similar procurement processes to award those contracts. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together is highest for the City’s professional services contracts (40.4%) and lowest for construction contracts (19.0%).

Figure 5-7.
Availability estimates by industry

Note:
Numbers rounded to nearest tenth of 1 percent. Numbers may not sum exactly to totals.
For more detail, see Figures F-5, F-6, and F-7 in Appendix F.
Source:
BBC Research & Consulting availability analysis.

Business group	Industry		
	Construction	Professional services	Goods and services
Non-Hispanic white woman-owned	10.8 %	15.8 %	7.6 %
Asian American-owned	1.6 %	2.6 %	8.5 %
Black American-owned	1.9 %	11.5 %	2.2 %
Hispanic American-owned	4.6 %	10.4 %	7.9 %
Native American-owned	0.2 %	0.1 %	0.1 %
Total Minority- and Woman-owned	19.0 %	40.4 %	26.3 %

Time period. BBC examined availability analysis results separately for contracts and procurements that the City awarded in the *early study period* (i.e., January 1, 2012 – June 30, 2014) and the *late study period* (i.e., July 1, 2014 – December 31, 2016) 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 5-8, the availability of minority- and woman-owned businesses considered together is somewhat lower in the early study period (23.1%) than in the late study period (24.4%).

Figure 5-8.
Availability estimates by time period

Note:
Numbers rounded to nearest tenth of 1 percent. Numbers 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	11.5 %	10.2 %
Asian American-owned	3.0 %	3.4 %
Black American-owned	3.5 %	3.2 %
Hispanic American-owned	4.9 %	7.4 %
Native American-owned	0.1 %	0.2 %
Total Minority- and Woman-owned	23.1 %	24.4 %

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction; professional services; and goods and services contracts and procurements that the City and County of Denver (the City) awarded between January 1, 2012 and December 31, 2016. BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in City contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on City prime contracts and subcontracts during the study period.¹ For example, if 5 percent of City prime contract and subcontract dollars went to non-Hispanic white woman-owned businesses on a particular set of contracts, utilization of non-Hispanic white woman-owned businesses for that set of contracts would be 5 percent. BBC considered utilization results on their own and as inputs in the disparity analysis (for details, see Chapter 7).

BBC measured the participation of all minority- and woman-owned businesses in City contracts regardless of whether they were certified as minority-owned business enterprises (MBEs), woman-owned business enterprises (WBEs), or Disadvantaged Business Enterprises (DBEs). BBC also measured participation separately for minority- and woman-owned businesses that were MWBE-certified.

Overall Results

Figure 6-1 presents the percentage of contracting dollars that minority- and woman-owned businesses considered together received on construction; professional services; and goods and services contracts and procurements that the City awarded during the study period (including both prime contracts and subcontracts). As shown in Figure 6-1, overall, minority- and woman-owned businesses considered together received 14.8 percent of the relevant contracting dollars that the City awarded during the study period. (The majority of those contracting dollars—10.1 percent—went to certified MWBEs.) Hispanic American-owned businesses (6.3%) and non-Hispanic white woman-owned businesses (5.3%) exhibited higher levels of participation in City contracts than all other groups.

Contract Goals

During the study period, the City used MWBE and DBE contract goals to award many locally-funded and federally-funded contracts, respectively, to encourage the participation of minority- and woman-owned businesses. The City's use of those contract goals is a race- and gender-conscious measure. It is useful to examine utilization analysis results separately for contracts that the City awards with the use of contract goals (*goals contracts*) and contracts that the City awards without the use of goals (*no-goals contracts*). Doing so provides useful information about

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.

outcomes for minority- and woman-owned businesses on contracts that the City awarded in a *race- and gender-neutral* environment and the efficacy of MWBE and DBE contract goals in encouraging the participation of minority- and woman-owned businesses in City contracts and procurements.

Figure 6-1.
Overall utilization results

Note:
Numbers rounded to nearest tenth of 1 percent. Numbers 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	5.3 %
Asian American-owned	1.2 %
Black American-owned	1.6 %
Hispanic American-owned	6.3 %
Native American-owned	0.5 %
Total Minority- and Woman-owned	14.8 %

Figure 6-2 presents utilization results separately for *goals* contracts and *no-goals* contracts. As shown in Figure 6-2, minority- and woman-owned businesses considered together showed higher participation in goals contracts (24.1%) than in no-goal contracts (8.4%). Those results might indicate the effectiveness of contract goals in encouraging the participation of minority- and woman-owned businesses in City contracts and procurements. Note, however, that examining disparity analysis results provides a better assessment of the efficacy of contract goals, because those results also take the availability of minority- and woman-owned businesses for goals and no-goals contracts into account.

Figure 6-2.
Utilization results by contract goal status

Note:
Numbers rounded to nearest tenth of 1 percent. Numbers may not sum exactly to totals.
For more detail, see Figures F-16 and F-17 in Appendix F.

Source:
BBC Research & Consulting utilization analysis.

Business group	Goal Status	
	Goals contracts	No-goals contracts
Non-Hispanic white woman-owned	8.1 %	3.3 %
Asian American-owned	1.2 %	1.2 %
Black American-owned	1.9 %	1.5 %
Hispanic American-owned	12.1 %	2.1 %
Native American-owned	0.8 %	0.3 %
Total Minority- and Woman-owned	24.1 %	8.4 %

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 utilization results separately for prime contracts and subcontracts. Figure 6-3 presents those results. As shown in Figure 6-3, the participation of minority- and woman-owned businesses considered together was much higher in the City’s subcontracts (42.9%) than in the City’s prime contracts (8.7%). The vast majority of contracting dollars that the City awarded during the study period were associated with prime contracts.

Figure 6-3.
Utilization results by contract role

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract Role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	3.5 %	13.5 %
Asian American-owned	1.0 %	2.2 %
Black American-owned	1.1 %	3.9 %
Hispanic American-owned	2.7 %	22.4 %
Native American-owned	0.4 %	0.9 %
Total Minority- and Woman-owned	8.7 %	42.9 %

DEN Contracts

BBC also analyzed the participation of minority- and woman-owned businesses in contracts that the Denver International Airport (DEN) awarded and contracts that other City departments awarded. Figure 6-4 presents those results. As shown in Figure 6-4, minority- and woman-owned businesses exhibited somewhat lower levels of participation in DEN contracts (14.1%) when compared to all other City contracts (15.4%).

Figure 6-4.
Utilization results by department

Note:

Numbers rounded to nearest tenth of 1 percent.
Numbers 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	Department	
	DEN	Non-DEN
Non-Hispanic white woman-owned	3.7 %	6.5 %
Asian American-owned	0.5 %	1.8 %
Black American-owned	2.1 %	1.2 %
Hispanic American-owned	7.2 %	5.5 %
Native American-owned	0.6 %	0.4 %
Total Minority- and Woman-owned	14.1 %	15.4 %

Industry

BBC examined utilization results separately for the City's construction; professional services; and goods and services contracts. The project team combined results for goods and services contracts, because the City uses similar procurement processes to award those contracts. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was highest in the City's professional services contracts (19.4%) and lowest in goods and services contracts (10.6%). The majority of contracting dollars that the City awarded during the study period were in construction, in which the participation of minority- and woman-owned businesses was 15.2 percent.

Figure 6-5.
Utilization results by relevant industry

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Industry		
	Construction	Professional services	Goods and services
Non-Hispanic white woman-owned	4.9 %	6.5 %	5.5 %
Asian American-owned	0.6 %	2.0 %	2.9 %
Black American-owned	0.7 %	7.3 %	0.4 %
Hispanic American-owned	8.3 %	3.6 %	1.7 %
Native American-owned	0.8 %	0.0 %	0.1 %
Total Minority- and Woman-owned	15.2 %	19.4 %	10.6 %

Time Period

BBC examined utilization results separately for contracts and procurements that the City awarded in the *early study period* (i.e., January 1, 2012 – June 30, 2014) and the *late study period* (i.e., July 1, 2014 – December 31, 2016) to determine whether the participation of minority- and woman-owned businesses in City contracts changed over time. As shown in Figure 6-6, the participation of minority- and woman-owned businesses considered together was similar between the early (12.8%) and late (16.9%) study periods.

Figure 6-6.
Utilization results by time period

Note:

Numbers rounded to nearest tenth of 1 percent. Numbers 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	4.5 %	6.1 %
Asian American-owned	0.7 %	1.8 %
Black American-owned	2.1 %	1.1 %
Hispanic American-owned	5.2 %	7.4 %
Native American-owned	0.4 %	0.7 %
Total Minority- and Woman-owned	12.8 %	16.9 %

Concentration of Dollars

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

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

Figure 6-7 presents those results. Overall, 639 different minority- and woman-owned businesses participated in City contracts during the study period. 86 of those businesses, or 13.5 percent of all utilized minority- and woman-owned businesses, accounted for 75 percent of the total contracting dollars that minority- and woman-owned businesses received during the study period.

Figure 6-7.
Concentration of dollars
that went to minority- and
woman-owned businesses

Note:

The sum of utilized businesses by group is not equal to total utilized minority- and woman-owned businesses, because 32 minority-owned businesses that received work during the study period were of unknown race/ethnicity.

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilized businesses	Number of businesses accounting for 75% of dollars	% of businesses accounting for 75% of dollars
Non-Hispanic white woman-owned	292	53	18.2%
Asian American-owned	51	8	15.7%
Black American-owned	60	5	8.3%
Hispanic American-owned	188	23	12.2%
Native American-owned	16	2	12.5%
Total Minority- and Woman-owned	639	86	13.5%

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses in contracts that the City and County of Denver (the City) awarded between January 1, 2012 and December 31, 2016 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work. The analysis focused on construction; professional services; and goods and services contracts and procurements. Chapter 7 presents the disparity analysis in four parts:

- A. Overview;
- B. Disparity Analysis Results;
- C. Statistical Significance; and
- D. Bid/Proposal Processes.

A. Overview

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation of minority- and woman-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.¹ BBC made those comparisons for each relevant racial/ethnic and gender group. BBC expressed both actual participation and availability as percentages of the total dollars associated with a particular set of contracts. (e.g., 5% participation compared with 4% availability). BBC then calculated a *disparity index* to help compare participation and availability results across relevant racial/ethnic and gender groups and different contract sets using the following formula:

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

A disparity index of 100 indicates *parity* between actual participation, or *utilization*, and availability. That is, participation of minority- and woman-owned businesses was largely in line with availability. A disparity index of less than 100 indicates a *disparity* between participation and availability. That is, minority- and woman-owned businesses were *underutilized* relative to their availability. Finally, a disparity index of less than 80 indicates a *substantial disparity*

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.

between participation and availability. That is, minority- and woman-owned businesses were substantially underutilized relative to their availability.²

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

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

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

A review of Figure 7-1 helps to introduce the calculations and format of all of the disparity analysis tables in Appendix F. As illustrated in Figure 7-1, the disparity analysis tables present information about each relevant racial/ethnic and gender group (as well as about all businesses) in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as minority-owned business enterprises (MBEs), woman-owned business enterprises (WBEs), or Disadvantaged Business Enterprises (DBEs).
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as WBEs or DBEs.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as MBEs or DBEs.
- Rows (5) through (9) present results for businesses of each individual racial/ethnic group, regardless of whether they were certified as MBEs.

² Many courts have deemed disparity indices below 80 as being *substantial* and have accepted such outcomes as evidence of adverse conditions for minority- and woman-owned businesses (e.g., see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994)). See Appendix B for additional discussion of those and other cases.

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	21,790	\$3,497,551	\$3,497,551				
(2) Minority and woman-owned businesses	4,543	\$519,020	\$519,020	14.8	23.7	-8.9	62.6
(3) Non-Hispanic white woman-owned	2,235	\$184,110	\$184,110	5.3	10.9	-5.6	48.4
(4) Minority-owned	2,308	\$334,911	\$334,911	9.6	12.8	-3.3	74.5
(5) Asian American-owned	397	\$40,636	\$42,054	1.2	3.2	-2.0	37.6
(6) Black American-owned	234	\$54,199	\$56,089	1.6	3.3	-1.7	47.9
(7) Hispanic American-owned	1,298	\$211,314	\$218,683	6.3	6.2	0.1	101.6
(8) Native American-owned	87	\$17,475	\$18,084	0.5	0.1	0.4	200+
(9) Unknown minority-owned	292	\$11,287					
(10) MWBE-certified	2,572	\$354,141	\$354,141	10.1			
(11) Non-Hispanic white woman-owned	1,028	\$112,018	\$112,018	3.2			
(12) Minority-owned MWBE	1,544	\$242,123	\$242,123	6.9			
(13) Asian American-owned MWBE	254	\$16,522	\$16,522	0.5			
(14) Black American-owned MWBE	185	\$40,315	\$40,341	1.2			
(15) Hispanic American-owned MWBE	1,038	\$174,415	\$174,528	5.0			
(16) Native American-owned MWBE	60	\$10,714	\$10,721	0.3			
(17) Unknown minority-owned MWBE	7	\$156					

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

* Unknown minority-owned businesses and unknown MBEs were allocated to minority and MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting disparity analysis.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 21,790 contract elements. The value presented in column (a) for each individual racial/ethnic and gender group represents the number of contract elements in which businesses of that particular group participated (e.g., as shown in row (6) of column (a), Black American-owned businesses participated in 234 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-1, BBC examined approximately \$3.5 billion for the entire set of contract elements. The dollar totals include both prime contract and subcontract dollars. The value presented in column (b) for each individual racial/ethnic and gender group represents the dollars that the businesses of that particular group received on the set of contract elements (e.g., as shown in row (6) of column (b), Black American-owned businesses received approximately \$54 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that BBC identified as minority-owned or MBEs but for which specific race/ethnicity information was not available. The dollar totals include both prime contract and subcontract dollars.
- Column (d) presents the participation of each racial/ethnic and gender group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for Black American-owned businesses, the study team divided \$56 million by \$3.5 billion and multiplied by 100 for a result of 1.6%, as shown in row (6) of column (d)).
- The bottom half of Figure 7-1 presents utilization results for businesses that were certified as MWBEs.

Availability results. Column (e) of Figure 7-1 presents the availability of each relevant racial/ethnic and gender group for all contract elements that the study team analyzed as part of the contract set. Availability estimates, which are represented as a percentage of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts (e.g., as shown in row (6) of column (e), the availability of Black American-owned businesses is 3.3%).

Differences between participation and availability. The next step in analyzing whether there was a disparity between the participation and availability of minority- and woman-owned businesses is to subtract the participation percentage from the availability percentage. Column (f) of Figure 7-1 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group. For example, as presented in row (6) of column (f) of Figure 7-1, the participation of Black American-owned businesses in City contracts was 1.7 percentage points less than their availability.

Disparity indices. It is sometimes difficult to interpret absolute percentage differences between participation and availability. Therefore, BBC also calculated a disparity index for each relevant racial/ethnic and gender group. Column (g) of Figure 7-1 presents the disparity index for each relevant racial/ethnic and gender group. For example, as reported in row (6) of column (g), the disparity index for Black American-owned businesses was approximately 48, indicating that Black American-owned businesses actually received approximately \$0.48 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that the City awarded during the study period.

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

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

B. Disparity Analysis Results

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

Overall. Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts that the City awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as the threshold for what indicates a substantial disparity.

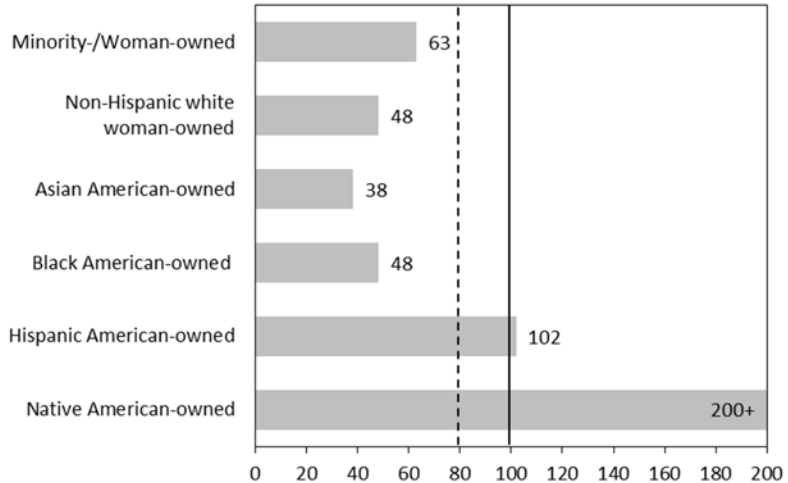
As shown in Figure 7-2, overall, the participation of minority- and woman-owned businesses in contracts that the City awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 63 indicates that minority- and woman-owned businesses received approximately \$0.63 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the City awarded during the study period. Disparity analysis results by individual group indicated that:

- Three groups exhibited disparity indices substantially below parity: non-Hispanic white woman-owned businesses (disparity index of 48), Asian American-owned businesses (disparity index of 38), and Black American-owned businesses (disparity index of 48).
- Hispanic American-owned businesses (disparity index of 102) and Native American-owned businesses (disparity index of 200+) did not exhibit a disparity.

Figure 7-2.
Disparity indices by group

Note:
Numbers rounded to nearest whole number.
For more detail, see Figure F-2 in Appendix F.

Source:
BBC Research & Consulting disparity analysis.



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

Figure 7-3 presents disparity analysis results separately for goals and no-goals contracts. As shown in Figure 7-3, whereas minority- and woman-owned businesses considered together showed parity on goals contracts (disparity index of 104), they exhibited a substantial disparity on no-goals contracts (disparity index of 35). Disparity analysis results by individual group indicated that:

- Non-Hispanic white woman-owned businesses (disparity index of 67) and Asian American-owned businesses (disparity index of 59) exhibited substantial disparities on goals contracts. Black American-owned business also exhibited a disparity that was close to the threshold of being considered substantial (disparity index of 82); and
- All groups except Native American-owned businesses (disparity index of 200+) exhibited substantial disparities on no-goals contracts.

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

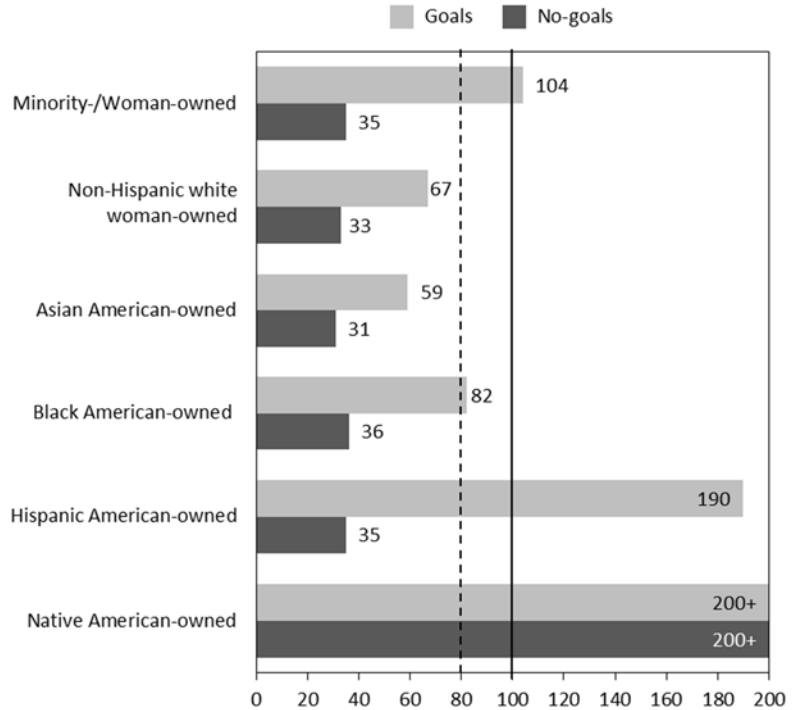
⁴ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 985, 987-88 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003).

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

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

Note:
 Numbers rounded to nearest whole
 number.
 For more detail, see Figures F-16 and F-
 17 in Appendix F.

Source:
 BBC Research & Consulting disparity
 analysis.



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

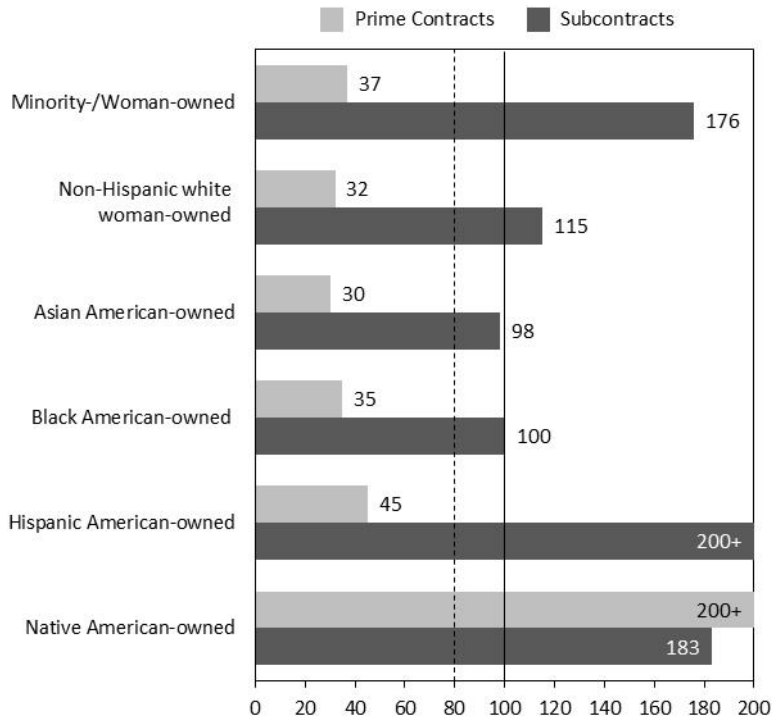
Contract role. Subcontracts tend to be much smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to minority- and woman-owned businesses. In addition, the City used MWBE and DBE contract goals when awarding many contracts during the study period, which primarily affect subcontract opportunities for minority- and woman-owned businesses. Thus, it might be reasonable to expect better outcomes for minority- and woman-owned businesses on subcontracts than on prime contracts. Figure 7-4 presents disparity indices for all relevant groups separately for prime contracts and subcontracts. As shown in Figure 7-4, minority- and woman-owned businesses considered together showed a substantial disparity for prime contracts (disparity index of 37) but not for subcontracts (disparity index of 176). Results for individual groups indicated that:

- All groups showed substantial disparities on prime contracts except for Native American-owned businesses (disparity index of 200+).
- No groups exhibited substantial disparities on subcontracts.

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

Note:
 Numbers rounded to nearest whole number.
 For more detail, see Figures F-8 and F-9 in Appendix F.

Source:
 BBC Research & Consulting disparity analysis.



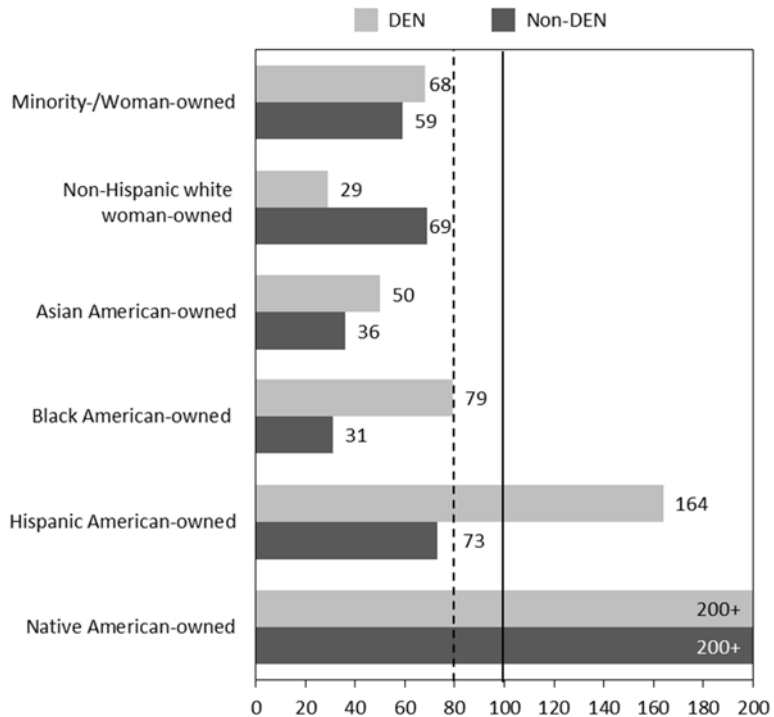
DEN contracts. BBC examined disparity analysis results separately for contracts that the Denver International Airport (DEN) awarded and contracts that other City agencies awarded. Figure 7-5 presents those results. As shown in Figure 7-5, minority- and woman-owned businesses considered together exhibited substantial disparities for both DEN contracts (disparity index of 68) and non-DEN contracts (disparity index of 59). Disparity analysis results by individual group indicated that:

- Three individual groups showed substantial disparities for DEN contracts: non-Hispanic white woman-owned businesses (disparity index of 29), Asian American-owned businesses (disparity index of 50), and Black American-owned businesses (disparity index of 79).
- All individual groups exhibited substantial disparities on non-DEN contracts, with the exception of Native American-owned businesses (disparity index of 200+).

Figure 7-5.
Disparity indices for DEN
and non-DEN contracts

Note:
 Numbers rounded to nearest whole number.
 For more detail, see Figures F-12 and F-13 in Appendix F.

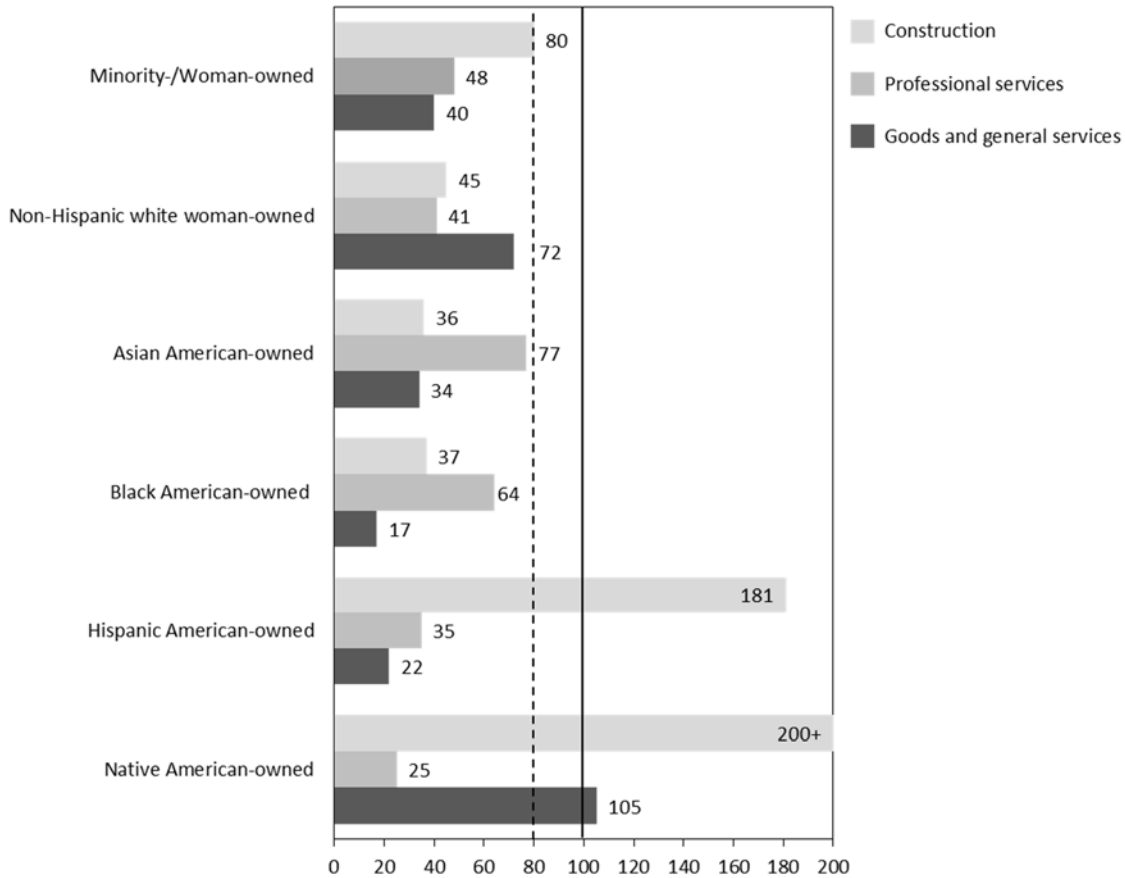
Source:
 BBC Research & Consulting disparity analysis.



Industry. BBC examined disparity analysis results separately for the City’s construction; professional services; and goods and services contracts. The project team combined results for goods and services contracts, because the City uses similar procurement processes to award those contracts. Figure 7-6 presents disparity indices for all relevant groups by contracting area. Disparity analyses results differed by contracting area and group:

- Minority- and woman-owned businesses considered together showed a disparity on construction contracts (disparity index of 80). Three individual groups showed substantial disparities: non-Hispanic white woman-owned businesses (disparity index of 45), Asian American-owned businesses (disparity index of 36), and Black American-owned businesses (disparity index of 37).
- Minority- and woman-owned businesses considered together showed a substantial disparity on professional services contracts (disparity index of 48). All individual groups showed substantial disparities on those contracts.
- Minority- and woman-owned businesses considered together showed a substantial disparity on goods and services contracts (disparity index of 40). All individual groups showed substantial disparities except for Native American-owned businesses (disparity index of 105).

Figure 7-6.
Disparity analysis results by relevant industry



Note: Numbers rounded to nearest whole number.
 For more detail, see Figures F-5, F-6, and F-7 in Appendix F.
 Source: BBC Research & Consulting disparity analysis.

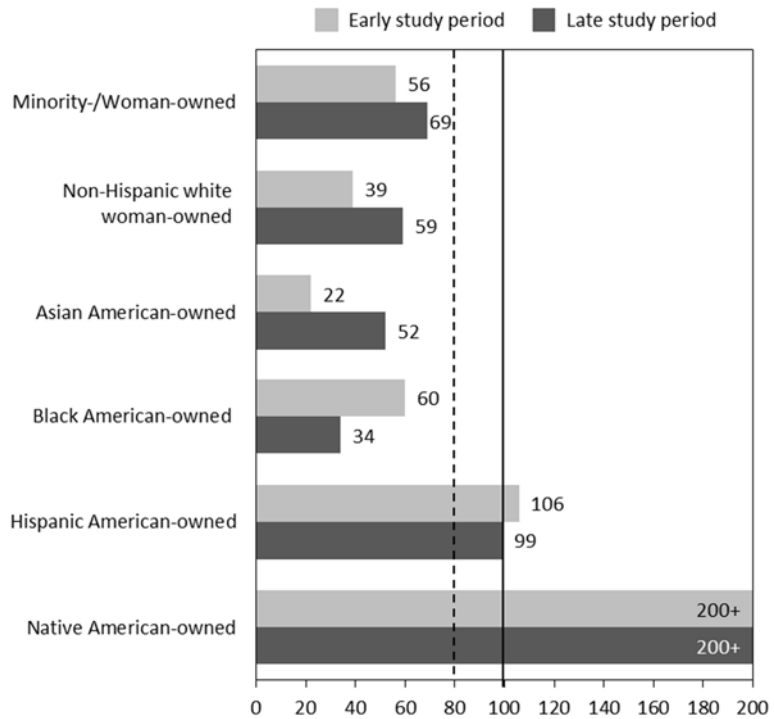
Time period. BBC also examined disparity analysis results separately for two separate time periods: January 1, 2012 through June 30, 2014 (*early* study period) and July 1, 2014 through December 31, 2016 (*late* study period). That information might help the City determine whether there were different outcomes for minority- and woman-owned businesses as the country moved further and further from the economic downturn that began in 2008. Figure 7-7 presents disparity indices for all relevant racial/ethnic and gender groups separately for the early and late study periods. As shown in Figure 7-7, minority- and woman-owned businesses showed substantial disparities for in the early study period (disparity index of 56) and in the late study period (disparity index of 69). Results for individual groups indicated that:

- Three groups exhibited substantial disparities in the early study period: non-Hispanic white woman-owned businesses (disparity index of 39), Asian American-owned businesses (disparity index of 22), and Black American-owned businesses (disparity index of 60).
- Those same three groups showed substantial disparities for late study period contracts.

Figure 7-7.
Disparity indices for early
and late study period

Note:
 Numbers rounded to nearest whole
 number.
 For more detail, see Figures F-3 and F-4
 in Appendix F.

Source:
 BBC Research & Consulting disparity
 analysis.



C. Statistical Significance

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

Results. BBC used Monte Carlo analysis to test whether the disparities that the study team observed on all contracts considered together and no-goals contracts were statistically significant. BBC identified substantial disparities for minority-owned businesses and woman-owned businesses considered together and for certain racial/ethnic and gender groups considered separately on those contract sets. Examining whether disparities are statistically significant is particularly instructive for no-goals contracts and prime contracts, because they provide information about outcomes for minority-owned businesses and woman-owned businesses in the absence of the City’s use of race-conscious and gender-conscious measures. Figure 7-9 presents results from the Monte Carlo analysis as they relate to the statistical significance of disparities that the study team observed for minority-owned and woman-owned businesses considered together and separately for each relevant racial/ethnic and gender group on all contracts considered together and no-goals contracts.

Figure 7-8.
Monte Carlo Analysis

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

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

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

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

Contract set and business group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
All contracts			
Minority-owned and woman-owned	63	0	<0.1 %
Non-Hispanic white woman-owned	48	45	<0.1 %
Minority-owned	75	0	<0.1 %
Asian American-owned	38	0	<0.1 %
Black American-owned	48	0	<0.1 %
Hispanic American-owned	102	N/A	N/A
Native American-owned	200+	N/A	N/A
No-goals contracts			
Minority-owned and woman-owned	35	0	<0.1 %
Non-Hispanic white woman-owned	33	45	<0.1 %
Minority-owned	36	0	<0.1 %
Asian American-owned	31	0	<0.1 %
Black American-owned	36	0	<0.1 %
Hispanic American-owned	35	0	<0.1 %
Native American-owned	200+	N/A	N/A

Source: BBC Research & Consulting disparity analysis.

D. Bid/Proposal Processes

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

DEN. BBC examined bid information for a sample of 84 contracts that DEN awarded during the study period. In total, DEN received 337 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 74 of the 337 bids (22%) that the study team examined:

- Fifty-four bids (16% of all bids) came from minority-owned businesses (36 different businesses); and
- Twenty bids (6% of all bids) came from non-Hispanic white woman-owned businesses (19 different businesses).

Success of bids. BBC examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in awards. As shown in Figure 7-10, 19 percent of the bids that minority-owned businesses submitted resulted in contract awards and 20 percent of the bids that non-Hispanic white woman-owned businesses submitted resulted in contract awards.

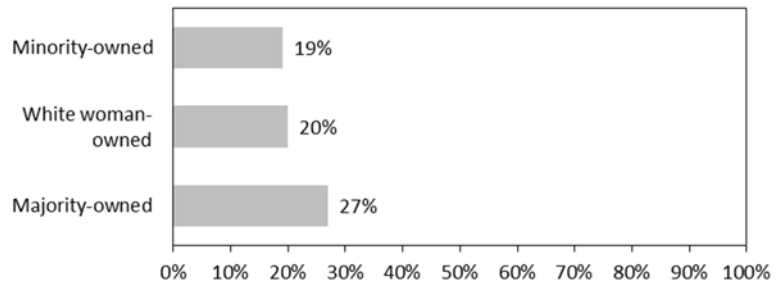
Figure 7-10.
Percentage of bids on DEN contracts that resulted in contract awards

Note:

Based on analysis of 337 bids on 84 construction contracts.

Source:

BBC Research & Consulting from entity contracting data.



Department of Public Works (Public Works). BBC examined proposal information for a sample of 51 Public Works contracts that the City awarded during the study period. In total, Public Works received 168 proposals for those contracts.

Number of proposals from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 39 of the 168 proposals (23%) that the study team examined:

- Thirty-six proposals (21% of all proposals) came from minority-owned businesses (11 different businesses); and
- Three proposals (2% of all proposals) came from a non-Hispanic white woman-owned business (one business).

Success of bids. BBC also examined the percentage of proposals that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 7-11, 31 percent of the proposals that minority-owned businesses submitted resulted in contract awards,

Of the proposals that non-Hispanic white woman-owned businesses submitted, 33 percent resulted in contract awards.

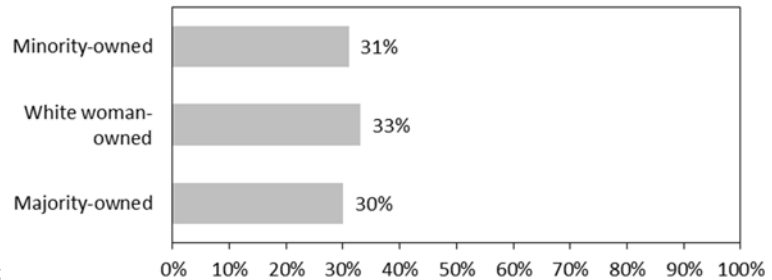
Figure 7-11.
Percentage of bids on Public Works contracts that resulted in contract awards

Note:

Based on analysis of 168 bids on 51 professional service contracts.

Source:

BBC Research & Consulting from entity contracting data.



General Services. BBC examined bid information for a sample of 160 General Services contracts that the City awarded during the study period. In total, the City received 828 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 168 of the 828 bids (20%) that the study team examined:

- Eight bids (1% of all bids) came from minority-owned businesses (four businesses); and
- One-hundred-sixty bids (19% of all bids) came from non-Hispanic white woman-owned businesses (fourteen businesses).

Success of bids. BBC also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 7-12, 63 percent of the proposals that minority-owned businesses submitted resulted in contract awards. Of the proposals that non-Hispanic white woman-owned businesses submitted, 28 percent resulted in contract awards.

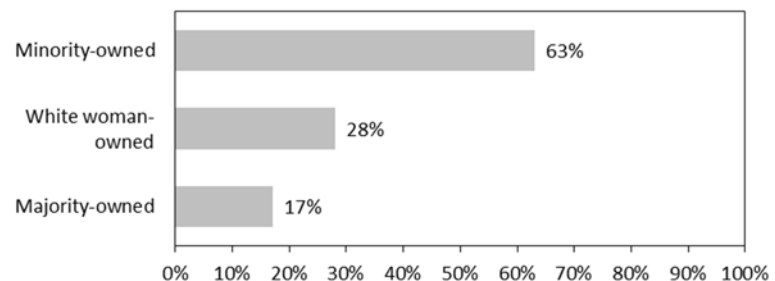
Figure 7-12.
Percentage of bids on goods and other service contracts that resulted in contract awards

Note:

Based on analysis of 828 bids on 160 goods and other services contracts.

Source:

BBC Research & Consulting from entity contracting data.



CHAPTER 8.

Program Measures

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Program Measures

The City and County of Denver (the City) uses a combination of *race- and gender-neutral* and *race- and gender-conscious measures* to encourage the participation of small businesses, minority-owned businesses, and woman-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).

As part of meeting the *narrow tailoring* requirement of the strict scrutiny standard of constitutional review, organizations that implement minority- and woman-owned business programs must maximize the use of race- and gender-neutral measures in trying to encourage the participation of minority- and woman-owned businesses (for details, see Chapter 2 and Appendix B). If an agency cannot sufficiently address barriers that minority- and woman-owned businesses face in its contracting through the use of race-neutral and gender-neutral measures alone, then it can also consider using race- and gender-conscious measures.

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

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

A. Program Overview

The City’s Office of Economic Development (OED) Division of Small Business Opportunities (DSBO) operates the City’s Minority- and Women-Owned Business Enterprise (MWBE), Emerging Business Enterprise (EBE), and Small Business Enterprise (SBE) Programs to encourage the participation of small businesses minority- and woman-owned businesses in City contracting. As part of the MWBE Program, DSBO also establishes aspirational annual goals for

¹ “Woman-owned businesses” refers to non-Hispanic white woman owned businesses.

the participation of those businesses in construction; professional services; and goods and general services contracts and uses a combination of race- and gender-neutral and race- and gender-conscious measures to meet those goals each year. The City certifies businesses as minority-owned business enterprises (MBEs), woman-owned business enterprises (WBEs), small business enterprises (SBEs), or emerging business enterprises (EBEs), as appropriate, to help meet the objectives of the program. DSBO's responsibilities also include:

- Monitoring the participation of MBEs, WBEs, SBEs, and EBEs in City contracts;
- Providing guidance related to setting aspirational MBE, WBE, SBE, and EBE goals and contract-specific goals to all City departments;
- Providing information and assistance to MBEs, WBEs, SBEs, EBEs, and other businesses relating to city contracting policies as well as bid specifications and requirements;
- Receiving, reviewing, and acting on complaints and suggestions concerning various City business programs; and
- Developing technical assistance programs to assist MBEs, WBEs, SBEs, EBEs, and other businesses relating to contracting as well as business and professional development.

B. Race- and Gender-Neutral Measures

The City uses myriad race- and gender-neutral measures as part of the MWBE, EBE, and SBE Programs to encourage the participation of small businesses—including many minority- and woman-owned businesses—in its contracting. The City uses the following types of race- and gender-neutral measures:

- SBE and EBE certification;
- Advocacy and outreach;
- Business development;
- Education and training; and
- Financial assistance.

SBE and EBE certification. DSBO certifies small businesses as SBEs and EBEs. The primary difference between SBE and EBE certification is that EBE certification is reserved for small businesses whose annual revenues are less than \$3 million, whereas SBE certification is available to small businesses whose annual revenues are in line with Small Business Administration revenue thresholds, which can far exceed \$3 million depending on industry. In addition to revenue requirements, businesses must possess the following characteristics to qualify for SBE and EBE certification:

- Businesses must be actively in business for at least six months.
- The majority of business owners must have personal net worth of less than \$1.32 million (excluding equity in primary residence and ownership in applicant businesses).
- Businesses must perform work in construction; professional services; or goods and services.

Benefits of SBE certification include businesses being listing in the City’s certified vendor database; increased visibility and notification of City contracting and subcontracting opportunities; free networking events for small business owners; and potential access to working capital loans from the City. In addition, the City has established the Defined Selection Pool Program, which limits competition on certain construction and goods and services contracts to certified SBEs. Similarly, the City limits competition on certain construction and professional services contracts to certified EBEs.

Advocacy and outreach. The City participates in various advocacy and outreach efforts as part of the MWBE, EBE, and SBE Programs.

Construction Empowerment Initiative (CEI). CEI was established in 2006 as an advisory panel consisting of community and business members. The purpose of CEI is to work with the City to help ensure that construction and design contract opportunities with the City are made available to local small businesses and minority- and woman-owned businesses. CEI meets with the City on a monthly basis to provide policy and procedure recommendations. The group is also integrally involved with the development and refinement of the City’s MWBE Ordinance.

Newsletter to certified firms. DSBO publishes a monthly newsletter that provides information related to DSBO activities, City projects, and upcoming outreach events. The newsletter is disseminated to all MBE-, WBE-, SBE-, and EBE-certified businesses.

General Services Business Opportunity Fair. The Department of General Services organizes and hosts an annual business outreach event. Businesses can learn about how best to work with General Services, including how to submit invoices, how to meet prevailing wage requirements, and how to find or apply for loans available to local small businesses. An important component of the event is an open question-and-answer session during which Denver businesses can ask questions of General Services’ staff. General Services has previously invited other City departments to participate in the event as well.

Mega project outreach. DSBO partners with local agencies and other City departments to provide outreach related to the City’s mega projects. At the outreach events, DSBO discusses any MWBE goals for the contract, DSBO requirements for the project, and certification processes.

Outreach event participation. DSBO and other City departments, including General Services, participate in outreach events with the Colorado Department of Transportation, the Regional Transportation District – Denver, and the Denver Health and Hospital Authority. City staff also regularly attend meetings sponsored by local organizations representing minority- and woman-owned businesses and share information regarding contracting opportunities with the City. Such organizations include:

- CEI;
- The Hispanic Contractors of Colorado;
- The Opportunity Council;
- Construction Black Chamber of Commerce;
- Asian Chamber of Commerce;

- Women Chamber of Commerce;
- Rocky Mountain Chamber of Commerce; and
- The Black Business Initiative.

Department websites. OED’s website provides information about certification processes; a certified firm directory; compliance information; information about contracting opportunities; policies and forms; business resources; and information about upcoming events and news. General Services’ website lists current and upcoming contracting solicitations. Any updates on contracting opportunities are e-mailed directly to the more than 350 businesses that have registered to receive information from the City. Those updates are also shared on the City’s LinkedIn page and the City’s website.

Business development programs. A benefit of MBE, WBE, SBE, and EBE certification is that certified businesses have access to the City’s business development opportunities.

Capacity building outreach. DSBO provides assistance and resources to small businesses to help build their capacity. Once a month, businesses can attend a free capacity-building advisory event that the City hosts. Businesses can access one-on-one advisory sessions and workshops on the resources available from various public and non-profit organizations. In addition to the advisory events, DSBO has created the Defined Selection Pool Program to offer small businesses prime contracting opportunities with the City.

One-on-one business meetings. Businesses have the opportunity to meet one-on-one with representatives from General Services so that General Services can learn more about individual businesses, provide tailored advice to businesses about how they can be more competitive on City contracting opportunities, and invite businesses to ask questions about specific contracting opportunities.

Mentor-Protégé Program. In 2015, DSBO developed a Mentor-Protégé Program to build effective working relationships between leaders of mature, established businesses and emerging minority- and woman-owned businesses. The objective of the program is for minority- and woman-owned businesses to benefit from the knowledge, experience, and social capital of more established businesses and to build capacity among minority- and woman-owned businesses within the construction and professional services industries. Mentors provide coaching on ways for protégés to compete more successfully on City contracts, including coaching on public contract applications and contract performance as well as a wide array of other business-management topics, from strategic planning to financial management and marketing.

Education and training. DSBO and other City departments provide training and education to businesses who are interested in becoming certified or doing work with the City.

Business certification training sessions. DSBO provides free, two-hour training sessions every month on how businesses can become certified as MBEs, WBEs, SBEs, and EBEs. The training sessions include an overview of different certification programs, the CEI Ordinance, and a walk-through of the Unified Certification Process (UCP) Application.

5 Steps for Doing Business with the City. General Services has developed the *5 Steps for Doing Business with the City* training to educate businesses on how the City procures construction services; professional services; and goods and services. The two-hour training is offered monthly at the City's offices and other locations around Denver.

Financial assistance. OED's Business Development team has created the Revolving Loan fund, which offers gap financing for established businesses that relocate or expand into certain industrial or commercial business areas within Denver. The program works by lending up to 25 percent of project costs and encouraging banks to provide the bulk of the remaining financing. The program also assists businesses that relocate to Denver with permitting.

C. Race- and Gender-Conscious Measures

The City currently uses SBE, MBE, WBE, and Disadvantaged Business Enterprise (DBE) contract goals to award many of its contracts.² Contracting goals for each contract are established according to contract size; work types involved; potential subcontracting opportunities; the availability of SBEs, MBEs, and WBEs for the contract; and SBE, MBE, and WBE participation on similar projects that the City has awarded in the past. Prime contractors can meet contracting goals by either self-performing the work if they are certified as SBEs, MBEs, or WBEs or by making subcontracting commitments with certified SBE, MBE, or WBE subcontractors at the time of bid. If the prime contractor cannot successfully make subcontracting commitments with certified SBEs, MBEs, or WBEs, then they must document sufficient Good Faith Efforts (GFEs) toward achieving the established contracting goals. DSBO then reviews GFE documentation to determine if the prime contractor's efforts were sufficient.

To advise on goal-setting for specific contracts, the City has established a goal committee comprising individuals who are engaged in the local construction; reconstruction and remodeling; and architectural and engineering industries. The OED Director may use the goal committee's advice on goal-setting as well as other relevant information.

D. Other Organizations' Program Measures

In addition to the race- and gender-neutral measures that the City currently uses, there are a number of race- and gender-neutral program measures that other organizations in Denver use to encourage the participation of minority- and woman-owned businesses in government contracts. Figure 8-1 provides examples of those measures.

² SBE contract goals are not considered to be race- or gender-conscious measures.

Figure 8-1.
Examples of race- and gender-neutral program measures that other organizations in Denver use

Type	Program
Advocacy and Outreach	The Denver Minority Business Development Agency facilitates greater access to the goods and services of minority-owned businesses for diverse corporate and government organizations, fostering the development of lasting and mutually beneficial business relationships. Core business services include global business development, access to capital, access to contracts, access to markets, and strategic business consulting.
	The Minority Business Office Colorado is located within the Colorado Office of Economic Development and International Trade and dedicated to advancing the efforts of Colorado's minority- and woman-owned businesses. The office features an established network of public, private, and government resources that can be leveraged by businesses of all types and sizes. It also provides information and counseling on certifications available for minority- and woman-owned businesses.
	Asian Chamber of Commerce - Colorado (ACC) is a membership organization whose mission is to provide economic development and business opportunities for its members. The ACC partners with community organizations and non-profits to help promote and cross-resource programs and initiatives; connects with member business units to help support their diversity and inclusion efforts; represents its community and region with local and state government; participates in delegations to help foster international trade; and provides networking, marketing, and promotional opportunities for its members.
	The Colorado Unified Certification Program was established to facilitate statewide DBE certification and eliminate the need for DBE applicants to obtain certification from multiple agencies.
	Black Business Initiative is an economic revitalization program for the Black community and by the Black community with a mission to grow Black owned businesses through education, mentorship, investment, community, and need.
	The vision of the Colorado Black Chamber of Commerce (CBCC) is to serve the needs of Black American-owned businesses and provide economic opportunity and support to them and the communities they serve. The CBCC's mission is to support the initiatives of Black American business owners and foster an enterprise that focuses on success and viability. CBCC provides access to education and training that keeps Black American business owners in step with the ever-changing requirements of Colorado's economic playing field.
	The Hispanic Contractors of Colorado's mission is helping small, diverse contractors learn how to do business with public organizations and large corporations.
	The Hispanic Chamber of Commerce of Metro Denver is a membership driven organization that comprises small-business owners, corporate representatives, community leaders, and association members representing various professions. The chamber supports the development and growth of member businesses through initiatives that encourage and promote business and economic development. In addition, it is a strong advocate of legislation affecting small businesses. The chamber also provides access to valuable information, business leaders, procurement opportunities, and education training. Not only does the chamber give small businesses viability in the business community, it gives them a voice, unity and strength.
	Mi Casa Women's Business Center is a women's business center partially funded by the United States Small Business Administration and is a member of the Association of Women's Business Centers. The center offers entrepreneurial training, individual business counseling, technology training, and networking opportunities to help aspiring entrepreneurs and emerging businesses achieve their goals.
	The Denver Water Supplier Diversity Program seeks to provide small businesses and businesses owned by minorities and women an opportunity to work for Denver Water as prime contractors, subcontractors, and suppliers. It includes an outreach database to help Denver Water staff identify small, minority- and woman-owned businesses that are available for Denver Water work.
The Denver Public Schools Office of Business Diversity is a program to help promote diversity in construction and related contracting for various bond-funded capital improvement projects.	

Figure 8-1. (continued)
Examples of race- and gender-neutral program measures that other organizations in Denver use

Type	Program
Capital, Bonding, and Insurance	Spanning long-term financial planning, the Small Business Administration's CDC/504 Programs provide a platform for the development of the community as a whole. The loans sanctioned under the program provides small businesses with fixed-rate financing, which are then used to acquire assets which are mainly aimed at modernization, such as commercial mortgages and street-improvement utilities.
	The SBA Microloan Program provides small, short-term loans that can be used for: <ul style="list-style-type: none"> • Purchasing supplies or inventory • Purchasing machinery • Purchase of furniture The Microloan fund cannot be used for the purchase of real estate or for paying off existing debts. The maximum Microloan amount is \$50,000.
	Businesses with special requirements (such as those in exports or operating in rural areas) are covered under the SBA 7(a) Loan Programs. The program is considered to be the most flexible choice and also the most suitable for emerging businesses. The different 7(a) loan programs are: <ul style="list-style-type: none"> • Special Purpose Loans, which offer loans to businesses which have been affected by NAFTA to assist Employee Stock Ownership plans and other initiatives. • Export Loan Programs, which offer loans to further expand export activities. • Rural Business Loans, which are aimed at providing a simpler and more streamlined process to acquire loans for businesses operating in the rural areas.
	The Colorado Microfinance Alliance is a consortium of microfinance practitioners, donors, educators, students, and professionals that facilitates learning opportunities for the public, microfinance practitioners, and their clients. The website offers information about the Alliance's partner organizations; a central calendar of microfinance-related activities in Colorado; and collaborative tools designed for networking and practical use.
	The Denver Capital Matrix is a resource directory of funding sources for Denver small businesses and entrepreneurs. The matrix identifies funding sources to include traditional bank lending, venture capital firms, private equity firms, angel investors, mezzanine sources, and others that have funded Colorado businesses and provides contact information and categorizes the investment focus of each listed organization.
	Colorado Lending Source is a free membership-based organization made up of lenders, small businesses, community organizations, and government groups.
	The Community Economic Development Company of Colorado is a SBA-certified non-profit which provides loans under the 504 program. Loans are provided below market rates, have long-term financing, and a low down payment on office, commercial, and industrial assets located in Colorado.
	The Colorado Enterprise Fund is a non-profit lending source which specializes in loans for small businesses and startups unable to secure traditional bank financing.
	The Rocky Mountain Microfinance Institute creates economic and social mobility through entrepreneurship support. It has a Business Builder loan program to provide microloans to entrepreneurs in need of financing to launch or expand their businesses.
	The Colorado Housing and Finance Authority (CHFA) Business Lending Program's Community Development team partners with lenders and economic developers to provide small businesses with the financing needed for future growth. It offers the following programs: <ul style="list-style-type: none"> • Loan programs to help businesses finance owner-occupied commercial real estate acquisition, renovations, and equipment purchases. • Tax exempt bonds to help manufacturing businesses and nonprofits take advantage of low interest financing available for real estate. • Cash Collateral Support program to acquire additional collateral to secure financing and connect with lenders actively serving small business customers. • New markets tax credits to encourage private investment in underserved communities.

Figure 8-1. (continued)

Examples of race- and gender-neutral program measures that other organizations in Denver use

Type	Program
<p>Technical Assistance</p>	<p>The Metro Denver Urban Economic Development Corporation (EDC) is an affiliate of the Denver Metro Chamber of Commerce whose mission is to enhance the regional economy through the expansion and retention of primary jobs and capital investment. The EDC provides extensive services to help site selectors and companies with location, expansion, and market decisions. The EDC has a property database for business site selection; provides proprietary market research and analysis; and assists with advocacy, access, and community involvement.</p>
	<p>The CDOT Emerging Small Business Program provides specific small business programs authorized by the Colorado legislature to promote competition for CDOT construction, professional service, and research contracts.</p>
	<p>The Connect2DOT Program is a partnership between CDOT and the Colorado Small Business Development Center Network designed to help small businesses in the transportation industry become more competitive and successful in bidding and contracting with CDOT and other local transportation agencies. The program offers free consulting and business training as well as online resources and events tailored to construction contractors and professional design, architecture, and engineering businesses.</p>
	<p>The Colorado Small Business Development Center (SBDC) Network is dedicated to helping existing and new businesses grow and prosper in Colorado by providing free and confidential consulting and no- or low-cost training programs. The SBDC combines information and resources from federal, state, and local governments with those of the education system and private sector to meet the specialized and complex needs of the small business community.</p>
	<p>The Colorado Procurement Technical Assistance Center (PTAC) helps small businesses grow with federal, state, and local government contracts. The core of the procurement assistance program is counseling and education, with support in the following areas:</p> <ul style="list-style-type: none"> • Determining Suitability for Government Contracting • Securing Necessary Registrations • Identifying Bid Opportunities • Teaming or Joint Venture Arrangements • SDB, 8(a), HUBzone, CDOT and other certifications • Proposal Techniques and Review • Reviewing Contract Terms & Conditions • Government Contract Performance Issues • Networking & Business Development • Preparing for Audit
	<p>The SBA - Colorado District Office has small business loan and assistance programs; special outreach efforts; and initiatives to aid and inform small businesses. Services include:</p> <ul style="list-style-type: none"> • Financial assistance for businesses through guaranteed loans made by area lenders • Free counseling, advice, and information on starting, better operating, or expanding small businesses through Counselors to America’s Small Business. • Business training and counseling through the SBDC • Assistance to socially and economically disadvantaged businesses through the 8(a) Business Development Program • Advice to women business owners • Special loan programs for businesses involved in international trade
	<p>Rocky Mountain E-Purchasing System (BidNet) is where all participating local government purchasing departments invite interested vendors to register for exclusive access to RFPs and information on bids and awards. Registered vendors benefit from more bid information in a central location, less paperwork, and an easier method of doing business with local governments.</p>
	<p>SCORE Denver is a non-profit resource partner of the SBA that offers one-on-one counseling; cost effective seminars and workshops; and for existing businesses, business "checkups." SCORE Denver's mentors will customize one-on-one confidential mentoring for anyone planning to start a business and to those already in business who are looking to improve their performance. SCORE's workshops include a broad range of topics for small business owners and aspiring entrepreneurs. SCORE also offers a free resource library which features a wide variety of documents and templates to assist in starting or growing a business.</p>

Figure 8-1. (continued)

Examples of race- and gender-neutral program measures that other organizations in Denver use

Type	Program
Mentor-Protégé	<p>The Colorado Department of Transportation's (CDOT's) Emerging Small Business Mentor-Protégé program provides opportunities for emerging small businesses to hone their business skills by working closely with established businesses in highway construction and professional services. CDOT does not match mentors and protégés. Businesses are responsible for identifying and forming a team and applying to CDOT for formal approval.</p> <p>Approved mentor-protégé teams must identify the goals of their relationships and create a plan to achieve the identified goals. Mentor-protégé teams will be responsible for managing and tracking progress against the plan by providing quarterly update surveys to CDOT via Survey Monkey. As described in the 'Incentives' page linked below, mentor-protégé teams may receive various benefits and incentives for participating in the program.</p> <p>A maximum of six teams are selected each year for the program. A mentor-protégé team will be monitored for one calendar year but may continue longer.</p>

CHAPTER 9.

Program Implementation

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Program Implementation

The City and County of Denver (the City) operates the Minority- and Women-owned Business Enterprise (MWBE), Emerging Business Enterprise (EBE), and Small Business Enterprise (SBE) Programs to encourage the participation of small businesses and minority- and woman-owned businesses in its locally-funded contracts and implements the Federal Disadvantaged Business Enterprise (DBE) Program to encourage the participation of minority- and woman-owned businesses in Federal Aviation Administration (FAA)-funded contracts that the Denver International Airport (DEN) awards. The 2018 City of Denver Disparity Study provides information that the City should consider in refining its implementation of both programs.

Aspirational MWBE and DBE Goals

The City establishes aspirational annual goals for the participation of certified minority-owned business enterprises (MBEs) and woman-owned business enterprises (WBEs) as part of the MWBE Program and for the participation of certified DBEs as part of its implementation of the Federal DBE Program. The City uses myriad race- and gender-neutral measures as well as race- and gender-conscious measures to encourage the participation of minority- and woman-owned businesses in its contracts in an effort to meet those goals. Results from the disparity study—particularly the availability analysis and analyses of marketplace conditions—can be helpful to the City in setting its next aspirational MWBE and DBE goals.

Aspirational MWBE goals. The City sets aspirational annual MWBE goals separately for its locally-funded construction; professional services; and goods and services contracts and procurements. Currently, the City has set those goals at 24 percent for construction, 33 percent for professional services, and 8 percent for goods and services. Information from the availability analysis provided information that the City can use as a basis for its aspirational MWBE goals. For the purposes of aspirational goal-setting, BBC Research & Consulting (BBC) calculated the availability of potential MWBEs—minority- and woman-owned businesses that are currently MWBE-certified or appear that they could be MWBE-certified based on revenue requirements set forth in the City’s MWBE Program—for locally-funded prime contracts and subcontracts that the City awarded during the study period.

Figure 9-1 presents the availability of potential MWBEs for the locally-funded construction; professional services; and goods and general services prime contracts and subcontracts that the City awarded during the study period. As shown in Figure 9-1, potential MWBEs might be expected to receive 20.5 percent of the City’s locally-funded contracting dollars based on their availability for that work. The availability of potential MWBEs is 16.5 percent for locally-funded construction contracts; 39.5 percent for locally-funded professional services contracts; and 19.8 percent for locally-funded goods and general services contracts. The City should consider that information as it sets its next aspirational MWBE goals for its locally-funded contracts.

Figure 9-1.
Availability of potential MWBEs for locally-funded contracts

Business group	Industry			Total
	Construction	Professional services	Goods and general services	
Asian American-owned	1.5 %	2.9 %	8.0 %	3.2 %
Black American-owned	1.8 %	11.2 %	2.2 %	3.2 %
Hispanic American-owned	3.2 %	9.9 %	1.9 %	3.8 %
Native American-owned	0.2 %	0.1 %	0.1 %	0.1 %
Non-Hispanic white woman-owned	9.8 %	15.5 %	7.6 %	10.1 %
Total Minority- and Woman-owned	16.5 %	39.5 %	19.8 %	20.5 %

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

Total availability represents a dollar-weighted aggregation of the availability percentages associated with each relevant industry based on the actual locally-funded dollars that the City spent in each industry during the study period.

For details, see Figures F-19, F-20, F-21, and F-22 in Appendix F.

Source: BBC Research & Consulting availability analysis.

Overall DBE goal. The City also sets an overall annual DBE goal for the FAA-funded contracts that DEN awards. Currently, the City has set that goal at 14.04 percent. For the purposes of helping the City determine a basis for its overall DBE goal, BBC calculated the availability of potential DBEs—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements set forth in 49 Code of Federal Regulations Part 26.65—for FAA-funded prime contracts and subcontracts that DEN awarded during the study period. As shown in Figure 9-2, that analysis indicated that potential DBEs might be expected to received 16.2 percent of the City’s FAA-funded prime contract and subcontract dollars based on their availability for that work. The City should consider that information as it sets its next overall DBE goals for DEN’s FAA-funded contracts.

Figure 9-2.
Availability of potential DBEs for FAA-funded contracts

Business group	Total
Asian American-owned	1.6 %
Black American-owned	2.4 %
Hispanic American-owned	5.1 %
Native American-owned	0.2 %
Non-Hispanic white woman-owned	6.9 %
Total DBEs	16.2 %

Note:

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

For more detail, see Figure F-18 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Goal adjustments. In setting aspirational annual goals, organizations often examine available evidence to determine whether an adjustment to availability is necessary to account for past participation of minority- and woman owned businesses in their contracting; current conditions in the local marketplace for minorities, women, minority-owned businesses, and woman-owned businesses; and other relevant factors. The Federal DBE Program—which organizations often use as a model to set and adjust their aspirational annual goals—outlines several factors that organizations might consider when assessing whether to adjust their goals:

1. Volume of work minority- and woman-owned businesses have performed in recent years;
2. Information related to employment, self-employment, education, training, and unions;

3. Information related to financing, bonding, and insurance; and
4. Other relevant data.¹

BBC completed an analysis of each of the above factors. Much of the information that BBC examined was not easily quantifiable but is still relevant to the City as it determines whether to adjust its aspirational MWBE and DBE goals.

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

The United States Department of Transportation’s (USDOT’s) “Tips for Goal-Setting” suggests that organizations should examine data on past participation of certified minority- and woman-owned businesses in their contracts in recent years. USDOT further suggests that organizations should choose the median level of annual minority- and woman-owned business participation for those years as the measure of past participation:

Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because the process of determining the median excludes all outlier (abnormally high or abnormally low) past participation percentages.²

If the City were to use an approach similar to the one that USDOT outlines in “Tips for Goals Setting,” it might consider taking the average of each of its aspirational annual goals with the median past participation for each corresponding industry and goal type to adjust its goals.

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

Chapter 3 summarizes information about conditions in the local contracting industry for minorities, women, and minority- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices C and D. BBC’s analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the Denver marketplace. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the contracts that the City awards. The City should consider that information carefully in determining whether any adjustments to its aspirational MWBE and DBE goals are warranted.

3. Information related to financing, bonding, and insurance. BBC’s analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in Denver do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices C and D). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the local marketplace. Such barriers would also place those businesses at a disadvantage in competing for City prime contracts and subcontracts.

¹ 49 CFR Section 26.45.

² Section III (A)(5)(c) in USDOT’s “Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program.” <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

Thus, the City should also consider information about financing, bonding, and insurance in determining whether to make any adjustments to its aspirational MWBE and DBE goals.

4. Other factors. The Federal DBE Program suggests that organizations also examine “other factors” when determining whether to adjust their aspirational annual goals. For example, there is quantitative evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix C presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix D. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local contracting industry.

Other Program Considerations

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

Networking and outreach. The City hosts and participates in many networking and outreach events that include information about marketing, MWBE and DBE certification processes, doing business with the City, and available bid opportunities. Many businesses that the study team interviewed as part of the disparity study complimented the City on its outreach efforts throughout the local marketplace (for details, see Appendix D). The City should consider continuing those efforts but might also consider broadening its efforts to include more partnerships with local trade organizations and other public organizations that have initiatives in place to encourage minority- and woman-owned business development, including the Denver Minority Business Development Agency, the Minority Business Office with the State of Colorado, the Black Business Initiative, the Colorado Black Chamber of Commerce, the Hispanic Contractors of Colorado, the Asian Chamber of Commerce–Colorado, Denver Water, and Denver Public Schools. The City might also consider creating a consortium of local organizations that would jointly host quarterly outreach and networking events as well as training sessions for businesses seeking public sector contracts. In addition, the City should consider ways that it can better leverage technology to network more effectively with 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.

Data collection. The City maintains comprehensive data on the prime contracts and procurements that it awards and maintains those data in a well-organized and intuitive manner. However, the City only maintains data on those subcontracts that are associated with prime contracts that it awards using MWBE or DBE contract goals (i.e., *goals* contracts). The City should consider collecting comprehensive data on *all* subcontracts, regardless of whether they are performed by minority- and woman-owned businesses and regardless of whether they are associated with goals contracts. Collecting data on all subcontracts will help ensure that the City

monitors the participation of minority- and woman-owned businesses as accurately as possible. 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; and
- Subcontract paid amount.

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

Monitoring minority- and woman-owned business participation. The City only monitors minority- and woman-owned business participation on goals contracts, which results in a skewed representation of the participation of minority- and woman-owned businesses in City contracting overall. Disparity study results indicate that, during the study period, the participation of minority- and woman-owned businesses was much lower in contracts that the City awarded without the use of MWBE or DBE contract goals (i.e., *no goals* contracts) than in goals contracts, despite the availability of minority- and woman-owned businesses being very similar for both contract sets. That result underscores the importance for the City to monitor the participation of minority- and woman-owned businesses in all contracts, regardless of whether they use any type of contract goals to award them. Doing so will help ensure that the City monitors the participation of minority- and woman-owned businesses as accurately as possible.

Growth monitoring. Along with working to improve its contracting and vendor data systems, the City might also consider collecting data on the impact that the MWBE and DBE Programs have on the growth of minority- and woman-owned businesses over time. Doing so would require the City to collect baseline information on certified MWBEs and DBEs—such as revenue, number of locations, number of employees, and employee demographics—and then continue to collect that information from each business on an annual basis. Such metrics would allow the City to assess whether the program is helping minority- and woman-owned businesses grow and also help refine the measures that the City uses as part of the MWBE and DBE Programs.

Prime contract opportunities. Disparity analysis results indicated substantial disparities for most racial/ethnic and gender groups on the prime contracts that the City awarded during the study period. The City has established a Defined Selection Pool Program, which limits competition on certain construction and goods and services prime contracts to certified SBEs or EBEs. The City should consider continuing and even expanding the use of the program to further encourage the participation of small businesses, including many minority- and woman-owned businesses

Subcontract opportunities. Overall, minority- and woman-owned businesses did not show disparities on the subcontracts that the City awarded during the study period. However, subcontracting accounted for a relatively small percentage of the total contracting dollars that the City awarded during the study period. To increase the number of subcontract opportunities,

the City could consider implementing a program that requires prime contractors to subcontract a certain amount of project work as part of their bids and proposals, regardless of the race/ethnicity or gender of subcontractor owners. For specific types of contracts where subcontracting or partnership opportunities might exist, the City could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed this threshold in order for their bids to be considered responsive. If the City were to implement such a program, it should include flexibility provisions such as a good faith efforts process.

Contract goals. The City uses MWBE and DBE contract goals on many of the contracts that it awards. Prime contractors can meet those goals by either making subcontracting commitments with certified MWBE or DBE subcontractors at the time of bid or by submitting waivers showing that they made reasonable good faith efforts to fulfill the goals but could not do so. Disparity analysis results showed that outcomes for minority- and woman-owned businesses were better on goals contracts than no goals contracts during the study period, indicating that the use of contract goals is an effective measure in encouraging the participation of minority- and woman-owned businesses in City contracts, particularly for Hispanic American-owned businesses. The City should consider continuing its use of MWBE and DBE contract goals in the future. The City will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B). It is also important for the City to continue to treat contract goals as only one tactic among many to encourage minority- and woman-owned business participation in its contracting and to not treat the use of such goals as a substitute for other measures that might help build the capacity of minority- and woman-owned businesses for City work, such as technical assistance programs, mentor-protégé programs, and financial assistance.

MWBE and DBE certification. As part of in-depth interviews and public meetings, some minority- and woman-owned businesses characterized the City's MWBE and DBE certification processes as difficult and cumbersome. The City should consider measures to simplify and streamline the process—particularly for recertification—to make it easier for minority- and woman-owned businesses to become certified and fully participate in the MWBE Program and the Federal DBE Program. The City should also consider working with the Colorado Department of Transportation (CDOT) to examine any collaboration opportunities to refine DBE certification processes.

Unbundling large contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that the City awarded during the study period. In addition, as part of in-depth interviews and public forums, several minority- and woman-owned businesses reported that the size of government contracts often serves as a barrier to their success (for details, see Appendix D). To further encourage the participation of small businesses, including many minority- and woman-owned businesses, the City should consider making efforts to unbundle relatively large prime contracts and even subcontracts into several smaller contracts. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontracting opportunities into smaller contract pieces that are more feasible for small businesses and minority- and woman-owned businesses to work on and accepts such attempts as good faith efforts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and

woman-owned businesses and result in greater minority- and woman-owned business participation.

Prompt payment. As part of in-depth interviews, several businesses, including many minority- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on City contracts, both when they work as prime contractors and as subcontractors (for details, see Appendix D). Many businesses also commented that having capital on hand is crucial to small business success. The City should consider reinforcing its prompt payment policies with its procurement staff and prime contractors and could also consider automating payments directly to subcontractors. Doing so might help ensure that both prime contractors and subcontractors receive payment in a timely manner. It may also help ensure that minority- and woman-owned businesses have enough operating capital to remain successful.

Diversity language in bid and proposal documents. Some interviewees and public meeting participants indicated that the City does not do enough to encourage prime contractors to make genuine efforts to partner with minority- and woman-owned businesses as part of City contracting. One step that the City could consider taking to emphasize the importance of diversity in its contracting is to describe its diversity objectives and the efforts that it expects prime contractors to make to partner with minority- and woman-owned businesses as part of all of its bid and proposal documents. Doing so will help make it clear to prime contractors that contracting diversity is a priority to the City and will also help ensure that prime contractors go beyond perfunctory efforts to work with minority- and woman-owned businesses.

APPENDIX A.

Definitions of Terms

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the City of Denver Disparity Study report. The following definitions are only relevant in the context of this report.

49 Code of Federal Regulations (CFR) Part 26

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

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

Anecdotal Information

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

Availability Analysis

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

Business

A business is a for-profit enterprise including all of its establishments or locations and including sole proprietorships, corporations, professional corporations, limited liability companies, limited partnerships, limited liability partnerships, or any other partnerships regardless of whether they were formed under the laws of the State of Colorado.

Business Listing

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

Business Establishment

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

City and County of Denver (The City)

Denver, Colorado is one of the largest cities in the United States with a regional population of nearly 3 million people. The City and County of Denver provides myriad services to the residents who live and work in the region. To provide those services, the City typically spends nearly \$1 billion each year in contract dollars to procure various goods and services in construction; professional services; and goods and 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 as part of a minority- or woman-owned business program. An organization that uses such measures has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports their use. The organization must assess such discrimination within its own relevant geographic market area.

Consultant

A consultant is a business that performs professional services contracts.

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction contracts.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

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

Denver International Airport (DEN)

DEN is one of the nation's busiest international airports. It offers nonstop service to nearly 200 destinations throughout North America, Latin America, Europe, and Asia. The City's Department of Aviation owns and operates DEN.

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 the Federal DBE Program (49 CFR Part 26) and that is certified as such through the City's Division of Small Business Opportunity or the Colorado 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 and business owners' personal net worth. Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Division of Small Business Opportunity (DSBO)

DSBO is a division of the City that is responsible for implementing various programs and measures designed to encourage the participation of small businesses as well as minority- and

woman-owned businesses in City contracting and procurement, including implementing the Minority and Woman-owned Business Enterprise Program, the Emerging Business Enterprise Program, the Small Business Enterprise Program, and the Federal Disadvantaged Business Enterprise Program.

Disparity

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

Disparity Analysis

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

Disparity Index

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

Federal Aviation Administration (FAA)

The FAA is an agency of the United States Department of Transportation that serves as the national aviation authority of the United States. The FAA has authority to regulate and oversee all aspects of civil aviation in the United States. DEN is a recipient of FAA funds.

Federal DBE Program

The Federal DBE Program was established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. Regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

Firm

See *business*.

Industry

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

Local Marketplace

See *relevant geographic market area*.

Locally-funded Contract

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

Minority

A minority is an individual who identifies with one of the racial/ethnic groups specified by the City's Minority- and Woman-owned Business Enterprise Program:

- Asian Americans;
- Black Americans;
- Hispanic Americans; and
- Native Americans.

Minority- and Woman-owned Business Enterprise (MWBE) Program

The City's MWBE Program is designed to prevent race- or gender-based discrimination against minority- and woman-owned businesses and encourage their participation in City contracts and procurements. As part of the program, the City sets aspirational annual goals for the participation of minority- and woman-owned businesses in its contracts and procurements and relies on a variety of measures in an effort to meet those goals.

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the racial/ethnic groups specified by the City's MWBE Program. A business does not have to be certified as a minority-owned business enterprise to be considered a minority-owned business in this study. (The study team considered businesses owned by minority women as minority-owned businesses.)

Minority-owned Business Enterprise (MBE)

An MBE is a minority-owned business that has been certified as such by DSBO.

Narrow Tailoring

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

- a) The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;

- b) The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- c) The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- d) The relationship of any numerical goals to the relevant business marketplace; and
- e) The impact of such measures on the rights of third parties.¹

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.

Project

A project refers to a construction; professional services; goods or services endeavor that 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 that are specifically designed to increase the participation of minority- and woman-owned businesses in government contracting. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but others might not. Similarly, businesses owned by women might be eligible but businesses owned by men might not. The use of contract goals is one example of a race- and gender-conscious measure.

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses attempting to do work with an organization or measures that are designed to remove potential barriers for small or emerging businesses, regardless of the race/ethnicity or

¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted).

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

Relevant Geographic Market Area

The relevant geographic market area is the geographic area in which the businesses to which the City awards most of its contracting dollars are located. The relevant geographic market area is also referred to as the *local marketplace*. Case law related to minority- and woman-owned business programs as well as disparity studies requires disparity study analyses to focus on the relevant geographic market area. The relevant geographic market area for the disparity study is Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson Counties in Colorado.

Statistically Significant Difference

A statistically significant difference refers to a quantitative difference for which there is a 0.95 or 0.90 probability that chance can be correctly rejected as an explanation for the difference (meaning that there is a 0.05 or 0.10 probability, respectively, that chance in the sampling process could correctly account for the difference).

Strict Scrutiny

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

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

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. The City had to have awarded a contract during the study period for the contract to be included in the study team's analyses. The study period for the disparity study was January 1, 2012 through December 31, 2016.

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., *water, sewer, and utility lines* is a subindustry of *construction*).

United States Departments of Transportation (USDOT)

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

Utilization

Utilization refers to the percentage of total contracting dollars that were associated with a particular set of contracts that went to a specific group of businesses.

Vendor

A vendor is a business that sells goods either to a prime contractor or prime consultant or to an end user such as 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 as a woman-owned business enterprise to be considered a woman-owned business. (The study team considered businesses owned by minority women as minority-owned businesses.)

Woman-owned Business Enterprise (WBE)

A WBE is a woman-owned business that has been certified as such by DSBO.

APPENDIX B.

Legal Framework and Analysis

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APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

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

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, MBE/WBE/DBE Programs, the Federal DBE Program, the Federal ACDBE Program, and the strict scrutiny analysis. This analysis reviews the Tenth Circuit Court of Appeals decisions in *Adarand Constructors, Inc. v. Slater* (“*Adarand VII*”),⁶ *Concrete Works of*

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

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

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

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

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

⁶ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”).

*Colorado, Inc. v. City and County of Denver*⁷ regarding MBE/WBE/DBE programs, the Federal DBE Program, and local and state government recipients of federal funds in their implementation of the Federal DBE Program. The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study.

In addition, the analysis reviews in Section F below other recent federal cases that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, including: *Dunnet Bay Construction Co. v. Illinois DOT*,⁸ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*,⁹ *Western States Paving Co. v. Washington State DOT*,¹⁰ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*,¹¹ *M.K. Weeden Construction v. Montana, Montana DOT, et al.*,¹² *Northern Contracting, Inc. v. Illinois DOT*,¹³ *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹⁴ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹⁵ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁶ *Geod Corporation v. New Jersey Transit Corporation*,¹⁷ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹⁸

The analyses of these and other recent cases summarized below, including the Tenth Circuit decisions in *Adarand Constructors, Inc. v. Slater* and *Concrete Works of Colorado v. City and County of Denver*, 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/DBEs/ACDBEs. They also are applicable in terms of the preparation of a

⁷ *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; *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994).

⁸ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), cert. denied, 137 S. Ct. 31, 2016 WL 193809, (October 3, 2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by Dunnet Bay, 2015 WL 4934560 (7th Cir., 2015).

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

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

¹¹ *Mountain West Holding Co., Inc. v. Montana*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum, (Not for Publication) U.S. Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

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

¹³ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹⁴ *Sherbrooke Turf, Inc. v. Minn. DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

¹⁵ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). Midwest Fence filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, see 2017 WL 511931 (Feb. 2, 2017), which was denied, 2017 WL 497345 (June 26, 2017)..

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

¹⁷ *Geod Corporation v. New Jersey Transit Corporation*, 766 F.Supp. 2d 642 (D. N. J. 2010).

¹⁸ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

DBE Program and ACDBE Program by Denver submitted in compliance with the federal DBE and ACDBE regulations.

Although these cases did not involve specific challenges to the Federal ACDBE Program, they are applicable and instructive to the study in connection with the implementation of the Federal ACDBE Program by recipients of U.S. DOT funds governed by 49 CFR Part 23 (“Participation of Disadvantaged Business Enterprise in Airport Concessions”). The Federal DBE Program and the Federal ACDBE Program are similar in many respects and the ACDBE Program in its regulations located at 49 CFR Part 23 expressly incorporates many of the federal regulations located in 49 CFR Part 26.

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.¹⁹ 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.”²⁰ 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.²¹ 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-

¹⁹ 488 U.S. 469 (1989).

²⁰ 488 U.S. at 500, 510.

²¹ 488 U.S. at 480, 505.

neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.²²

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.²³ 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.”²⁴

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.”²⁵ “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.”²⁶

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.”²⁷ 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.”²⁸

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.”²⁹ “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.”³⁰

²² 488 U.S. at 507-510.

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

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

²⁵ 488 U.S. at 502.

²⁶ *Id.*

²⁷ 488 U.S. at 509.

²⁸ *Id.*

²⁹ 488 U.S. at 509.

³⁰ *Id.*

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.”³¹

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 the Federal DBE and ACDBE 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 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.³² The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and

³¹ 488 U.S. at 492.

³² *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).

- The program must be narrowly tailored to achieve that compelling government interest.³³

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.³⁴ 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.³⁵ 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.³⁶

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.”³⁷ 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).³⁸ 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.³⁹
- **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

³³ *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 I”)*, 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 I”)*, 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).

³⁴ *Id.*

³⁵ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

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

³⁷ *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).

³⁸ 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.

³⁹ *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.

enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor's work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.⁴⁰

- **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.⁴¹
- **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.⁴²
- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal DBE Program.⁴³ Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal DBE Program.⁴⁴

The Federal DBE Program (and ACDBE Program). After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁴⁵ 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

⁴⁰ *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

⁴¹ *Id.* at 1172-74 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁴² *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.

⁴³ 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.

⁴⁴ *Id.* at § 1101(b)(1).

⁴⁵ 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.

2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁴⁶ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁴⁷

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.⁴⁸

The Federal DBE and ACDBE Programs established responsibility for implementing the DBE and ACDBE Programs to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE and/or ACDBE goals 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 and ACDBE Programs outline 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 and ACDBE programs. The implementation of the Federal DBE and ACDBE Programs are 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, and 49 CFR §§ 23.41-51.

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.⁴⁹ This is accomplished by determining the relative number of ready, willing, and able DBEs and ACDBEs in the recipient’s market.⁵⁰ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁵¹ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d) and 49 CFR §23.51(d). These include, among other types, the current capacity of DBEs and ACDBEs to perform work on the recipient’s contracts as measured by the volume of work DBEs and ACDBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs and ACDBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs and ACDBEs to obtain financing, bonding, and insurance, as well as data on employment,

⁴⁶ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁴⁷ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

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

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

⁵⁰ *Id.*

⁵¹ *Id.* at § 26.45(d); *Id.* at § 23.51(d).

education, and training.⁵² This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE and ACDBE participation one would expect absent the effects of discrimination.⁵³

Further, the Federal DBE and ACDBE Programs require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁵⁴ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁵⁵

Federal aid recipients are to certify DBEs and ACDBEs 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 §§ 26.61-26.73.⁵⁶

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

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

⁵² *Id.*

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

⁵⁴ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁵⁵ 49 CFR § 26.51(b); 49 CFR § 23.25.

⁵⁶ 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39.

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

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

Therefore, Congress in the FAST Act passed on December 3, 2015, found based on testimony, evidence and documentation updated since MAP-21 was adopted in 2012 as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.⁵⁷

MAP-21 (July 2012). In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.⁵⁸ In MAP-21, Congress specifically found as follows:

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

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

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

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

⁵⁷ Pub L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat 1312.

⁵⁸ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

many aspects of surface transportation-related business in the public and private markets; and

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”⁵⁹

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there was “a compelling need for the continuation of the” Federal DBE Program.⁶⁰

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011). The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26.

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”⁶¹

The United States DOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE program.⁶² The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”⁶³ The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis...”, noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”⁶⁴ This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁶⁵

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental

⁵⁹ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁶⁰ *Id.*

⁶¹ 76 F.R. at 5092.

⁶² 76 F.R. at 5095.

⁶³ 76 F.R. at 5095.

⁶⁴ *Id.*

⁶⁵ *Id.*

entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁶⁶ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.⁶⁷ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁶⁸

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.⁶⁹ It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.⁷⁰ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁷¹

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."⁷² "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.'"⁷³ Anecdotal

⁶⁶ See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁶⁷ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 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.

⁶⁸ See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 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.

⁶⁹ *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.

⁷⁰ *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 I"), 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).

⁷¹ *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 I"), 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.

⁷² *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 I"), 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).

⁷³ 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 I"), 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).

evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁷⁴

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁷⁵ Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.⁷⁶ 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.⁷⁷

To successfully rebut the government’s evidence, the courts hold, including the Tenth Circuit Court of Appeals in *Concrete Works v. City and County of Denver*, and *Adarand Constructors v. Slater*, 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.⁷⁸ 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.⁷⁹ Conjecture and unsupported criticisms of the government’s methodology are insufficient.⁸⁰ The courts, including in the Tenth Circuit in *Concrete Works*, have

⁷⁴ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 R.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).

⁷⁵ *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”)*, 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).

⁷⁶ *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).

⁷⁷ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁷⁸ 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.

⁷⁹ 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).

⁸⁰ *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.

held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.⁸¹

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.”⁸² The Tenth Circuit and other 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.⁸³ 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.⁸⁴ 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.⁸⁵

The courts, including the Tenth Circuit in *Concrete Works* and *Adarand VII*, 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.”⁸⁶ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”⁸⁷

Thus, the Tenth Circuit holds 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.⁸⁸ The court in *Concrete Works* found that it was not required to attempt to craft a ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark,

⁸¹ *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).

⁸² *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).

⁸³ *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).

⁸⁴ *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).

⁸⁵ *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).

⁸⁶ 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.

⁸⁷ 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).

⁸⁸ 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).

and other courts have stated the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.”⁸⁹

The Tenth Circuit Court of Appeals in *Concrete Works* applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures.⁹⁰ 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.”⁹¹ 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.⁹²

The Tenth Circuit held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination.⁹³ 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.’”⁹⁴ (plurality opinion). Furthermore, the Court of Appeals stated 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.⁹⁵

The Tenth Circuit in *Concrete Works* 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.⁹⁶ The Court of Appeals said that once Denver met its burden, Concrete Works Company (“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.”⁹⁷ (internal citations and quotations omitted). The Court of Appeals found 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.”⁹⁸ The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances.⁹⁹

⁸⁹ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *H. B. Rowe*, 615 F.3d at 241. (internal quotation marks omitted).

⁹⁰ *Concrete Works*, 321 F.3d 950, at 957-58, 959 (10th Cir. 2003).

⁹¹ 488 U.S. 469, 492 (1989) (plurality opinion).

⁹² *Concrete Works*, 321 F.3d 950, at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

⁹³ *Id.*

⁹⁴ *Id.*, quoting *Croson*, 488 U.S. at 509

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Concrete Works*, 321 F.3d 950, 958 (10th Cir. 2003) (internal citations and quotations omitted).

⁹⁹ *Id.* at 960.

The Tenth Circuit found 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.¹⁰⁰ The Tenth Circuit, quoting its 1994 decision in *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."¹⁰¹

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.¹⁰² 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."¹⁰³

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.¹⁰⁴ "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."¹⁰⁵

One form of statistical evidence is the comparison of a government's utilization of MBE/WBES compared to the relative availability of qualified, willing and able MBE/WBES.¹⁰⁶ The federal courts have held that a significant statistical disparity between the utilization and availability of

¹⁰⁰ *Id.* at 970.

¹⁰¹ *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994).

¹⁰² *Id.* at 97, quoting *Croson*, 488 U.S. at 500.

¹⁰³ *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

¹⁰⁴ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (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.

¹⁰⁵ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹⁰⁶ *Croson*, 488 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver ("Concrete Works II")*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

minority- and women-owned firms may raise an inference of discriminatory exclusion.¹⁰⁷ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹⁰⁸

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE/ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹⁰⁹ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹¹⁰ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹¹¹
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹¹²
- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹¹³ A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”¹¹⁴

¹⁰⁷ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁰⁸ *Western States Paving*, 407 F.3d at 1001.

¹⁰⁹ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁰ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹¹ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹² See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹¹³ *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹¹⁴ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.¹¹⁵

In terms of statistical evidence, the courts, including the Tenth Circuit, have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹¹⁶

The Tenth Circuit in *Concrete Works* noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities.¹¹⁷ 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.¹¹⁸

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.¹¹⁹

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence Denver presented on marketplace discrimination.¹²⁰ 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*.¹²¹ 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

¹¹⁵ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

¹¹⁶ See, e.g., *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; *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994).

¹¹⁷ *Concrete Works*, 321 F.3d 950, citing *Croson*, 488 U.S. at 503.

¹¹⁸ *Id.* at 972.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 973.

¹²¹ *Id.*

area.”¹²² 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.”¹²³

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.¹²⁴ Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹²⁵

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.¹²⁶ 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.¹²⁷

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.¹²⁸ 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.¹²⁹

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.¹³⁰ (“[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.*”¹³¹ Further, the court pointed out that it earlier rejected the argument CWC reasserted 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.”¹³² The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private*

¹²² *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹²³ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹²⁴ *Id.* at 973.

¹²⁵ *Id.*

¹²⁶ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹²⁷ *Id.*

¹²⁸ *Id.* at 974.

¹²⁹ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹³⁰ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹³¹ *Id.* (emphasis added).

¹³² *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

construction market in the Denver MSA” was relevant to Denver’s burden of producing strong evidence.¹³³

Consistent with the court’s mandate in *Concrete Works II*, Denver 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.”¹³⁴ The Tenth Circuit ruled that 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.¹³⁵

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by Denver 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.”¹³⁶

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.¹³⁷

In *Concrete Works*, Denver 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. 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.”¹³⁸ In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.”¹³⁹

The Tenth Circuit in *Concrete Works* concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court noted that in *Adarand VII* it took “judicial notice

¹³³ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹³⁴ *Id.*

¹³⁵ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹³⁶ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹³⁷ *Id.* at 977.

¹³⁸ *Id.* at 977-78.

¹³⁹ *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13.

of the obvious causal connection between access to capital and ability to implement public works construction projects.”¹⁴⁰

Denver 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 City’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 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.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

¹⁴⁰ *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

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).

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.

- 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

The anecdotal evidence, according to the Tenth Circuit, presented in *Concrete Works* included several incidents involving "profoundly disturbing" behavior on the part of lenders, majority-owned firms, and individual employees.¹⁴⁸ 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 *Concrete Works* ("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 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.¹⁴⁹

The Tenth Circuit 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.¹⁵⁰

After considering Denver's anecdotal evidence, the district court in *Concrete Works* 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.¹⁵¹ Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the Tenth Circuit concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver's initial burden.¹⁵²

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); e.g., *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

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).

¹⁴⁸ *Concrete Works*, 321 F.3d at 989.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073.

¹⁵² *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").

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 Tenth 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;
- 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.¹⁵³

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.¹⁵⁴

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.”¹⁵⁵ Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral

¹⁵³ 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.

¹⁵⁴ 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.

¹⁵⁵ *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).

alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁵⁶

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.’”¹⁵⁷

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁵⁸ 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.”¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁶²

¹⁵⁶ 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.

¹⁵⁷ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

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

¹⁵⁹ 551 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).

¹⁶⁰ *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.

¹⁶¹ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁶² *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.

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.¹⁶³

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."¹⁶⁴ The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.¹⁶⁵ 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.¹⁶⁶ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁶⁷ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁶⁸

The recent 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁶⁹ 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.¹⁷⁰ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of

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

¹⁶⁴ 473 F.3d at 722.

¹⁶⁵ *Id.* at 722.

¹⁶⁶ *Id.* at 723-24.

¹⁶⁷ *Id.*

¹⁶⁸ *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).

¹⁶⁹ *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).

¹⁷⁰ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

the Federal DBE Program constituted unlawful discrimination.¹⁷¹ 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.¹⁷²

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.¹⁷³

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.¹⁷⁴ And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.¹⁷⁵

¹⁷¹ *Id.*

¹⁷² 840 F.3d 932 (7th Cir. 2016).

¹⁷³ 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.

¹⁷⁴ 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.

¹⁷⁵ 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).

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.”¹⁷⁶

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.¹⁷⁷

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.”¹⁷⁸

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

¹⁷⁶ *Croson*, 488 U.S. at 509-510.

¹⁷⁷ 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).

¹⁷⁸ *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.

efforts), the courts require evaluation of additional factors as listed above.¹⁷⁹ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁸⁰ (2) good faith efforts provisions;¹⁸¹ (3) waiver provisions;¹⁸² (4) a rational basis for goals;¹⁸³ (5) graduation provisions;¹⁸⁴ (6) remedies only for groups for which there were findings of discrimination;¹⁸⁵ (7) sunset provisions;¹⁸⁶ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁸⁷

2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Tenth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁸⁸ The Tenth Circuit has applied “intermediate scrutiny” to classifications based on gender.¹⁸⁹ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁹⁰

¹⁷⁹ 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).

¹⁸⁰ *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).

¹⁸¹ *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.

¹⁸² *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).

¹⁸³ *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).

¹⁸⁴ *Id.*

¹⁸⁵ 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.

¹⁸⁶ 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).

¹⁸⁷ *Coral Constr.*, 941 F.2d at 925.

¹⁸⁸ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *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, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d 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.

¹⁸⁹ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *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, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), cert. denied, 489 U.S. 1067 (1989) (citing *Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)).

¹⁹⁰ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *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, *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 (3d Cir. 1993).

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.¹⁹¹

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.¹⁹²

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.¹⁹³ The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹⁹⁴

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

¹⁹¹ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *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); *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.”).

¹⁹² *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*.

¹⁹³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F.Supp 2d 613, 619-620 (2000); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

¹⁹⁴ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

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.”¹⁹⁵

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.”¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹ 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.²⁰⁰ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.²⁰¹ 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.²⁰² 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

¹⁹⁵ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

¹⁹⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁹⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

¹⁹⁸ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

¹⁹⁹ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

basis standard.²⁰³ 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.²⁰⁴

The courts in Colorado and the Tenth Circuit Court of Appeals 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.”²⁰⁵ So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.²⁰⁶

Under the rational basis test, “a statutory classification is presumed constitutional and does not violate equal protection unless it is proven beyond a reasonable doubt that the classification does not bear a rational relationship to a legitimate legislative purpose.”²⁰⁷ “[T]he burden is on claimant, as the challenging party, to prove the statute is unconstitutional beyond a reasonable doubt.”²⁰⁸

In applying rational basis review, “we do not decide whether the legislature has chosen the best route to accomplish its objectives.”²⁰⁹ Instead, “[o]ur inquiry is limited to whether the scheme as constituted furthers a legitimate state purpose in a rational manner.”²¹⁰

“[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.”²¹¹ 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

²⁰³ *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Colorado Insurance Guaranty Association v. Sunstate Equipment, LLC*, 405 P.2d 320, 328-329, 331-332 (Colo. App. 2016); *Sanchez v. Industrial Claim Appeals Office of Colorado*, 411 P.2d 245, 252 (Colo. App. 2017); see, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *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.

²⁰⁴ See, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); see, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988).

²⁰⁵ See, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); see, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Zerba v. Dillon Companies, Inc.*, 292 P.3d 1051, 1055 (Colo. 2012); 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).

²⁰⁶ *Id.*, *Zerba v. Dillon Companies, Inc.*, 292 P.3d 1051, 1055 (Colo. 2012); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993));

²⁰⁷ *Sanchez v. Industrial Claim Appeals Office*, 411 P.3d 245 (2017), quoting, *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 506 (Colo. 1997).

²⁰⁸ *Sanchez v. Industrial Claim Appeals Office*, 411 P.3d 245 (2017), quoting, *Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005), *aff’d* on other grounds sub nom. *City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006).

²⁰⁹ *Sanchez v. Industrial Claim Appeals Office*, 411 P.3d 245 (2017) quoting, *Dean v. People*, 2016 CO, ¶ 13, 366 P.3d 593.

²¹⁰ *Id.*

²¹¹ *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); *Gray v. Commonwealth of Virginia*, 274 Va. at 308-9, 645 S.E. 2d at 460.

does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality”.²¹²

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.”²¹³ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”²¹⁴

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”).²¹⁵

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”²¹⁶

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.²¹⁷ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²¹⁸

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.²¹⁹ 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

²¹² *Heller v. Doe*, 509 U.S. 312, 321 (1993).

²¹³ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012).

²¹⁴ *Id.*; see, *Gray v. Commonwealth of Virginia*, 274 Va. at 308, 645 S.E. 2d at 459.

²¹⁵ 2012 WL 5939228 (Fed. Cl. 2012).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

opportunity to participate as subcontractors....”²²⁰

4. Pending cases (at the time of this report)

There are no significant pending cases on appeal at the time of this report that may potentially directly impact and be instructive to the study. The most recent case, cited below, was settled and voluntarily dismissed in March 2018 by order of the district court and stipulated to by the parties, after remand from the Ninth Circuit Court of Appeals.

Mountain West Holding Co., Inc. v. Montana, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum Opinion (Not For Publication), U.S. Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014). *Petition for Panel Rehearing and Rehearing En Banc* filed with the U.S. Court of Appeals for the Ninth Circuit by Montana DOT, May 30, 2017, *denied* on June 27, 2017. The case on remand was voluntarily dismissed by stipulation of the parties after the parties entered into a Settlement Agreement (February 23, 2018). The case was ordered dismissed by the district court on March 14, 2018 after the parties performed the Settlement Agreement. (See Section F below.)

United States v. Taylor, 232 F. Supp. 3d 741 (W.D. Penn. 2017). It is instructive to the study to note the recent decision by the federal District Court for the Western District of Pennsylvania in *United States v. Taylor*, 232 F. Supp. 3d 741 (W. D. Penn. 2017). The court 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). The court in denying the motion to dismiss the Indictment upheld the federal DBE regulations in issue against a challenge to the Federal DBE Program.

The court rejected a challenge to the authority of the U.S. DOT to promulgate the federal DBE regulations claiming the U.S. DOT exceeded its authority. 232 F.Supp. at 757. The court found that the legislative history and executive rulemaking with respect to the relevant statutory provisions and regulations were sufficient to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.* at 757, *citing*, 49 U.S.C. Section 322, 23 U.S.C. Section 304, and 23 U.S.C. Section 315.

In addition, the court in *Taylor*, pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny,” with multiple courts holding that the DBE 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)).

After the court denied Defendant Taylor’s motion to dismiss the Indictment, the Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment

²²⁰ *Id.*

sentencing the Defendant, and ordered restitution and a fine. The case also was terminated on March 13, 2018.

Rothe Development, Inc. v. U. S. D.O.D. and S.B.A., 2016 WL 4719049 (D.C. Cir. 2016). Also, it is instructive to the study to point out the recent decision in *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds, Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration, et al*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C., 2015), *certiorari denied* in 2017.

Rothe filed this action against the U.S. Department of Defense and the U.S. Small Business Administration challenging the constitutionality of the Section 8(a) Program on its face. The *Rothe* case is nearly identical to the challenge brought in *DynaLantic Corp. v. U.S. Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). *DynaLantic's* court rejected the plaintiff's facial attack and held the Section 8(a) Program facially constitutional.

Plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in *DynaLantic* and urged the court to strike down the race-conscious provisions of Section 8(a) on their face. The district court in *Rothe* agreed with the court's findings, holdings and reasoning in *DynaLantic*, and thus concluded that Section 8(a) is constitutional on its face.

The district court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government demonstrated a compelling interest for the racial classification, the need for remedial action is supported by strong and un rebutted evidence, and the Section 8(a) program is narrowly tailored.

Rothe appealed the decision to the United States Court of Appeals for the District of Columbia Circuit. The majority of the three judge panel affirmed the district court's decision, but on other grounds.²²¹

The Court of Appeals in *Rothe* found that the challenge was only to the Section 8(a) statute, not the implementing regulations, and thus held the Section 8(a) statute was race-neutral.²²² Therefore, the court held the rational basis test applied and not strict scrutiny.²²³ The court affirmed the grant of summary judgment to the government defendants applying the rational basis standard, and upheld the validity of Section 8(a) based on the limited challenge by Rothe to the statute and not the regulations.

The Court of Appeals held that Section 8(a) of the Small Business Act does not warrant strict scrutiny because it does not on its face classify individuals by race.²²⁴ Section 8(a), the Court said, unlike the implementing regulations, uses facially race-neutral terms of eligibility to identify

²²¹ 2016 WL 4719049 (September 9, 2016).

²²² 2016 WL4719049, at *1-2.

²²³ *Id.*

²²⁴ 2016 WL 4719049 at **1-2.

individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such.²²⁵ See Section G below.

Rothe filed a Petition for Rehearing and Rehearing En Banc to the full Court of Appeals. The court denied the Petition. Rothe then filed a Petition for a Writ of Certiorari to the U.S. Supreme Court, which was denied on October 16, 2017. 2017 WL 1375832.

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 Program, the Federal ACDBE Program, and the implementation of the Federal DBE and ACDBE Programs by state DOTs 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.

²²⁵ *Id.*

SUMMARIES OF RECENT DECISIONS

D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Tenth Circuit Court of Appeals

1. *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.

2. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) *cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari “as improvidently granted” without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court's vacation of the Tenth Circuit's dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee *Adarand Constructors, Inc.* In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause (“SCC”), which employs race-conscious presumptions designed to favor minority enterprises and other “disadvantaged business enterprises” (“DBEs”).

The court's evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id.* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

"Compelling Interest" in race-conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O'Connor explicitly states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions" (citing *Croson*, 488 U.S. at 498-506)). Interpreting *Croson*, the court recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.'" *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." *Id.*

Evidence required to show compelling interest. While the government's articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a '*strong basis in evidence* for [the government's] conclusion that remedial action was necessary.'" *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, *citing Concrete Works*, 36 F.3d at 1520-21.

After the government's initial showing, the burden shifted to *Adarand* to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* (quoting *Wygant*, 476 U.S. at 277-78, (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of

prior discrimination and thus a remedial purpose.” *Id.* at 1166, quoting, *Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, citing, *Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166–67 citing, *Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O’Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program.

Id. at 1167, quoting, *Concrete Works*, 36 F.3d at 1529.

Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government’s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding

existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government's evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to “old boy” networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors' unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government's evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government's evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up “anticipated costs, and therefore the bid, for minority-owned businesses.” *Id.* at 1172.

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government's evidence as to the kinds of obstacles minority subcontracting businesses face

constituted a strong basis for the conclusion that those obstacles are not “the same problems faced by any new business, regardless of the race of the owners.” *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court’s decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government’s review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area “minority firms still receive only 87 cents for every dollar they would be expected to receive” based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government’s] prime contractors, an inference of discriminatory exclusion could arise.” *Id.* quoting, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

The court said that it was mindful that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 1172, quoting, *Croson* at 501–02. But the court found that here, it was unaware of such “special qualifications” aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, citing, *Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, quoting, *Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, quoting, *Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, citing, *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Adarand’s rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand’s contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject

to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* “Race” the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.” *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O’Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government’s initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court’s finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, *quoting*, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, *quoting*, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal*

Workers', 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, *citing, Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.” 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O’Connor’s majority opinion in *Croson* added a further factor to the court’s analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because “there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, *quoting, Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, *quoting, Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); *see also* 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, *see* 49 CFR §

26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized.

Id 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.

3. 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).

4. 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.

5. 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 Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with

the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

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

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination

by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia (“VMI”)*, 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may

have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

7. 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).

8. 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 percent of all city contracts. 199 F.3d at 208. *Id.* The 5 percent 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 percent because it was found that 10 percent 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 percent participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5 percent 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 percent 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 percent. *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 percent 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 percent 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 percent. *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 percent 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 percent 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.

9. 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 defendants 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.

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. 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.

Recent District Court Decisions

13. 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 50 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 34 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 4 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.

14. 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 F.3d 233 (4th Cir. 2010), discussed above.

15. *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.

16. 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.

17. *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.

18. 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.

19. 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).

20. 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.

21. 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.

22. *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).

23. 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 defendants 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.

24. 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. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (Not for Publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, *dismissing in part, reversing in part and remanding* the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014)

Note: The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant”

minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,”

and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana’s DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana’s overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West’s claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West’s claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana’s DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study’s analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.
2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.
3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and

the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available *subcontractors* to the proportion of *prime* contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting, Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and *quoting, Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West’s case, it concluded that the record 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.

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

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 citing *Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at *7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under- inclusiveness. *Id.* at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, citing 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence “mismatch” argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “only on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore,

according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs’ ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between

the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered “solid evidence of systematic under-utilization calling for affirmative action to correct it.” *Id.* at *13. The study found that DBEs made up 25.55% of prime contractors in the construction field, received 9.13% of prime contracts valued below \$500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts’ value that DBEs received dropped dramatically, to just 1.5% of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

Tollway program. Tollway also relied on a disparity study limited to the Tollway’s contracting market area. The study used a “custom census” process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway’s historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector.” *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01% across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence’s criticisms. Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at *15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence’s strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for

relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the

evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to

determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting.” *Id.* at *18. The court concluded that Midwest Fence “has shown how the Illinois program *could* yield that result but not that it actually does so.” *Id.*

In light of the IDOT and Tollway programs’ mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the “theoretical possibility of a ‘mismatch’ could be a problem, but we have no evidence that it actually is.” *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* “So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination”, according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact “on this point.” *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

3. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 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.

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.

A. Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (*quoting Western States Paving*, 407 F.3d at 997-99).

1. Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (*citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (*quoting Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (*quoting Western*

States Paving, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, see *Croson*, 488 U.S. at 509, and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in every measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

2. Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed

systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

B. Consideration of race-neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

C. Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California.* *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Stat. 1144 (2005)). *Id.* at 1200.

D. Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by

both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

5. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id.* at 1182. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id.* at 1182.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id.* at 1183.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and

the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract.” *Id.* at 1183. The district court found that Braunstein’s inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT’s DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id.* at 1185. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government “affirmative action” program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id.* at 1186. Thus, Braunstein’s surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is “able and ready” to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id.* at 1186. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein’s ability to compete for work as a subcontractor. *Id.* at 1187. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff’s showing that he has been subjected to such a barrier. *Id.* at 1186.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id.* at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id.* at 1187.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

6. 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.*

7. 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.

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states’ implementation of the Federal DBE Program were narrowly tailored, and the state DOT’s implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment’s Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE

Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads (“Nebraska DOR”) under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT’s and Nebraska DOR’s implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side’s position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state’s implementation becomes relevant to a reviewing court’s strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal “must be based on demonstrable evidence” as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state’s determination that more DBEs would

be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the “maximum feasible portion” of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state’s failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court’s narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contacting 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*).

Recent District Court Decisions

9. 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).²²⁶

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants’ Motion to Dismiss Midwest Fence’s request for punitive damages.

²²⁶ 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.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program’s 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant’s report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all “likely to be influenced by the presence of discrimination if it exists” and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a “disparity index” for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep’t. of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government’s compelling interest in implementing a national program. *Id.* at 727, *citing Rothe*, 545 F.3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race- and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program’s goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program’s presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become “overconcentrated” in a particular area of contract work, recipients must take

appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing to Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its

burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

The study employed a “custom census” approach to calculate DBE availability, and examined the Tollway’s contract data to determine utilization. *Id.* at 737. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an “economy-wide analysis” examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person’s race or sex and their earning power and ability to form a business. *Id.*

Midwest’s challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an “economy-wide analysis” similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway’s method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program’s burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program’s burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

Notice of Appeal. At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

10. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race-based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work." *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas

of work are forced to bear the entire burden of “correcting discrimination”, while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in

support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.

The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971-73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

2. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or

necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and

therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

1. Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

2. Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

3. Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because

MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

11. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and

its implementation of the Federal DBE Program, including an alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court’s Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to

do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded “because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting.*” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The “no-waiver” policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT’s decision rejecting Dunnet Bay’s bid was consistent with the regulations and did not exceed IDOT’s authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay’s argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay’s bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT’s authority under federal law, the Court held Dunnet Bay’s claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and

neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id.* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a "no-waiver policy," such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay

was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

12. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE

subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in

Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, quoting *Western States Paving*, 407 F.3d at 991, citing *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion

Transcript at 45. The court concluded that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives.” Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans’ race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, “which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...”, and whether Caltrans has complied with the Ninth Circuit’s guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held “that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law.” Slip Opinion Transcript at 52.

The court rejected the plaintiff’s arguments that anecdotal evidence failed to identify specific acts of discrimination, finding “there are numerous instances of specific discrimination.” Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans’ program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an “extensive disparity study, anecdotal evidence, both of which is what was missing” in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans “did exactly what the Ninth Circuit required” and that Caltrans has gone “as far as is required.” Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, “clearly constitutional,” and “narrowly tailored.” Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans’ program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight “because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work.” Slip Opinion Transcript at 55. Whereas, the district court held the “disparity study used by Caltrans was much more comprehensive and accounted for this and other factors.” *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the

district court found, “is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional.” *Id.* at 56.

The court held that because “Caltrans’ DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional.” Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans’ DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

14. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by *NJT* in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the *NJT*’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for *NJT* and concluded that a genuine issue material fact existed only as to whether the method used by *NJT* to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. *NJT* relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The

court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion

of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, *citing Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 *quoting Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, *citing Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, *quoting Northern Contracting*, 473 F.3d at 722 and *citing also Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.*

at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, citing 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, citing *Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, *citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

15. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender-based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's

requirements. The district court stated that the requirement that a recipient must evidence past discrimination “is nothing more than a requirement of the regulation.” *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT’s DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota’s DBE program was narrowly tailored because it was in compliance with TEA-21’s requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota’s DBE program to ensure compliance with TEA-21’s requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT’s DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs’ argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that “perhaps more importantly, NJT’s DBE goal was approved by the USDOT every year

from 2002 until 2008.” *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT’s adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender-neutral means. The district court concluded that “critically,” plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT’s DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT’s adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied

both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

16. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to

undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, *quoting Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473

F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

17. 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. 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.

18. 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.

19. 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 woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipt 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.

20. *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.*

21. 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 Analysis

APPENDIX C.

Quantitative Analysis

Figure C-1.
Percentage of workers 25 and older with at least a four-year college degree, Denver and the United States, 2012-2016

Note:

**/++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence levels for Denver and the United States as a whole, respectively.

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

Source:

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

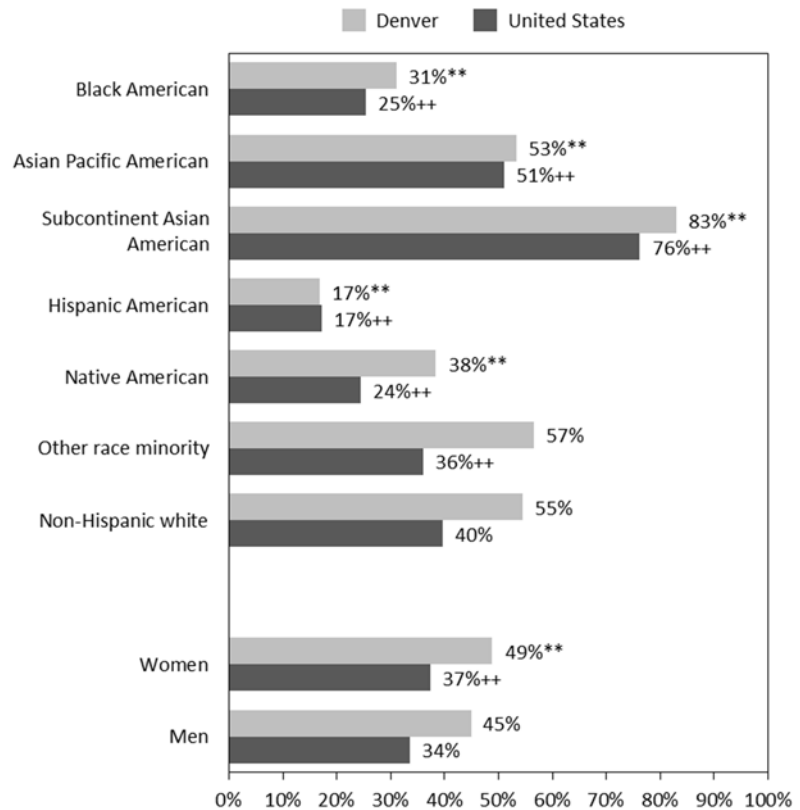
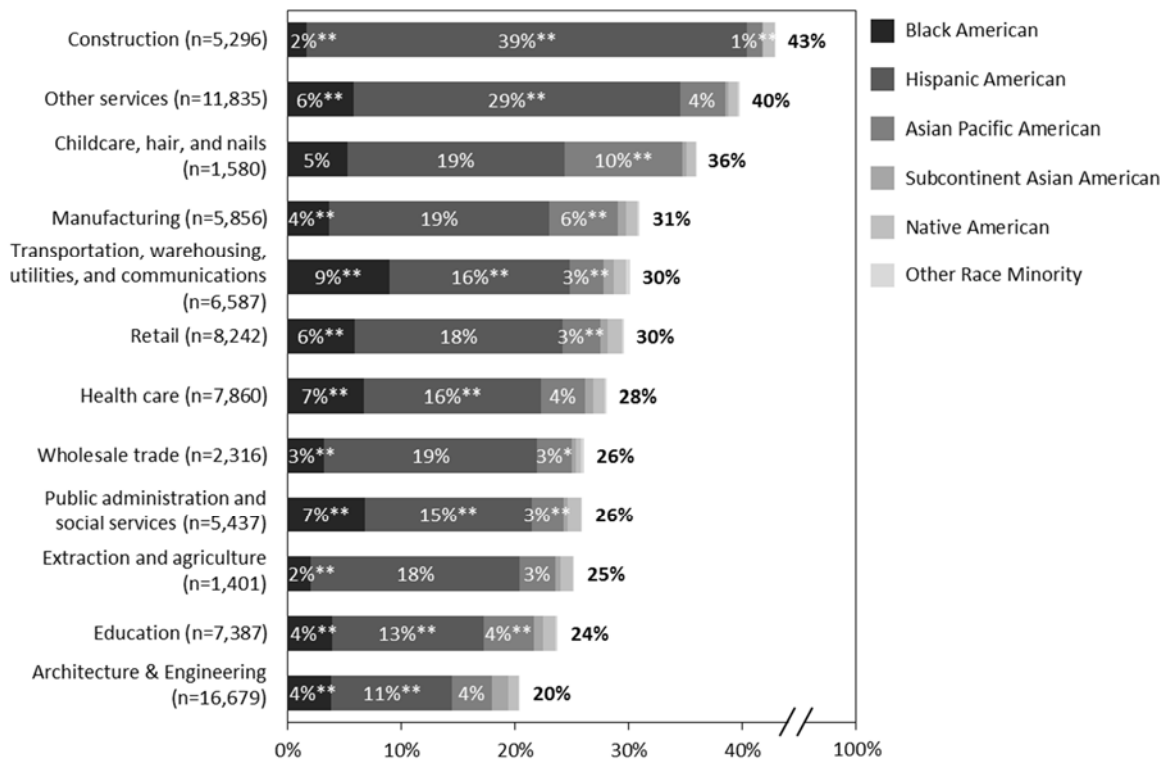


Figure C-1 indicates that, compared to non-Hispanic white Americans working in Denver, smaller percentages of Black Americans, Asian Pacific Americans, Hispanic Americans, and Native Americans have four-year college degrees. In contrast, compared to non-Hispanic white Americans and men, a larger percentage of Subcontinent Asian Americans and women working in Denver have four-year college degrees, respectively.

Figure C-2.
Percent representation of minorities in various industries in Denver, 2012-2016



Note: *, ** 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.

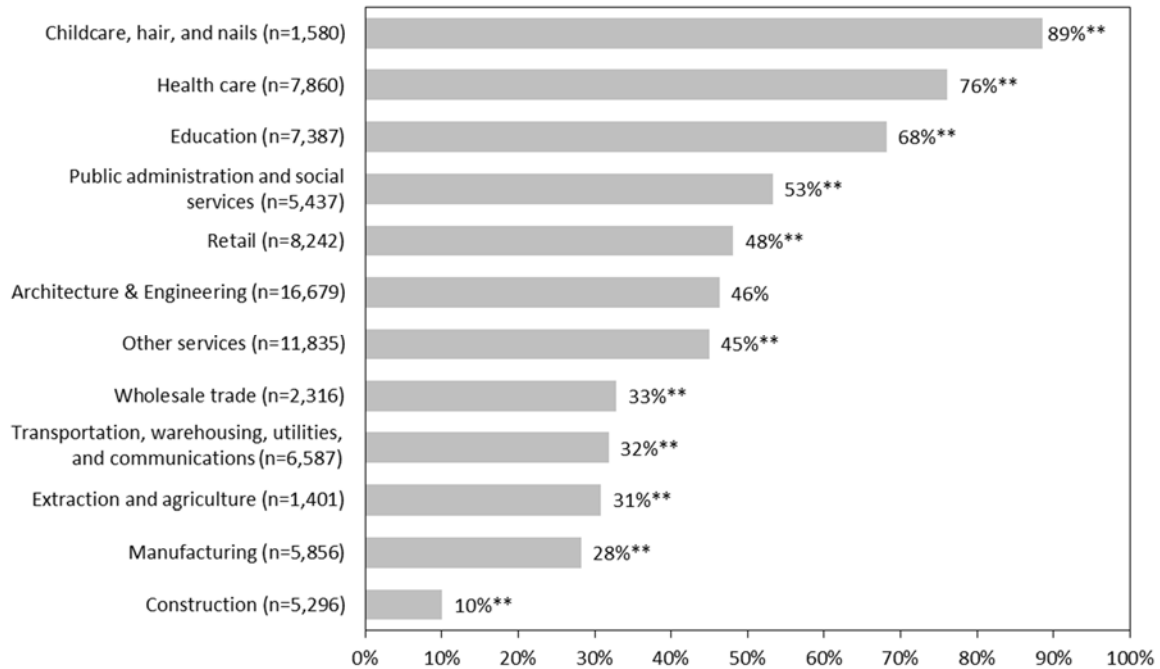
The representation of minorities among all Denver workers is 5 percent for Black Americans, 19 percent for Hispanic Americans, 4 percent for Asian Pacific Americans, 1 percent for Subcontinent Asian Americans, 1 percent for Other race minorities, and 30 percent for all minorities considered together.

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

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

Figure C-2 indicates that the Denver industries with the highest representations of minority workers are construction; other services; and childcare, hair, and nails. The Denver industries with the lowest representations of minority workers are extraction and agriculture; education; and architecture and engineering.

Figure C-3.
Percent representation of women in various industries in Denver, 2012-2016



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

The representation of women among all Denver workers is 46 percent.

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

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

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

Figure C-4.
Race/ethnicity and gender of workers in study-related industries and all industries, Denver and the United States, 2012-2016

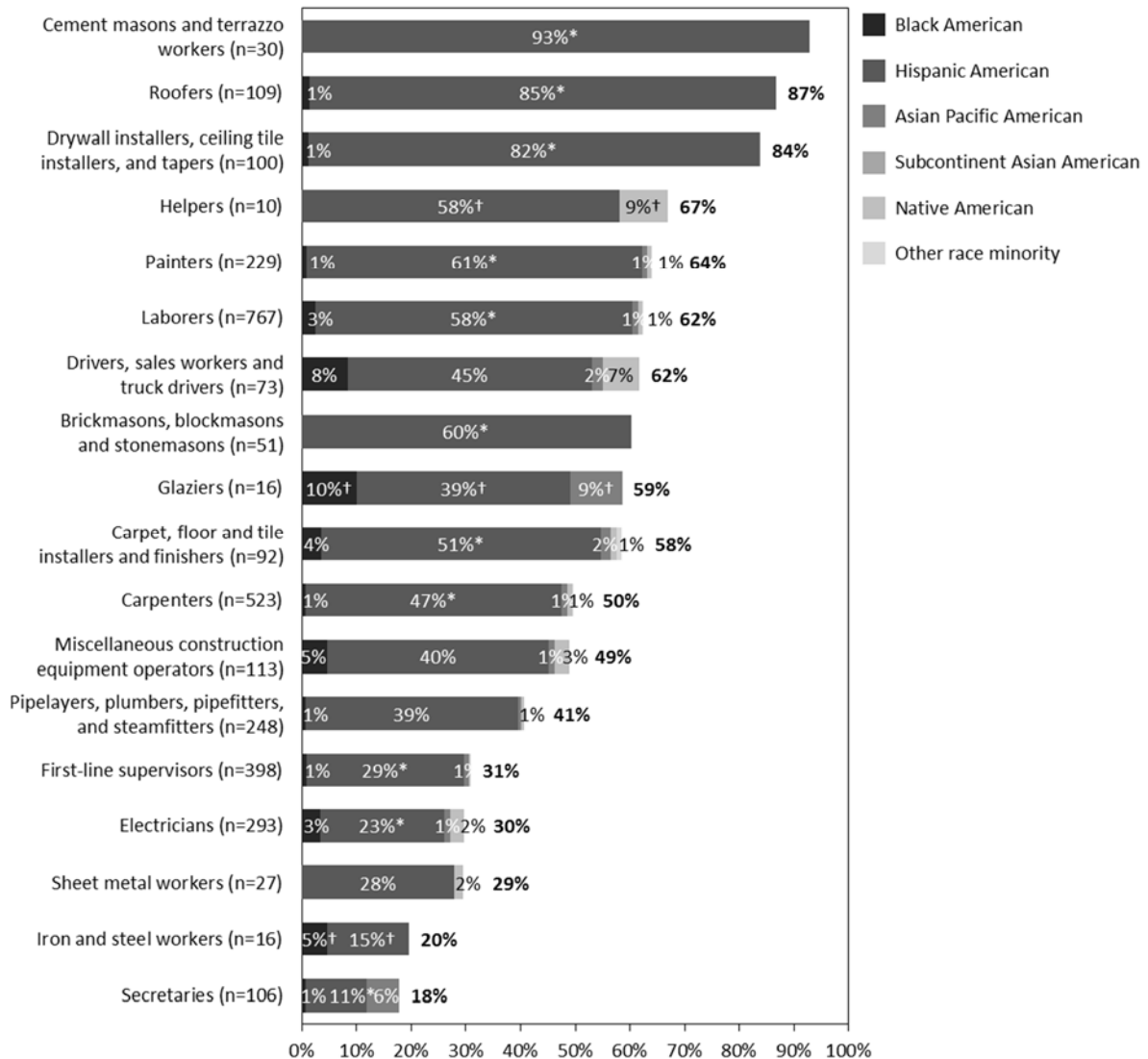
Denver	All Industries (n=59,067)	Construction (n=4,770)	Professional Services (n=5,758)	Goods & Services (n=9,187)
Race/ethnicity				
Black American	4.5 %	1.8 % **	3.5 % **	5.1 %
Asian Pacific American	2.7 %	1.0 % **	2.5 %	2.5 %
Subcontinent Asian American	0.4 %	0.0 %	1.3 % **	0.9 %
Hispanic American	14.2 %	28.1 % **	6.8 % **	13.4 %
Native American	1.1 %	1.6 %	0.8 %	1.1 %
Other race minority	0.4 %	0.4 %	0.4 %	0.4 %
Total minority	23.4 %	32.9 %	15.3 %	23.4 %
Non-Hispanic white	76.6 %	67.1 % **	84.7 % **	76.6 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	45.5 %	10.9 % **	43.9 % **	35.3 % **
Men	54.5 %	89.1 % **	56.1 % **	64.7 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %
United States	All Industries (n=6,832,970)	Construction (n=480,280)	Professional Services (n=370,271)	Goods & Services (n=926,709)
Race/ethnicity				
Black American	10.9 %	6.2 % **	9.0 % **	10.8 % **
Asian Pacific American	3.4 %	1.2 % **	4.4 % **	3.2 % **
Subcontinent Asian American	0.7 %	0.2 % **	1.9 % **	0.9 % **
Hispanic American	10.7 %	15.0 % **	7.0 % **	10.9 % **
Native American	1.2 %	1.6 % **	0.9 % **	1.0 % **
Other race minority	0.4 %	0.4 %	0.4 %	0.5 %
Total minority	27.3 %	24.5 %	23.6 %	27.2 %
Non-Hispanic white	72.7 %	75.5 % **	76.4 % **	72.8 %
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	46.5 %	9.9 % **	46.0 % **	31.9 % **
Men	53.5 %	90.1 % **	54.0 % **	68.1 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %

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

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

Figure C-4 indicates that there are smaller percentages of Asian Pacific Americans, Black Americans, and women working in the Denver construction industry than in all industries considered together. In addition, there are smaller percentages of Black Americans, Hispanic Americans, and women working in the professional services industry than in all industries considered together. Finally, there is a larger percentage of women working in the goods and services industry than all industries considered together.

Figure C-5.
Percent representation of minorities in construction occupations in Denver, 2012-2016



Note: * Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% confidence level.

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

The representation of minorities among all Denver construction workers is 2 percent for Black Americans, 39 percent for Hispanic Americans, 1 percent for Asian Pacific Americans, 0 percent for Subcontinent Asian Americans, 1 percent for Native Americans, 0 percent for Other race minorities, and 43 percent for all minorities considered together.

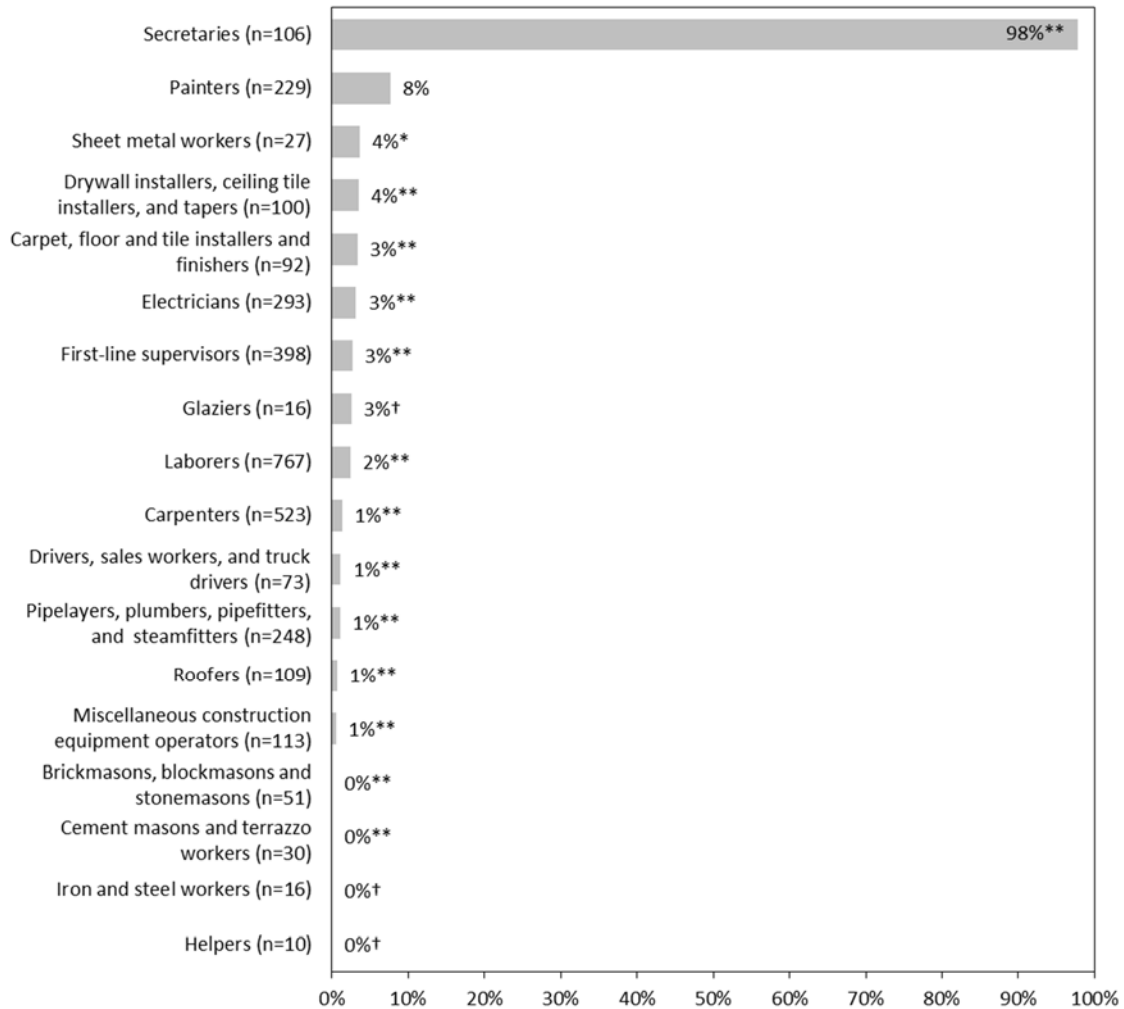
Data on plasterers and stucco masons are not presented, because none were found in the study area sample.

Crane and tower operators, dredge, excavating and loading machine operators, paving, surfacing and tamping equipment operators and other construction equipment operators were combined into the single category of miscellaneous construction equipment operators.

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

Figure C-5 indicates that the Denver construction occupations with the highest representations of minority workers are cement mason and terrazzo workers; roofers; and drywall installers, ceiling tile installers, and tapers. The Denver construction occupations with the lowest representations of minority workers are sheet metal workers; iron and steel workers; and secretaries.

Figure C-6.
Percent representation of women in selected construction occupations in Denver, 2012-2016



Note: *, ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

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

The representation of women among all Denver construction workers is 10 percent.

Data on plasterers and stucco masons are not presented, because none were found in the study area sample.

Crane and tower operators, dredge, excavating and loading machine operators, paving, surfacing and tamping equipment operators and other construction equipment operators were combined into the single category of miscellaneous construction equipment operators.

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

Figure C-6 indicates that the Denver construction occupations with the highest representations of women workers are secretaries; painters; and sheet metal workers. The Denver construction occupations with the lowest representations of women workers are brickmasons, blockmasons, and stonemasons; cement masons and terrazzo workers; iron and steel workers; and helpers.

Figure C-7.
Percentage of workers who worked as a manager in each study-related industry, Denver and the United States, 2012-2016

Note:

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

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

Source:

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

Denver	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	5.6 % **	6.2 % **	3.7 % **
Asian Pacific American	12.2 %	5.8 % **	4.4 % **
Subcontinent Asian American	0.0 % †	9.0 %	9.7 %
Hispanic American	2.6 % **	6.4 % **	2.5 % **
Native American	3.9 % **	11.3 %	3.3 % **
Other Race Minority	6.9 % †	0.0 % †	0.0 % *
Non-Hispanic white	16.8 %	9.8 %	8.6 %
Gender			
Women	14.5 % **	8.7 %	6.3 % *
Men	10.5 %	9.5 %	7.3 %
All individuals	10.9 %	9.2 %	6.9 %
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	5.0 % **	4.4 % **	2.2 % **
Asian Pacific American	10.4 %	6.7 % **	5.7 %
Subcontinent Asian American	14.3 % **	9.4 %	9.2 % **
Hispanic American	3.1 % **	5.5 % **	2.3 % **
Native American	5.8 % **	6.5 % **	3.3 % **
Other Race Minority	6.3 % **	5.8 % **	3.9 % **
Non-Hispanic white	10.5 %	9.1 %	5.9 %
Gender			
Women	10.0 % **	6.9 % **	4.3 % **
Men	8.0 %	9.1 %	5.2 %
All individuals	10.9 %	8.1 %	4.9 %

Figure C-7 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Hispanic Americans, and Native Americans work as managers in the Denver construction industry. Smaller percentages of Black Americans, Asian Pacific Americans, and Hispanic Americans work as managers in the Denver professional services industry. In addition, smaller percentages of Black Americans, Asian Pacific Americans, Hispanic Americans, and Native Americans work as managers in the Denver goods and services industry. In addition, compared to men, a smaller percentage of women work as managers in the Denver goods and services industry. In contrast, a larger percentage of women than men work as managers in the Denver construction industry.

Figure C-8.
Mean annual wages,
Denver and the United
States, 2012-2016

Note:

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

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for Denver and the United States as a whole, respectively.

Source:

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

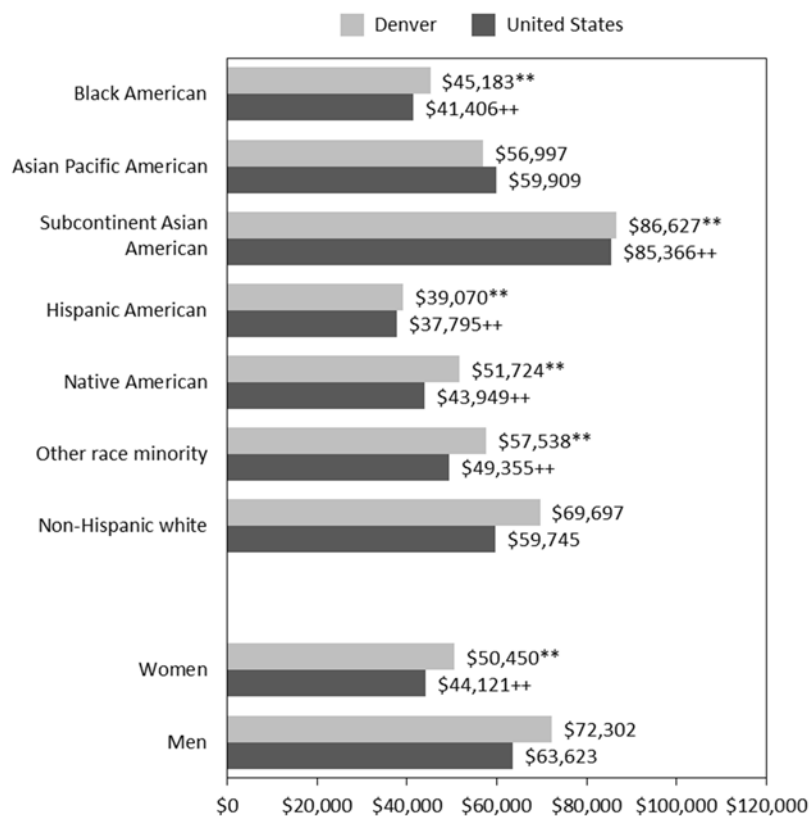


Figure C-8 indicates that, compared to non-Hispanic white Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities in Denver exhibit lower mean annual wages. In addition, women in Denver exhibit lower mean annual wages than men. In contrast, compared to non-Hispanic white Americans, Subcontinent Asian Americans exhibit higher mean annual wages.

**Figure C-9.
Predictors of annual wages
(regression), Denver, 2012-2016**

Note:

The regression model includes 45,861 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 2012-2016 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	7425.547 **
Black American	0.764 **
Asian Pacific American	0.869 **
Subcontinent Asian American	0.913 **
Hispanic American	0.877 **
Native American	0.850 **
Other minority group	0.862 *
Women	0.800 **
Less than high school education	0.836 **
Some college	1.153 **
Four-year degree	1.560 **
Advanced degree	2.047 **
Disabled	0.799 **
Military experience	0.998
Speaks English well	1.260 **
Age	1.067 **
Age-squared	0.999 **
Married	1.114 **
Children	1.023 **
Number of people over 65 in household	0.891 **
Public sector worker	1.067 **
Manager	1.275 **
Part time worker	0.350 **
Extraction and agriculture	1.340 **
Construction	0.882 **
Wholesale trade	0.969
Retail trade	0.714 **
Transportation, warehouse, & information	1.010
Professional services	1.051 **
Education	0.618 **
Health care	1.001
Other services	0.692 **
Public administration and social services	0.837 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in Denver, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.76 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man in Denver, even after accounting for various other personal characteristics.

Figure C-10.
Predictors of annual wages
(regression), United States, 2012-2016

Note:

The regression model includes 4,032,836 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables, and Northeast for region variables.

Source:

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

Variable	Exponentiated Coefficient
Constant	7784.638 **
Black American	0.856 **
Asian Pacific American	0.958 **
Subcontinent Asian American	0.976 **
Hispanic American	0.911 **
Native American	0.881 **
Other minority group	0.908 **
Women	0.781 **
Less than high school education	0.854 **
Some college	1.197 **
Four-year degree	1.669 **
Advanced degree	2.307 **
Disabled	0.794 **
Military experience	0.999
Speaks English well	1.353 **
Age	1.058 **
Age-squared	0.999 **
Married	1.121 **
Children	1.011 **
Number of people over 65 in household	0.905 **
Midwest	0.881 **
South	0.895 **
West	0.986 **
Public sector worker	1.109 **
Manager	1.305 **
Part time worker	0.363 **
Extraction and agriculture	0.958 **
Construction	0.930 **
Wholesale trade	0.967 **
Retail trade	0.751 **
Transportation, warehouse, & information	1.031 **
Professional services	1.062 **
Education	0.657 **
Health care	1.000
Other services	0.710 **
Public administration and social services	0.824 **

Figure C-10 indicates that, compared to being a non-Hispanic white American in the United States, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.86 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man, even after accounting for various other personal characteristics.

Figure C-11.
Home Ownership Rates,
Denver and the United
States, 2012-2016

Note:

The sample universe is all households.

** , ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for Denver and the United States as a whole, respectively.

Source:

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

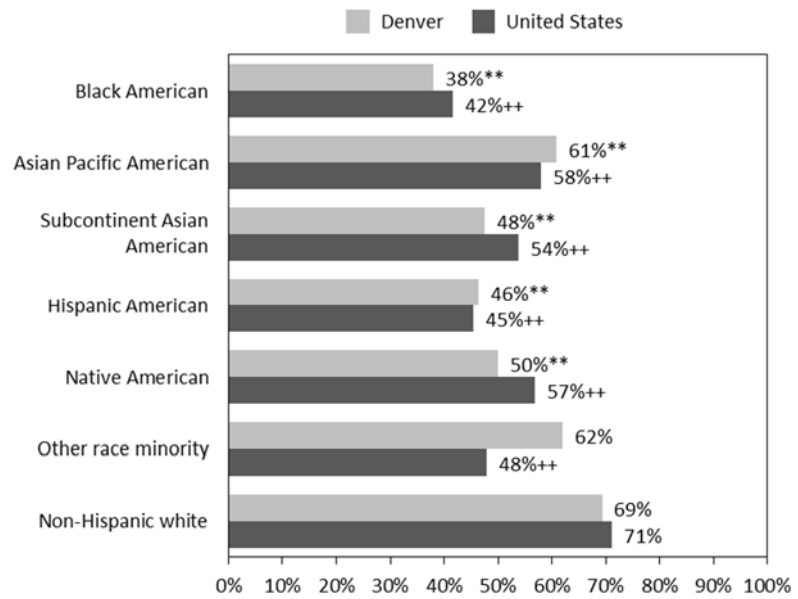


Figure C-11 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, and Native Americans in Denver own homes.

Figure C-12.
Median home values,
Denver and the United
States, 2012-2016

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

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

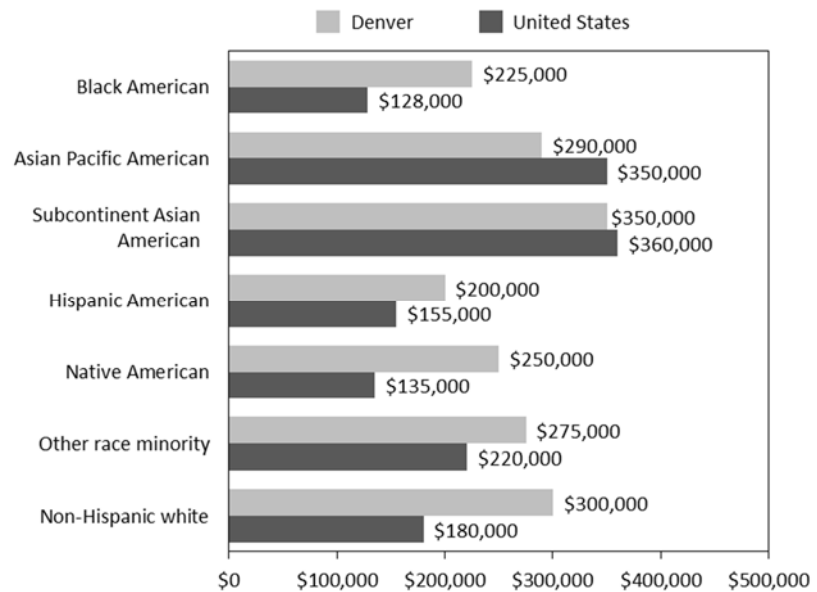


Figure C-12 indicates that Black American, Asian Pacific American, Hispanic American, Native American, and other race minority homeowners in Denver own homes of lower median values than non-Hispanic white American homeowners. In contrast, Subcontinent Asian American homeowners in Denver own homes of higher median values than non-Hispanic white American homeowners.

Figure C-13.
Denial rates of conventional purchase loans for high-income households, Denver and the United States, 2016

Note:

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

Source:

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

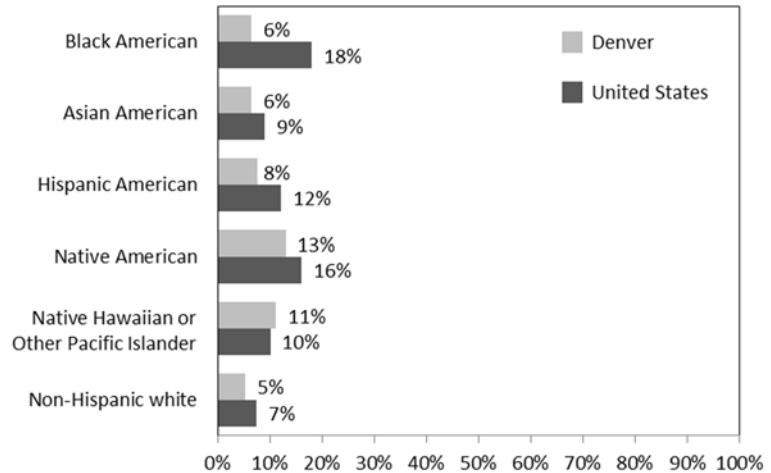


Figure C-13 indicates that in 2016 Black Americans; Asian Americans; Hispanic Americans; Native Americans; and Native Hawaiian or Other Pacific Islanders in Denver were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.

Figure C-14.
Percent of conventional home purchase loans that were subprime, Denver and the United States, 2016

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

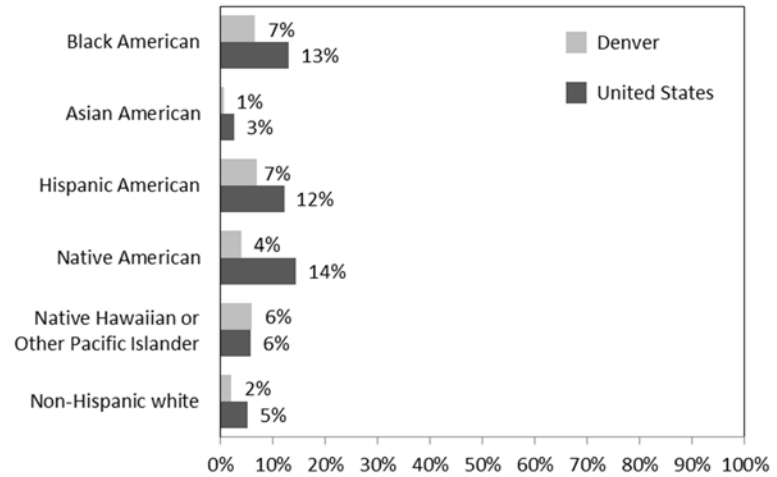


Figure C-14 indicates that in 2016 Black Americans; Hispanic Americans; Native Americans; and Native Hawaiian or Other Pacific Islanders in Denver were awarded subprime conventional home purchase loans at a greater rate than non-Hispanic white Americans.

**Figure C-15.
Business loan denial
rates, Mountain 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 Mountain Census Division consists of Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, and Wyoming.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

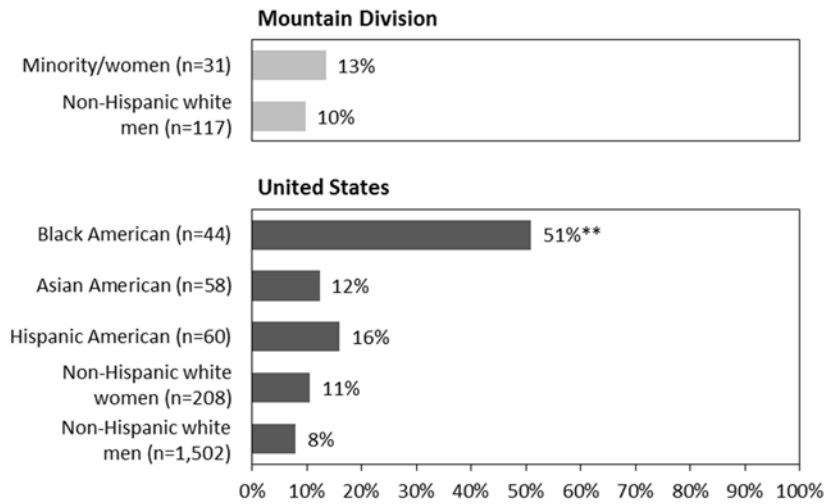


Figure C-15 indicates that, in 2003, Black American-owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men.

Figure C-16.
Businesses that did not
apply for loans due to fear
of denial, Mountain
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 Mountain Census Division consists of Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, and Wyoming.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

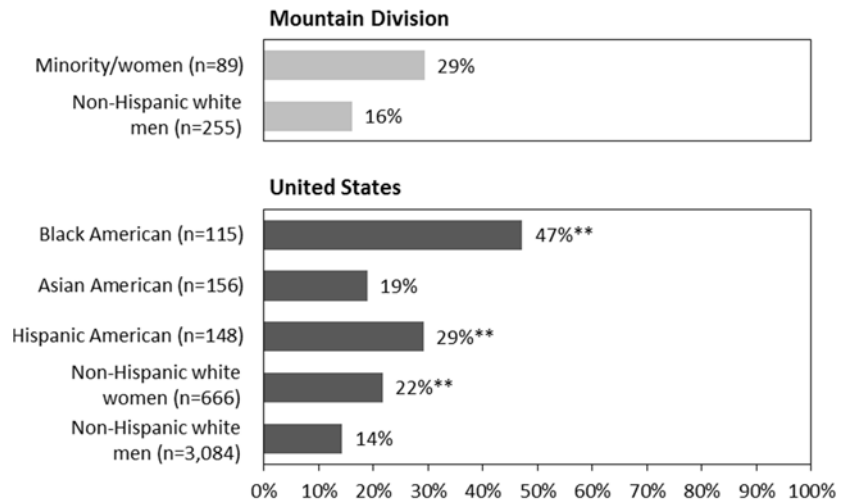


Figure C-16 indicates that, in 2003, Black American-, Hispanic American-, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-17.
Mean values of approved
business loans, Mountain
Division and the United States,
2003

Note:

** , ++ Denotes statistically significant differences from non-Hispanic white men (for minority groups and women) at the 95% confidence level for the United States as a whole and the South Atlantic Division, respectively.

The Mountain Census Division consists of Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, and Wyoming.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

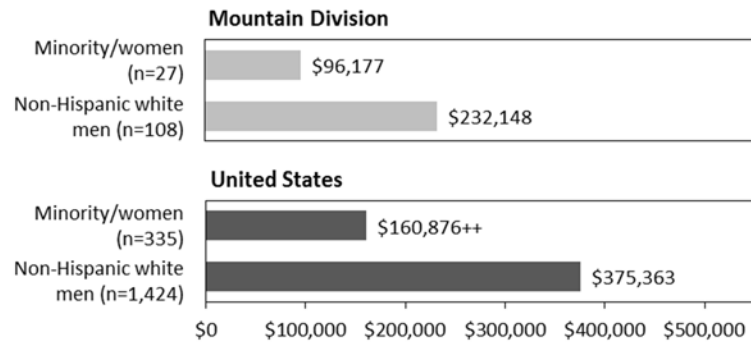


Figure C-17 indicates that, in 2003, minority- and woman-owned businesses in the United States who received business loans were approved for loans that were worth less than those that businesses owned by non-Hispanic white men received.

Figure C-18.
Self-employment rates in
study-related industries,
Denver and the United
States, 2012-2016

Note:

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

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

Source:

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

Denver	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	14.3 % **	7.9 % **	6.8 % **
Asian Pacific American	17.9 % *	7.8 % **	11.3 %
Subcontinent Asian American	0.0 % †	3.3 % **	5.8 % **
Hispanic American	11.8 % **	11.8 % **	10.3 % **
Native American	18.2 %	15.5 %	16.3 %
Other Race Minority	23.9 % †	4.8 % †	6.6 %
Non-Hispanic white	27.3 %	20.0 %	14.2 %
Gender			
Women	16.4 % **	19.4 % **	13.3 %
Men	21.4 %	16.9 %	12.5 %
All individuals	20.9 %	17.9 %	12.8 %
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	17.8 % **	8.2 % **	7.3 % **
Asian Pacific American	23.2 % **	11.5 % **	11.4 % **
Subcontinent Asian American	22.9 % **	7.5 % **	8.4 % **
Hispanic American	17.7 % **	11.4 % **	12.0 % **
Native American	18.4 % **	15.4 % **	14.1 %
Other Race Minority	23.1 %	13.5 % **	13.4 %
Non-Hispanic white	26.1 %	18.9 %	14.4 %
Gender			
Women	16.1 % **	15.2 % **	12.7 % **
Men	24.0 %	16.7 %	13.0 %
All individuals	23.2 %	16.0 %	12.9 %

Figure C-18 indicates that, compared to non-Hispanic white Americans, Black Americans, Asian Pacific Americans, and Hispanic Americans exhibited lower rates of self-employment (i.e., business ownership) in the Denver construction industry; Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and Hispanic Americans exhibited lower rates of self-employment in the Denver professional services industry; and Black Americans, Subcontinent Asian Americans, and Hispanic Americans exhibited lower rates of self-employment in the Denver goods and services industry. In addition, women working in the Denver construction industry exhibited lower rates of self-employment than men.

Figure C-19.
Predictors of business ownership in
construction (probit regression), Denver,
2012-2016

Note:

The regression includes 4,740 observations.

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

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

Variable	Coefficient
Constant	-2.5441 **
Age	0.0576 **
Age-squared	-0.0004 **
Married	0.0149
Disabled	0.0686
Number of children in household	-0.0172
Number of people over 65 in household	0.1727 **
Owns home	-0.0775
Home value (\$000s)	0.0003 **
Monthly mortgage payment (\$000s)	0.0086
Interest and dividend income (\$000s)	0.0031
Income of spouse or partner (\$0000s)	0.0012 **
Speaks English well	0.3470 **
Less than high school education	-0.0863
Some college	-0.0381
Four-year degree	-0.1920 **
Advanced degree	-0.3448 **
Black American	-0.3021
Asian Pacific American	-0.1058
Subcontinent Asian American	0.0000 **
Hispanic American	-0.3820 **
Native American	-0.1239
Other minority group	0.1749
Women	-0.4076 **

Figure C-19 indicates that, compared to being a non-Hispanic white American in Denver, being Hispanic American is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics. In addition, compared or to being a man in Denver, being a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.

Figure C-20.
Disparities in business ownership rates for Denver construction workers, 2012-2016

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Hispanic American	11.7%	38.0%	31
Non-Hispanic white women	17.9%	30.3%	59

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable values. 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 2012-2016 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-20 indicates that Hispanic Americans own construction businesses in Denver at a rate that is 31 percent that of similarly-situated non-Hispanic white Americans. In addition, non-Hispanic white women own construction businesses in Denver at a rate that is 59 percent that of similarly-situated non-Hispanic white men.

Figure C-21.
Predictors of business ownership in
professional services (regression), Denver,
2012-2016

Note:

The regression includes 8,873 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient
Constant	-3.8493 **
Age	0.0500 **
Age-squared	-0.0003 *
Married	-0.0259
Disabled	-0.0293
Number of children in household	0.0271
Number of people over 65 in household	0.0826 *
Owns home	-0.2009 **
Home value (\$000s)	0.0004 **
Monthly mortgage payment (\$000s)	0.0022
Interest and dividend income (\$000s)	0.0018 *
Income of spouse or partner (\$0000s)	0.0009 **
Speaks English well	0.8884 **
Less than high school education	0.2545
Some college	0.2036 **
Four-year degree	0.3517 **
Advanced degree	0.3078 **
Black American	-0.3617 **
Asian Pacific American	-0.4676 **
Subcontinent Asian American	-0.7729 **
Hispanic American	-0.1151
Native American	0.0590
Other minority group	-0.8808
Women	0.1113 **

Figure C-21 indicates that, compared to being a non-Hispanic white American in Denver, being Black American, Asian Pacific American, or Subcontinent Asian American is related to a lower likelihood of owning a professional services business, even after accounting for various other personal characteristics. In contrast, compared or to being a man in Denver, being a woman is related to a greater likelihood of owning a professional services business, even after accounting for various other personal characteristics.

Figure C-22.
Disparities in business ownership rates for Denver professional services workers, 2012-2016

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	8.2%	15.2%	54
Asian Pacific American	8.0%	16.5%	48
Subcontinent Asian American	3.5%	13.8%	25

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable values. 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 2012-2016 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-22 indicates that Black Americans own professional services businesses in Denver at a rate that is 54 percent that of similarly-situated non-Hispanic white Americans. Asian Pacific Americans own professional services businesses in Denver at a rate that is 48 percent that of similarly-situated non-Hispanic white Americans; and Subcontinent Asian Americans own professional services businesses in Denver at a rate that is 25 percent that of similarly-situated non-Hispanic white Americans.

Figure C-23.
Predictors of business ownership in goods and services (regression), Denver, 2012-2016

Note:

The regression includes 10,137 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient
Constant	-2.5382 **
Age	0.0415 **
Age-squared	-0.0003 **
Married	-0.0511
Disabled	0.1126
Number of children in household	0.0347
Number of people over 65 in household	0.0839 *
Owns home	-0.2004 **
Home value (\$000s)	0.0004 **
Monthly mortgage payment (\$000s)	0.0180
Interest and dividend income (\$000s)	0.0040 **
Income of spouse or partner (\$0000s)	0.0005
Speaks English well	0.1168
Less than high school education	-0.0882
Some college	0.0256
Four-year degree	-0.0011
Advanced degree	-0.0198
Black American	-0.3303 **
Asian Pacific American	-0.1358
Subcontinent Asian American	-0.4132 *
Hispanic American	-0.0577
Native American	0.1731
Other minority group	-0.1338
Women	0.0330

Figure C-23 indicates that, compared to being a non-Hispanic white American in Denver, being a Black American or Subcontinent Asian American is related to a lower likelihood of owning a goods and services business, even after accounting for various other personal characteristics.

Figure C-24.
Disparities in business ownership rates for Denver goods and services workers, 2012-2016

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	7.3%	12.8%	57
Subcontinent Asian American	5.4%	11.4%	47

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable values. 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 2012-2016 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-24 indicates that Black Americans own goods and services businesses in Denver at a rate that is 57 percent that of similarly-situated non-Hispanic white Americans. In addition, Subcontinent Asian Americans own goods and services businesses in Denver at a rate that is 47 percent that of similarly-situated non-Hispanic white Americans.

Figure C-25.
Rates of business closure, expansion, and contraction, Colorado and the United States, 2002-2006

Note:

Data only include only privately-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.

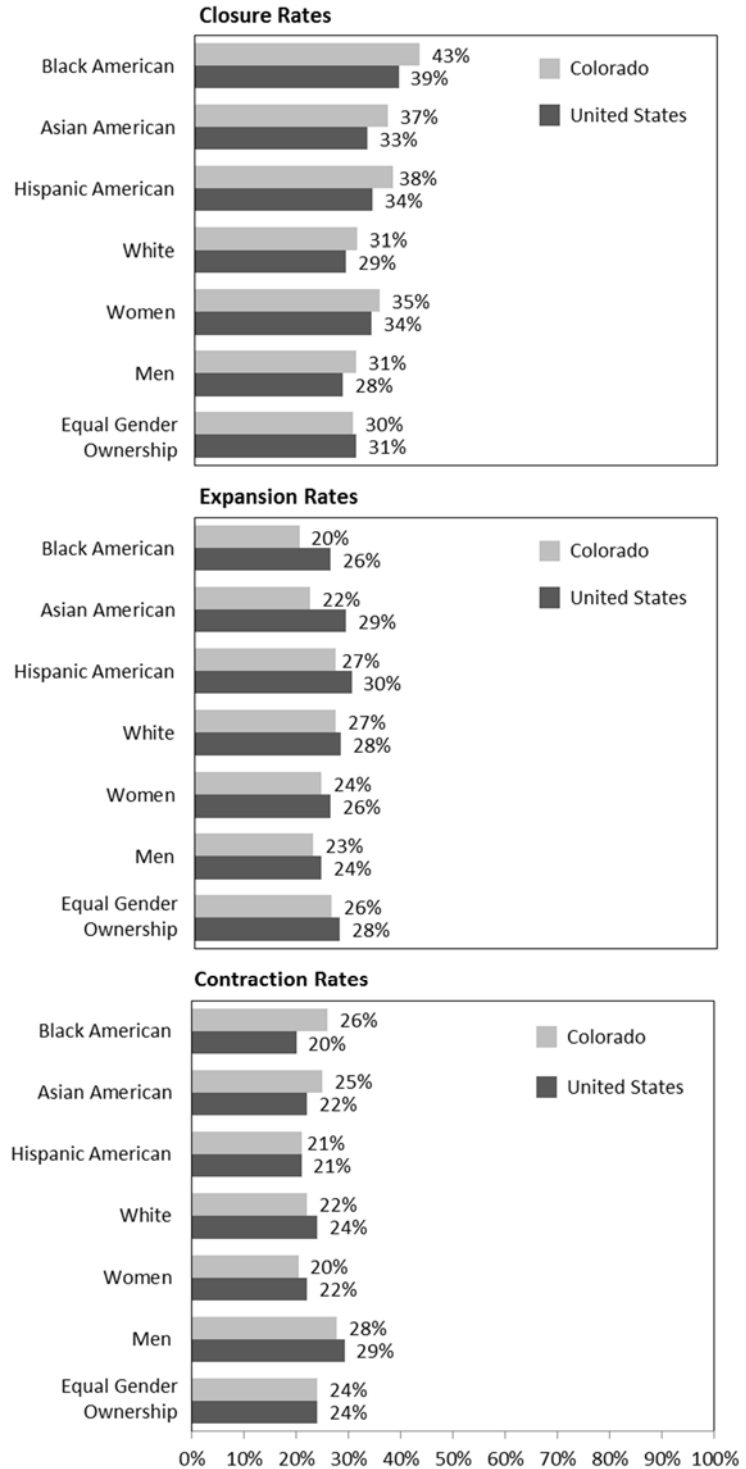


Figure C-25 indicates that minority-owned businesses in Colorado show higher closure rates than non-Hispanic white American-owned businesses. Woman-owned businesses in Colorado show higher closure rates than businesses owned by men. In addition, Black American- and Asian American-owned businesses in Colorado show lower expansion rates and higher contraction rates than non-Hispanic white American-owned businesses.

Figure C-26.
Mean annual business receipts (in thousands), Denver-Aurora, CO CSA and the United States, 2012

Note:

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

Source:

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

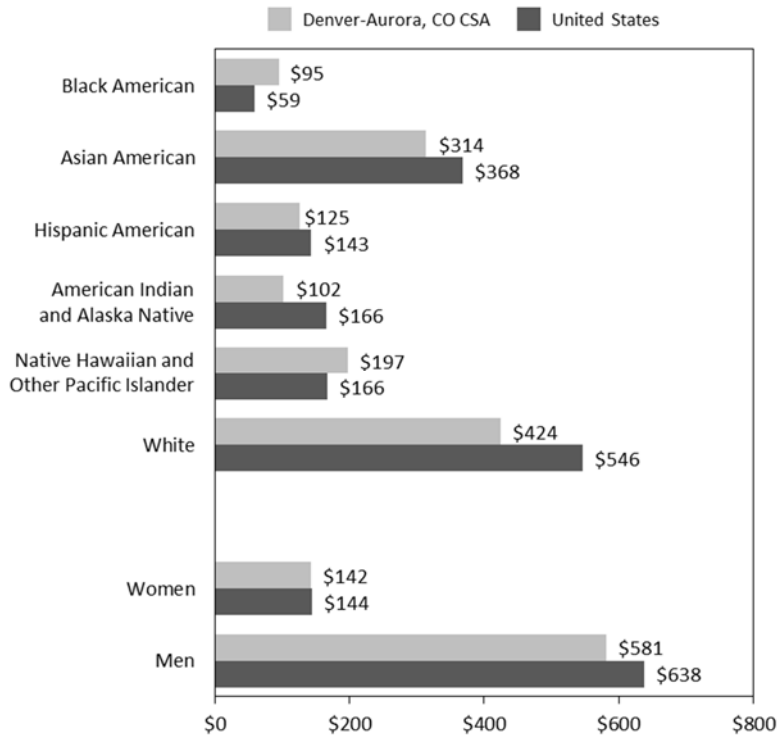


Figure C-26 indicates that, in 2012, Black American-; Asian American-; Hispanic American-; American Indian and Alaskan Native-; and Native Hawaiian and Other Pacific Islander-owned businesses in the Denver-Aurora CSA showed lower mean annual business receipts than non-Hispanic white American-owned businesses. In addition, woman-owned businesses in the Denver-Aurora CSA showed lower mean annual business receipts than businesses owned by men.

Figure C-27.
Mean annual business
owner earnings, Denver
and the United States,
2012-2016

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) or from men (for women) at the 95% confidence level for Denver and the United States as a whole, respectively.

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

Source:

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

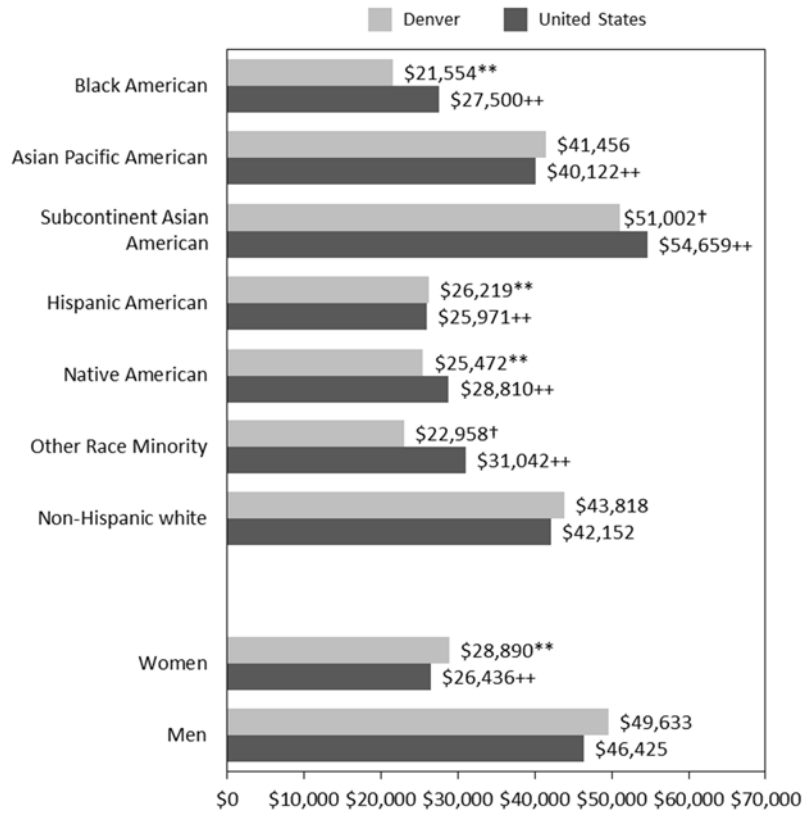


Figure C-27 indicates that the owners of Black American-, Hispanic American-, and Native American-owned businesses in Denver earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in the Denver earn less on average than the owners of businesses owned by men.

**Figure C-28.
Predictors of business owner earnings
(regression), Denver, 2012-2016**

Note:

The regression includes 5,113 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 older who reported positive earnings. All amounts in 2016 dollars.

** Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Exponentiated Coefficient
Constant	531.365 **
Age	1.166 **
Age-squared	0.998 **
Married	1.224 **
Speaks English well	1.065
Disabled	0.627 **
Less than high school	0.528 **
Some college	0.925
Four-year degree	1.246 **
Advanced degree	1.549 **
Black American	0.530 **
Asian Pacific American	1.143
Subcontinent Asian American	2.220 **
Hispanic American	1.005
Native American	0.723
Other race minority	0.854
Women	0.539 **

Figure C-28 indicates that, compared to being an owner of a business owned by non-Hispanic white Americans or men in Denver, being Black American or a woman is related to significantly lower earnings, even after accounting for various other business and personal characteristics.

**Figure C-29.
Predictors of business owner earnings
(regression), United States, 2012-2016**

Note:

The regression includes 436,401 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

*, ** Denotes statistical significance at the 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 2011-2015 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	550.652 **
Age	1.148 **
Age-squared	0.999 **
Married	1.242 **
Speaks English well	1.143 **
Disabled	0.583 **
Less than high school	0.746 **
Some college	1.044 **
Four-year degree	1.311 **
Advanced degree	1.894 **
Black American	0.820 **
Asian Pacific American	1.084 **
Subcontinent Asian American	1.154 **
Hispanic American	1.040 **
Native American	0.682 **
Other race minority	1.115 *
Women	0.527 **

Figure C-29 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being an owner of a Black American- or Native American-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. In addition, compared to being the owner of a business owned by men in the United States, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

APPENDIX D.

Qualitative Information about Marketplace Conditions

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Qualitative Information about Marketplace Conditions

Appendix D presents qualitative information that the study team collected and analyzed through the public engagement process for the City and County of Denver (the City) Disparity Study. BBC collected public testimony from stakeholders using a variety of methods and conducted in-depth interviews with business owners and trade association representatives in the region. In total, more than 100 business and trade association representatives provided written or spoken comments to the study team. Appendix D summarizes the key themes and insights that emerged from those comments and is divided into the following 13 sections:

A. Introduction. This section describes the public engagement process for gathering and analyzing the qualitative information summarized in Appendix D.

B. Background on Denver businesses. This section describes the characteristics of the businesses whose owners or representatives provided public testimony or gave an interview for the disparity study. This section presents information on business type, business size, business formation, and current economic conditions in Denver

C. Keys to business success. This section presents business owners' and representatives' perspectives on the keys to business success in the Denver marketplace.

D. Doing business as a prime contractor or subcontractor. This section describes businesses' mix of prime contract and subcontract work, their experiences in those roles, and how they obtain their work.

E. Potential barriers to doing business in Denver. This section describes the barriers that businesses face in the Denver marketplace and details about whether race- or gender-based discrimination may be contributing to those barriers.

F. Work with the City and other public organizations. This section describes business owners' experiences working with or attempting to work with the City of Denver and other public organizations in the region.

G. Allegations of unfair treatment. This section documents business owners' and representatives' experiences with unfair treatment by customers, prime contractors, or other parties when bidding on or performing contract work.

H. Insights regarding race-/ethnicity- or gender-based discrimination. This section presents information about any experiences business owners or representatives have had with discrimination in the Pennsylvania marketplace and how that behavior affects minority-, woman-, LGBT-, veteran- or disabled-owned businesses.

I. Insights regarding business assistance programs. This section describes business owners' opinions about business assistance programs and other steps to remove barriers for small business development in Denver.

J. Insights regarding contracting processes. This section captures business owners and representatives' feedback about the Commonwealth's and PennDOT's contracting processes and procurement policies.

K. Insights regarding minority- and woman-owned business programs. This section presents information about businesses' experiences with minority- and woman-owned business programs and the City's program.

L. Insights regarding certification. This section presents information about businesses' experiences with certification processes, including the City's certification process.

M. Other insights and recommendations regarding City contracting and programs. This section presents additional comments and suggestions for the City to consider.

A. Introduction

Throughout the study period, business owners and managers; trade association representatives; and other interested parties had the opportunity to discuss their experiences working in the Denver marketplace and provide public testimony. Those insights were collected through several different channels:

- Participating in an in-depth interview;
- Participating in an availability survey;
- Providing oral or written testimony during a public meeting; and
- Submitting written testimony via email.

From September 2017 through September 2018, the study team used a variety of public engagement methods to gather those comments and facilitated several public meetings about the disparity study. The study team's public engagement strategy consisted of the following:

In-depth interviews. The study team conducted in-depth interviews with representatives of businesses and trade associations in Denver. The interviews included discussions about interviewees' perceptions of and experiences with government contracting; the City's Minority- and Women-owned Business Enterprise (MWBE), Emerging Business Enterprise (EBE), Small Business Enterprise (SBE), and Federal Disadvantaged Business Enterprise (DBE) Programs; and businesses' experiences working or attempting to work with public agencies in the region. In-depth interview comments are identified in Appendix D by random interview numbers (i.e., #1, #2, #3, etc.).

Availability surveys. The study team conducted availability surveys for the disparity study in 2017 and 2018. 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 Denver marketplace. The study team 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 “AS.”

Public meetings. The study team solicited written and verbal testimony at public meetings held in the Denver region in late 2017. The study team reviewed and analyzed all public comments from those meetings. Public meeting comments are denoted by the prefix “PT” throughout Appendix D.

Written testimony. Throughout the study, interested parties had the opportunity to submit written testimony directly to the study team via email. All written testimony received by email was analyzed by the study team. Written testimony is indicated by the prefix “WT” throughout Appendix D.

B. Background on Denver Businesses

Part B summarizes information related to:

- How businesses become established;
- Challenges in starting, operating, and growing a business;
- Types of work that businesses perform;
- Size of businesses;
- Capability of businesses to perform different types and sizes of contracts;
- Local effects of the economic downturn;
- Current economic conditions; and
- Business owners’ experiences pursuing public and private sector work.

How businesses become established. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Many interviewees worked in the industry or a related industry before starting their own businesses, or have worked for many years in the industry. [e.g., #4, #16, #30] For example:

- The non-Hispanic white male owner of a professional services firm reported that he started the firm by himself and has always been the sole owner and manager of the firm. He added that he started his firm 27 years ago and has been working in his industry for over 40 years. [#3]
- The Black American male business owner said that he worked for 18 years in engineering and has “been a small business owner for about eight [or] nine years now.” [PT#1c]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that she is president and CEO of the firm. She said that she founded the company

about 10 years ago and noted that she worked for a number of engineering firms before starting her own. [#5]

- The Subcontinent Asian American male owner of a specialty contracting firm reported that he started the company almost 10 years ago after moving to the United States. He added that he used to own a business in Pakistan and prefers to be “his own boss.” [#18]

The same business owner said that some of his relatives in the U.S. have the same type of company, so it didn’t take long for him to figure out what he needed to do to get started. [#18]

- The non-Hispanic white male owner of a construction firm stated that he is the owner and president of the company. He added, “I started the business because I wanted to be my own boss and my father had this same type of business in Denver. I learned everything I know from him.” [#24]

The same business owner continued, “The company was formed about five years ago. The reason I started it was because I wanted to start my own business. I didn’t want to have someone else bossing me around. Not even my father. I learned my skills from him and wanted to be like him.” [#24]

- The non-Hispanic white male owner of a construction-related firm reported that he has been president of the company for nine years. He said that his business merged with another engineering company a few years ago, and noted that his primary responsibility as president is business development. [#25]

When asked why he started the firm, the same business owner stated that he was “laid off from another engineering company when the economy slowed down.” He said, “I looked around for a while for another position, but decided that I could and should start my own company.” [#25]

- The non-Hispanic white male owner of a construction services firm reported that he is president of the company and that he founded it in 2008. He continued, “I started this company after I was laid off from another commercial mechanical employer. I wanted to be more in control of my success.” [#31]

When asked to describe the formation of his firm, the same business owner stated, “I wanted to have something of my own. After being laid off, I thought my own company growth would be more predictable [and] not depend on how much money another company was making.” [#31]

- When asked how he came to be the owner of the firm, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “I actually started my own business in the [mid-1970s] during a business downturn. I had been laid off from a number of firms, so I just started doing kitchen remodels, deck additions, house additions, single family houses, whatever I could find. I moved into public work, and my

first project was for the Denver Urban Renewal Authority, then I had a contract with [Regional Transportation District].” [#22]

The same business owner went on to say that the company in its present form began in the mid-1990s. He added, “I really transitioned into public work when they built the airport, and that was in the late 1980s when the first [anti-discrimination] ordinance was established. I joined forces with other minority architects and contractor organizations As a result of that, we got some work at the airport. The airport work and the ordinance really helped our firm grow until 9/11. We had a lot of contracts that just stopped [then], so we laid off people. It was very painful.” [#22]

- The non-Hispanic white male owner of an engineering company stated that he has been president of the company since its founding over 20 years ago. He added, “I used to work for [a city in the Denver area] Working there and other government places, it’s easy to get in, but not to move up. After a few years there, I moved to [work at an] engineering company. I have over 40 years of engineering experience in public and private companies. I knew it was time to start my own company many years ago.” [#26]

When asked about the formation of his firm, the same business owner said, “I wanted to start my own company ... to be the boss. I had satisfactory experiences working for [a city in the Denver area] and the ... engineering company. But, I really felt it was time for my own company and not working for someone else.” [#26]

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that he is majority owner and founder of the firm. The other owner, he explained, is a non-Hispanic white female. He said that he formed the company after about 30 years of experience as a contract furniture representative. [#9]

The same business owner added, “I was a sales manager for a lighting pole manufacturer for about three or four years, [then] decided I should start my own business It was a combination of observation in the marketplace along with research that led me to discover a market in [our particular] market, a niche that I thought we could fulfill.” [#9]

- The non-Hispanic white male representative of a majority-owned construction services firm reported that the company was founded almost 40 years ago by a non-Hispanic white male. He noted that the founder still owns the firm. [#21a]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that he is the president, principal engineer, and majority owner of the firm. He said that before starting his own firm in the late 1980s, he previously served as vice president of another similar firm. [#14]

When asked why he started the firm, the same business owner reported that he wanted to capture upcoming work at the new Denver International Airport. He said that he got his MBE certification about a year after starting the company, which enabled the firm to secure contracts with them. [#14]

- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said that she is in charge of business development, contract and department management at the firm. Regarding the firm’s background, she said, “The founder started it from scratch because he wanted to be his own boss. He had worked for many other companies and felt he had enough experience to be successful on his own. [He] did run the business for about 12 years and witnessed much success.” [#28]

The same business representative continued, “The founder promoted one of his managers [to] president about seven years ago, but has stayed [with the company] in a leadership role, similar to a CEO in many other companies. His current duties include overseeing company growth.” [#28]

- The Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated that he worked in the cabling industry for many years before deciding to start his own company. He added, “I started this company because I felt very confident I could do the job as boss, just as [well] as some of the managers I worked with at larger companies.” [#32a]

The same business owner continued, “I started this company [over 10] years ago. It took about two years in the development and research phase. I wanted to be my own boss and felt as though I had enough contacts in the industry. I have worked in this capacity for other companies for about 20 years.” [#32a]

- When asked to describe the formation of the firm, the non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that she started the company almost 20 years ago and worked in the industry prior to that. [#20]

One business assistance organization representative discussed the organization’s formation.

The Native American female representative of a business assistance organization reported that she has been with the organization for about five years. When asked about the organization’s formation, she said, “When the organization started in the early 90s we were just around the Denver metro area. Over time that started to grow into a regional focus, [and] then in 2013 we took a giant leap across the country By 2015 we expanded our influence through the National Center for American Indian Enterprise Development.” [#37]

Some business owners gave a wide variety of reasons for starting their own businesses. For example:

- When asked how the firm started, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm stated, “I lost my job and was out of work for a couple months, [and] my cousin asked me to help her clean a house for a construction company. At that time, I didn’t even know about an opportunity like that. [It was] after helping her [that] I decided to start a business.” She reported that she started the firm over 10 years ago. [#35]
- The non-Hispanic white male owner of a goods and services firm reported that he started the firm six years ago. He explained that the firm began as a side hobby before turning into

a commercial venture. He said, “Initially, we started as an online store, and after we got some initial attention and went viral, we started doing custom commissions and it just kind of bloomed from there.” [#10]

- The non-Hispanic white female owner of a DBE-certified construction firm reported that she is sole owner of the firm and that her responsibilities include “business development, finances, payroll, human resources,” and “anything else required to keep the business going.” [#27]

The same business owner went on to say that the firm started about eight years ago. She added, “My daughter used to own a ... company and I worked for her as the payroll clerk. My husband worked for her as the accountant. [After] she died ... my husband and I were going to take over her company, but unfortunately the finances of that company were not sound. In fact, we probably would have had to file bankruptcy, so we started a new company doing [similar] work.” [#27]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that she is owner and president of the firm, which she started over 25 years ago after leaving a job she wasn’t satisfied with. She added, “I review the design work that is coming in from my staff I’m in charge of everything. I occasionally will manage projects. I will do some of our larger projects as the principal in charge.” [#12]

When asked about the circumstances of the firm’s founding, the same business owner said, “I had been working in a planning environment downtown in a small company I needed to travel for the job, and I didn’t really like the job In addition to that, my boss did really inappropriate things, but of course I [was] just was 20 years old... and thought it was the course of doing business.” [#12]

She continued, “So, all those things led to the creation of my firm. I really didn’t like doing planning work, and I had worked in small-scale residential construction prior to that, which I enjoyed more. My husband, who really encouraged me, had a corporate job at the time so there was some flexibility within our family. That’s what made me get it started. I still have the business plan that I wrote.” [#12]

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm reported that his firm has been in business for almost 30 years. Regarding how his firm became established, he said that shortly after starting the firm he was intrigued by a magazine article about [his field]. He stated, “I flew to Chicago and looked at the manufacturers [of that product]” He noted that this was an untapped market at the time, and reported that the firm eventually expanded their services. [#39]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm reported that she holds a variety of roles at the firm, including “CEO, janitor, billing/invoicing, [and] front desk.” She added that she started the company about two years ago. [#19]

The same business owner went on to say that she was COO of many major hospitals before starting the firm. She explained, "I started feeling that I wanted something more, so I started looking around to find a company to buy [I] started to buy another striping company, but discovered the financials just didn't look right. Numbers ... just didn't add up. So, I started this company." [#19]

She continued, "I didn't know anything about [my field]." She added, "This just fell into my lap. Originally, I thought about starting an investment company. Then with more research, because there are not a lot of ... companies available [in my field], I realized it was an opportunity for me to start my own business. [I have] no regrets or second thoughts at all." [#19]

- The Hispanic American male owner of an architectural engineering firm stated that he is president and senior partner of the firm as well as co-founder. He said that he studied architecture and engineering in college and got licensed in both disciplines. He added that he and his wife moved to Colorado when she pursued a graduate degree, and that he joined a local firm that did both architecture and engineering before starting his own firm alongside a non-Hispanic white male colleague many years ago. [#16]

The same business owner added that his partner had contacts at Colorado State University that were critical to getting the business started. He noted that he is semi-retired, and that his former partner has long since retired. He went on to say that because he is the only architect at the firm he oversees all design functions. [#16]

- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that he started at the firm as operations manager. When asked how he came to be owner of the firm, he said, "I started the company with four other individuals in [the late 1990s], so there were five of us. Over the years I bought the others out. The last buyout was about [two years] ago." He went on to say that the other founders were also Black American males. [#36]

When asked why they decided to start the firm, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, "My partners and I were looking for an opportunity, and one partner attended an event where he learned about a possible opportunity with [a large firm]. We started talking to [this firm] and they said they were going to sell some stores and they wanted to get minorities into that business The conversation led to us buying some of their stores, and that's when we started [the company]." [#36]

- The Hispanic American male owner of a specialty contracting firm explained that he formed his company in pursuit of a better balance between his work and his home life. He noted, "I started off running my business, doing everything myself, and eventually got to a point where I could hire employees and delegate the work." [#4]

The same owner went on to add, "I worked as an electrician for a couple of the big [contracting firms] in town, and I felt like I got to the highest point I could with them." [#4]

- The non-Hispanic white male owner of a professional services firm stated that he started his own firm because “[he] wanted to have better control over [his] risks.” He added, “I wanted to have the community as the center of why we’re in business, and to be able to use technology to a better extent than the environment I had been at before.” [#3]
- When asked how the firm started, the non-Hispanic white female co-owner of a specialty services firm said that when her daughter was young she began [creating a product] for her and her friends. After doing this for many years, she said, “I just thought it was really fun and I had been in accounting for 35 years, [so] one day I decided I wanted to do this instead of accounting.” She noted that the other co-owner is also a non-Hispanic white female. [#8]
- The non-Hispanic white male representative of a majority-owned specialty services firm reported that the firm was founded by a non-Hispanic white male in 2005. When asked why the firm was formed, he said that the owner had a previous business, and started the current firm because he wanted to re-enter the industry. [#34]
- The Black American veteran male owner of a general contracting company reported that he started his business almost 10 years ago and is the only owner of the firm. He said that he moved to Colorado to start a business shortly after leaving the military, and added, “I knew a few people here, and they knew a lot of people looking for someone to work on projects. I have plenty of work that keeps me very busy.” [#29]

The same business owner went on to say, “When I moved here, I knew I needed something to do to make money. I know about construction. I learned it from my father as a boy, and I have been doing it for years.” [#29]

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said she joined the firm as co-owner in 2004 alongside a family member. She said the family member formed the company after working for several construction companies previously. [#2]

The same business co-owner added, “I researched a lot of things. I talked to people I was connected with, good people within the City of Denver that helped us with questions. There’s so much out there, but a lot of people don’t want you to succeed and they’ll kind of ... make it a little bit harder [to get the information].” [#2]

- When asked how her business became established, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm commented that she decided to start the company after having her first child. She explained, “When I came back from my maternity leave, [my previous employer] had moved all of my stuff out of the corner office [and into] a shared office. [They also] informed me that I had been removed from the bonus pool because I was no longer considered a serious employee, because I only worked 36 hours a week instead of 40.” [#5]

The same business owner went on to say that after leaving the company she knew “there [had] to be a better way.” She said, “There [was] a way I [could] be an engineer and a mom,” and noted, “The concept [of my firm] is that it’s a part of the whole. I do not intend to suck

the life out of my employees. I intend to be an asset to them. My goal is to provide all the financial security that every one of my individual employees needs as well as the time off that they need.” [#5]

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is primarily responsible for the general health and wellbeing of the firm, including marketing and billing. The other co-owner, he reported, is also a Black American male. He said that the firm opened about two years ago after he worked for a plumbing company. He said, “We saw [that] the ... company we referred [customers] to was really taking advantage of homeowners, and they weren’t really doing a good job.” [#7]

The same business co-owner said that at that point he called a colleague and asked if he wanted to start a company with him. He went on to say, “We got together and went through all the certifications, the classes ... courses, [and] filed for our business ID Then [we] just got started by marketing with existing [companies] and letting them know that we would take care of their customers.” [#7]

- The Hispanic American female co-owner of an SBE-certified professional services firm reported that she is 51 percent owner of the firm. The other owner, she added, is a non-Hispanic white male and licensed architect. She stated that she was initially hired almost 20 years ago to do billing, but that her duties evolved until she finally bought into the company. She said that she now manages all administrative duties. [#15a]

Some business owners reported that they inherited or work for a family-owned business. For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said her father started the business over 40 years ago. Being a family-owned business, she commented, “Everyone is an employee, whether you like it or not.” She said she worked in media management and sales after graduating college, and started at the firm after being asked to review its marketing materials. [#13]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that the firm was started over 60 years ago by a non-Hispanic white male, and that the firm is still owned by the same family. [#23a]
- The non-Hispanic white male owner of a specialty services firm stated that his father started the business over 20 years ago and that he took over as president about 10 years ago. He noted that he has always been involved in the business, and added, “When my father founded the business, there was always a consideration of me taking over some day as the president.” [#30]

The same business owner continued, “I was always involved in the business growing up. I learned every job that the company performs. I never thought I would do anything else.” He said that he became president of the firm after graduating college. [#30]

Challenges in starting, operating, and growing a business. Interviewees' comments about the challenges in starting, operating, and growing a business varied.

Business owners and representatives reported lack of access to capital or high cost of materials as a challenge in starting, sustaining, or growing their business, among other challenges. [e.g., #3c, AS#39, PT#3c] For example:

- Regarding the risk associated with starting a small business, the female representative of a small business said, “[With] small business owners, it takes a special person ... to go into that and take all the risk and what have you It is across the board ... people not wanting to be owners.” [PT#2b]
- Regarding challenges that new firms such as his face when starting or growing a business in the local marketplace, the non-Hispanic white male owner of a construction services firm stated, “I have the experiences, expertise, and licensing necessary to build and continue to grow my business, [but] I could use assistance in ... the bonding area.” [#31]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm stated, “At first, it was difficult obtaining financing and bonding. The more work we completed, the easier that became. I know right now companies are facing workforce shortages that [are] affecting their ability to start some jobs. One of the benefits of having our type of business model [is that] we aren’t always out there looking for personnel. We have hired them as employees, and they are here ready to work.” [#28]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “Startups have problems obtaining financing.” [#22]
- A survey respondent said, “It’s difficult for a small company to break into work in the area.” [AS#37]

A few business assistance organization representatives discussed start-up challenges faced by member firms. Comments include:

- The Native American female representative of a business assistance organization said, “I think overall, our community faces an uphill battle. Whether you are minority-owned or woman-owned, there are barriers like financing to get a business up and running, and then it’s hard to compete with people who are already established. The certification process is a barrier because it’s very cumbersome. If there was a way you could do more of it online, it certainly would help. And the fact that the airport certification is different from [Regional Transportation District] ... if those agencies could communicate more with each other, it might help to get more companies certified.” [#37]

When asked what challenges members face in starting or growing a business, and if there are additional difficulties for minorities or women, the same business association representative said, “The obvious one is capital, and it’s a challenge any small business is going to encounter. And then waiting to get paid. You need money to pay employees and

purchase supplies for a project. They tell me they'd love to be on a school project or [Regional Transportation District project] but, unfortunately, they can't wait 90 days to get paid. You need a lot of cash flow to pay employees every week for three or four months while you wait for your money. Getting loans for equipment to grow their business is also a challenge. We encourage them to apply with the SBA or Native American Bank, or different organizations that might help them in ways that a traditional bank might not be able to." [#37]

- When asked what challenges his members face in starting or growing a business, the Asian-Pacific American male representative of a business assistance organization said that new members often do not know "where [to] start." He added, "We have a lot of great resources and we encourage members to use them, like the [Denver] Metro Chamber [of Commerce], the SBA, et cetera." [#33]

The same business assistance organization representative continued, "The Minority Supplier Development Council is a great resource [too]. Local banks provide resources. A problem for us though, is that immigrants bring language challenges. Asians are cursed because there is no one single language like Spanish. You have Cantonese, Japanese, Vietnamese, Hindi ... there are easily 25 or more languages. Trying to secure loans [and] working with public agencies to get their business started is more pronounced in the immigrant Asian population." [#33]

Many survey respondents commented on high rent costs as a barrier for new firms.

[e.g., AS#31, AS#41, AS#54] Comments include:

- A survey respondent said, "The main barrier is the price of rent. I've looked all over Denver and there was nothing small enough for me. I take a little over 700 square feet, and I couldn't afford to rent. There is nothing small enough to lower the cost of rent." [AS#42]
- Regarding barriers or difficulties in Denver associated with starting or expanding the business, a survey respondent commented, "Commercial rent prices are too expensive." [AS#35]

One business assistance association representative noted that high housing costs deter potential work force. The Native American female representative of a business assistance organization said it's difficult to find qualified employees in the Denver metro area. She added, "And trying to attract work force from another area doesn't work because housing is too expensive." [#37]

One survey respondent indicated that some customers prefer to work with more established businesses. A survey respondent said, "We've encountered clients who have not been willing to work with new small businesses." [AS#13]

One business owner reported on early challenges with business partners. The Hispanic American male owner of a specialty contracting firm stated that he began his company as the sole owner but took on a partner when the firm was young. He explained that he relied on the partner to assist with MBE certification, though the partner would not help due to his political

stance. The founder then decided to buy out his partner to once again be the sole owner of the firm. [#4]

Another business owner indicated that the decision to start a business can be one of the biggest challenges of business start-up. The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that deciding to start a business is a huge step with a lot of risk. He added that SBE/MBE/WBEs should consider business closure to be a non-option at first. [#14]

Many survey respondents reported facing tax-related challenges. Some reported on high property taxes in the Denver area among other related issues. [e.g., AS#32, AS#52, AS#59] For example:

- Regarding taxes, a survey respondent said, “You are killing us with property tax. We can’t buy new equipment. Denver itself has youth tax. All those taxes make us [un]competitive with other companies” [AS#58]
- A survey respondent said, “Property taxes are so high that we’re moving the business.” [AS#60]
- A survey respondent stated, “My only complaint is getting tax bills a year later on old projects from Denver. I feel those taxes should be put in the bids initially. [AS#28]

Types of work that businesses perform. Interviewees discussed whether and why over time their firms changed the types of work that they perform.

Some interviewees indicated that their companies have changed, evolved, or expanded their lines of work over time, or conducted a wide range of services. For example:

- The Subcontinent Asian American male owner of a specialty contracting firm stated that he performs services for residential customers statewide, and commented that there is no job too small for his firm. [#18]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm reported that his firm expanded its products and services to include office supplies and printing. When asked why, he said the supply industry was consolidating, which provided an opportunity for him to enter the market as a “niche player.” He added that he specifically targets companies with at least 15 office workers, tribes throughout the nation, and the federal government. He went on to say that the firm’s growth can be attributed to “knowing where [they] are going,” and commented, “We don’t just get on the highway. We have a roadmap that we want to focus on.” [#39]
- When asked about the services offered by his firm, the Black American veteran male owner of a general contracting company stated that his firm performs “all types” of residential work, including electrical, drywall, plumbing, and home repairs. [#29]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that her company offers structural engineering analysis, structural construction documents and specifications, and construction administration as it relates to structures. [#5]

When asked about the growth of her firm, the same business owner said they have grown much slower than others in the industry due to how specialized they are as a structural engineering company. [#5]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that his firm provides geotechnical and environmental services, including construction inspection, bridge inspection, and materials testing. He said that the percentage of work in the various sectors varies from year-to-year depending on the types of projects in the market. [#14]
- When asked about the services offered by the firm, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that they do a variety of services for commercial and residential clients. [#35]
- When asked about the services offered by the firm, the non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, “The company does environmental consulting. However, we are very unique in that we provide all types of civil site services, which include earthwork, demolition and dismantlement, construction site cleanup, and other services a customer might need.” [#28]
- When asked about the products and services offered by the firm, the non-Hispanic white male owner of a goods and services firm reported that they are a custom project shop. He stated, “We do a little bit of everything.” [#10]
- When asked what products and services the firm offers, the non-Hispanic white male representative of a majority-owned construction services firm reported that the company provides preconstruction and design assist, design-build, construction, baggage handling systems, and special projects services. He noted that the share of business for each account varies yearly as it can be impacted by a very large project. [#21a]

Many trade association and business assistance organization representatives discussed membership and the services offered by their organization. For example:

- When asked what services the organization offers members and why new members would want to get involved, the non-Hispanic white male representative of a trade association reported that they offer opportunities for members, especially specialty contractors, to develop relationships with each other. He explained, “The number one reason a specialty contractor would join our organization would be to have a better relationship and to start to figure out how to work with those general contractors again.” [#40]

The same trade association representative continued, “So, when a public project in Denver comes out for bid or proposal, they already know what that general contractor wants in

terms of prequalification ... estimates ... drawings and modeling, and staffing, and what their whole program is so they can be a sophisticated partner. And then the suppliers, obviously, want to supply to the specialty contractors up to the general contractors.” [#40]

He went on to say that in sum, the organization offers specialty contractors “education and training” and “provide[s] networking” for general contractors. Regarding networking, he said, “We survey our members [and] know our customers and really, what differentiates us [from other] construction association[s] in the market ... is that we make it very easy ... to meet the exact person you need to meet within a firm to do business with them.” [#40]

- When asked to describe the organization’s services, the Native American female representative of a business assistance organization said, “We are a trade association whose mission is to assist commerce that benefits American Indian communities through economic development.” [#37]

The same business assistance organization representative continued, “We provide training and community development programs such as tax workshops, business legislation workshops ... mortgage training, health equity programs, entrepreneurial programs, plus we serve as a resource for our non-native members, and more. We’ve partnered with the National Center for American Indian Enterprise Development and the American Indian Procurement Technical Assistance Center to help American Indian businesses with government contracts. One of our longest legacies is the annual ... achievement awards, supporting and recognizing American Indian scholars, businesses, nonprofits, and professionals.” [#37]

Regarding the organization’s membership, she said, “Our membership includes companies involved in clothing and accessories, like Native American jewelry; business and professional services; construction; food and dining; legal and [finance]; government agencies; and tribal entities.” [#37]

- When asked what types of businesses the organization serves, the Asian-Pacific American male representative of a business assistance organization stated, “The membership includes large corporations, large engineering firms, B2Bs, smaller businesses, and restaurants. In addition, there are major academic partners and companies in the health care sector. We also have a concessionaire at [Denver International Airport], and we’re very proud of that.” [#33]

When asked if many of the organization’s members work in transportation-related construction or engineering, the same business assistance organization representative stated that a few of their members work on transportation-related construction. He said, “We have [a member who is] a concessionaire at the airport. We have a few engineers, but I could probably count on one hand how few Asian engineers there are. When [Regional Transportation District] or the airport reach out to us, we frankly struggle with getting attendees.” [#33]

- The Hispanic American male representative of a trade association reported that the organization helps advocate on behalf of minority- and women-owned small businesses, as

well as for some larger prime contractors. He explained, “In many ways, we are the connector between our small businesses, the minority- and women-owned businesses, and the primes, as well as public entities, the city, public schools, [Regional Transportation District], CDOT, and the airport.” [#11]

The same trade association representative continued, “We try to gather information from those various public entities and provide that information to our members. We also look for private work and [other] opportunities and ensure that our membership is aware of those opportunities.” He said that most members are involved in the construction industry, but noted, “We have some print shops, marketing folks, consultants, and other soft skills like HR consultants” [#11]

When asked about the types of work members perform, he said that members work on transportation-related construction and engineering work. He explained, “They do both vertical and horizontal work as well as professional design. One of the things that we are also working on is trying to attract more professional services firms to our organization because I think it has always been known as construction There are a lot of professional services companies out there that could benefit from our organization, and it would benefit both sides because then you get to know who's actually designing the engineering ... and then who's building it.” [#11]

- The non-Hispanic white female representative of a trade association said that she has been with the organization for over 25 years. She described the organization as a business association for horizontal and vertical engineering firms in the private sector.” She said, “Besides transportation, bridges, [and] roads, [members] are also [working] with water infrastructure. That’s what I consider horizontal, but there’s also the vertical side.” [#38]

When asked what the organization offers its members, the same trade association representative said, “We do a lot of networking events, educational programming, [and] anything dealing with the business side of engineering.” She said that members seek membership with her association “because they know [the association] can help them with the business side [of things].” Engineers go to school to be engineers in the technical side. They don’t go to school to learn about how to run a business.” [#38]

She continued, “We help them with that transition from being technical experts to running their business, [to become] business people They look to us for those ways in which they can ... grow their businesses and be a strong business entity.” [#38]

Many interviewees reported stable work types or little or no change in the type of work they do. [e.g., #6, #7, #9, #12, #15a, #16, #19, #20, #22, #23a, #24, #25, #26, #27, #31, #32a, #34, #36]

Employment size of businesses. Business owners and representatives were asked about the number of people they employ and if their employment size fluctuates. Many discussed their firms’ growth in comparison to others in the industry.

- The Subcontinent Asian American male owner of a specialty contracting firm reported that he is the sole employee of his company. When asked what he does if a job is too big, he indicated that he hires independent contractors. He explained, “I have many fellow contractors that I use in that situation.” [#18]

When asked about the growth of his company, the same business owner said that his business is currently very profitable and that he has the capital to build a new primary business location. He went on to comment that most other contractors he works with are also private contractors with firms of similar size. [#18]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that her firm has two employees, including herself. When asked to describe the firm’s growth, she said, “I’ve been in business [over 10] years and still only have two employees, so I’m not growing.” She later noted that she sees a lot of small firms like hers that are also not growing. [#35]

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that the firm consists of only two employees, including himself. Regarding how his firm’s growth compares to others in the industry, he indicated that the firm is doing as well as others. He noted that they’ve seen consistent and steady growth since 2011. [#9]

- The Black American veteran male owner of a general contracting company reported that he is the only employee of the firm. He explained, “If I need help, I will hire people I know that can do the job. There are many independent contractors out there.” [#29]

When asked about the firm’s growth, the same business owner said that he is satisfied with the amount and type of work he receives. He added, “I used to have an office in [a city in the Denver area], [but] moved the office into my house for the convenience of taking care of paperwork any time of the day or night. I work six days per week, and that’s the way other contractors are working now. There is a lot of work in Denver right now. We all feel we have to take full advantage of it while we can.” [#29]

- The non-Hispanic white male owner of an engineering company stated, “I used to have five employees and a partner, and a contract drafter. But as things have slowed down, I let everyone else go I’m only planning to work another 4 [to] 5 years.” [#26]

When asked how the growth of his company compares to others in the industry, the same business owner said, “I have seen a steady, slow downturn in the work I do As I laid off employees, I moved to a smaller office ... at the same physical address. I know there are a lot of other high-end residential engineers doing very well, [but] I am satisfied with where I am now in my career.” [#26]

- The non-Hispanic white female co-owner of a specialty services firm reported that she and the other co-owner are the only employees of the company. Regarding the firm’s growth, she said, “With [our line of work], it’s kind of like when you find a dentist and stay with a dentist. I’m getting some other customers from other businesses, but mostly it’s new

customers that are coming to me. New businesses are asking for their work to be done here.” [#8]

- When asked how many employees his firm has, the non-Hispanic white male owner of a construction services firm stated, “I am the owner and the primary worker, [but] I have hired a helper because there is just so much work right now. So, the total number [of employees] is two. This is satisfactory for me right now because I work out of my home.” [#31]

Regarding the growth of his company, the same business owner stated, “All small independent businesses like mine are experiencing very good growth right now. I was off for about six-months last year because of surgery [and] I’m just now getting back to the level I want to be. I’m very pleased about that because my marketing comes from word of mouth. I don’t even have a website to advertise.” [#31]

- When asked how many employees his company has, the Hispanic American male owner of an engineering firm reported that they currently have four employees, all of which are licensed professional engineers. [#16]
- The non-Hispanic white male owner of a goods and services firm reported that the firm has five full-time employees. He said that he believes the firm’s growth rate is higher than the industry average. He explained, “We’re a very agile company, and so we kind of go where the market is. And we grow to meet the needs of our consumers and our clients. So, while other companies might specialize in just one thing, we don’t necessarily specialize. We generalize in a lot of ways so we can better suit what our customers need for their specific projects.” [#10]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that the firm has five full-time employees, including herself. She added that the firm has one part-time employee and one contract employee. When asked how the growth of her firm compares to others in the industry, she said their growth is “conservative.” She explained, “We haven’t tried to push our growth really aggressively, but all [professional services work] tends to follow economic cycles We’re the same as the rest of the world in that capacity, or at least the rest of the industry.” [#12]
- The non-Hispanic white female owner of a DBE-certified construction firm reported that the firm currently has five full-time employees. She said, “I wish I could hire more. It’s hard to find people that want to stand out in the weather directing traffic.” [#27]

Regarding the growth of her firm, the same business owner stated that she is satisfied. She explained, “We get a lot of work from CDOT because of all of the projects around the state that need the service we provide. I don’t see that slowing down at all. There are so few ... companies [in our field], [so] we really don’t market. [Clients] come to us. There is a lot of repeat business because we do a good job. I don’t believe I could take on much more work because I don’t have the staff right now.” [#27]

- The Hispanic American male owner of a specialty contracting firm stated that his firm has seven employees, all of whom work full time. He went on to say that the growth of his company has been steady. He added, "I think we are a niche type of firm that is not comparable to a general firm [in the industry] I would say we're comparable to a [specialty] contractor in terms of growth." [#4]

The same firm owner reported that he tries to keep his firm's growth in check. He explained, "I don't market [to other firms] because I feel like I'm going to get too busy and I'll have to hire permanent guys and get more trucks to keep up with that flow of even service work." He went on to explain that the firm does hope to grow in the future when they have the appropriate resources. [#4]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that she has four part-time employees and four full-time employees. [#5]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated that her firm has five full-time employees, including herself, and six part-time employees. She added that she is pleased with the steady growth of her company, and commented, "I need to make sure that I am constantly aware of that growth. It would be dangerous growing too fast, agreeing on contracts, and not having labor or equipment to satisfy the scope." [#19]

When asked how her company's growth compares to others in the industry, the same business owner stated, "I have one very large competitor that has been around for [almost] 30 years. I'm not sure how their growth is, [but] I believe our growth is above the rest because we do epoxy, which is required for CDOT jobs. Those machines are expensive, and I don't believe the other small companies have that equipment." [#19]

- When asked about the firm's employment size, the Asian-Pacific American female representative of a DBE-, MWBE-, SBE-, and EBE-certified construction firm said, "We currently have 12 employees working for us full time. I keep track of that very closely to make sure we have all we need for the work we get. Most of the employees have been around for at least two years." [#32b]
- When asked about his firm's employment size, the non-Hispanic white male owner of a construction-related firm reported that they currently have eight full-time employees and "six junior engineers." He commented, "When we merged, [my partner] came with three total employees. We have a strong group that works well together." [#25]

When asked to describe the growth of his company, the same business owner stated, "The current location is where I have always had my office. We got bigger space in the office building when we merged." He added, "This location is the only office." [#25]

- When asked to describe the growth of his firm, the Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm said, "I am very pleased with the growth we have right now, [but] I believe opportunities [may be] slowing down some."

That's based on conversations we have with another cabling company. However, we haven't felt any impact yet." [#32a]

The same business owner continued, "I have heard from other ... companies that their work is slowing down considerably, and [that] the amounts of the contracts are getting smaller. We concentrate on making sure our customer is satisfied. That is why most of our business comes from word of mouth." He added, "The company has never missed a deadline Our annual revenues are about \$2 million." [#32a]

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm has 10 full-time employees and 15 part-time employees. Regarding his firm's growth compared to the competition, he said, "Some have grown a lot faster than we have because we concentrate on a particular type of customer, and we don't market in the same way that other firms do. We don't use Google marketing [or] pay for analytics. Our business model is basically referrals and word of mouth." [#7]

The same business co-owner added, "We're not aggressively trying to grow into a larger company. We want to stay a small business because it's a way for us to deliver what we say we want to deliver as a small business, [which is] enabling the owner to go see every single customer. We know [that] if we grow into a larger business, that won't be possible." [#7]

- The non-Hispanic white female owner of a DBE-, MWBE, SBE, and ESB-certified professional services firm reported, "I currently employ 17 staff." [WT#15]
- When asked about the firm's employment size, the non-Hispanic white male representative of a majority-owned specialty services firm reported that the firm has 25 employees. [#34]

Regarding the firm's growth, the same business owner said that it has been growing steadily since the end of the recession. When asked what got them through the recession, he responded, "Going digital [did]." [#34]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that the firm employs about 28 people. She said that the firm is not meeting its growth potential because she does not pursue many contracts nationwide. She explained that she is thinking about retirement and does not want to jeopardize her house and retirement savings to grow the firm. [#20]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm reported that the firm has "roughly 40 employees ... five of [which] are part-time." [#36]

When asked about the firm's growth, the same business owner stated, "The retail portion has been fairly steady. The only way to grow that is to invest in more locations. The wholesale business has been difficult at best. At one time we were certified with [Regional Transportation District], but we outgrew their program [and] lost that contract. That was a bit of a setback." [#36]

He continued, “Now it goes up and down with the economy. We have a lot of big competitors out there that have more buying power than I do. I’m in a secondary position when I go to the [supplier] because I don’t have enough volume to get a direct contract. Without a direct contract, you’re at a price disadvantage. I’m one or two cents over cost because I have to go through a jobber.” [#36]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that he started his firm by himself, though over the next three to four years it grew to 10 employees. Since then, he added, his firm has grown to its current size of 48 employees. [#14]
- When asked about the growth of the firm, the same business owner said that it is close to the average for his industry. He noted that several other minority-owned firms in his industry have grown faster, though he said that he attributes that growth to their hire of former CDOT employees. [#14]
- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm stated that her company has a workforce of 25 to 50 employees. She later added that the company grew to two locations. [#13]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm reported, “There are about 200 employees in the company. About five [years ago] we changed the business model to one that provided full-service to customers [with] a team approach to completing projects. The company will self-perform most of the projects awarded, which means we do the work from start to finish. The types of positions we have include design, estimating, construction, and project management.” [#28]
- The non-Hispanic white female representative of a majority-owned construction services firm reported that the company has 567 employees, which includes their Utah and Arizona offices. [#21d]
- The non-Hispanic white male representative of a majority-owned construction services firm described the firm’s growth as above average for the industry. He said that the firm was awarded a \$75 million project 10 years after its founding. Years later, he added, the firm was awarded the largest design-build project in North America at that time. By 2016, he said that they performed over \$2 billion of large commercial and industrial installation projects in the U.S. and abroad. [#21a]
- The non-Hispanic white male representative of a majority-owned goods and services firm said that the firm has roughly 10,000 nationwide employees, with about 600 of those in Colorado. He added that their growth is above average because they are one of the largest electrical distributors in the country. [#23a]

A number of companies reported that they expand and contract their employment size depending on work opportunities or market conditions. Some reported using subcontractors, when needed, to increase resources. [e.g., #18] For example:

- The Hispanic American female co-owner of an SBE-certified professional services firm said that the firm currently has six employees and is in the process of hiring two more. [#15a]

When asked about the firm's growth compared to others in the industry, the same business co-owner commented that growth has been "flat." She said that the firm has not bounced back from the recession. She added, "It's a challenge for small firms to overcome the perception of [not] being able to complete the work. People are afraid we will get overloaded and be unable to complete the work, [though] we've never missed a deadline." [#15a]

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that the firm has eight employees. When asked to describe the firm's growth, he said, "When I first started my company I was a sole proprietor, and I slowly added one or two people. And then in [the early 1980s] I took on a partner That lasted about four years and we got into larger projects. In [the mid-1990s] the company took on a different corporate structure when I took on four partners. We grew to about 20 [employees] until 9/11, then the firm shrank to about 10" [#22]

When asked how the growth of his firm compares to other firms in the industry, the same business owner stated, "That's tough to say. It seems like the larger firms get larger and the smaller firms get smaller. If you're a 100-plus firm, you're adding people. If you're 20 or less, you're losing people." [#22]

- When asked the firm's employment size, the non-Hispanic white male owner of a specialty services firm said, "We currently have 13 full-time employees, [and] one of those employees has been with the company since my father started it." [#30]

When asked about the growth of the firm, the same business owner said, "We did open a branch in [another state] several years ago because we were getting a lot of work down there, [but] unfortunately that dried up because companies find it easier to print in-house. We only have [one] location now. We were only in [another state] for about a year." Regarding managing multiple locations, he said, "It's hard to manage more than one site. The demands of managing employees, financials, and marketing to different types of customers is more than a full-time job Even though we closed in [another state] ... everything is right here at the home office, and it's easier to manage." [#30]

When asked how the firm's growth compares to others in the industry, he said, "We are one of the last big [companies in our field]. We continue to develop business relationships to stay in business." [#30]

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm reported that her company employs 45 people. She said it has gone as high as 50 full-time employees when they have increased workloads. When asked about the growth of her company, she said they've grown at a rate slower than other firms. [#2]

- The non-Hispanic white male owner of a construction firm stated, “I am the only employee of my company.” He added that if a job is “too big,” he will hire other electrical contractors as needed. [#24]

When asked about the firm’s growth, the same business owner said, “I am very satisfied with the growth of my company. I’ve always worked out of my home. It allows me to spend time with my [family].” [#24]

- The non-Hispanic white male owner of a professional services firm reported that he employed six or seven people five years after the founding of his firm. He now employs four people, attributing the decline to the recession in 2008. [#3]

The same firm owner went on to say that firms he is familiar with have experienced significant growth in recent years. He added, “I’m not as interested in growth as I am in maintaining the type of work that we do. I have never had a desire to have a bigger firm.” He attributed this preference for having a small firm to the high degree of specialization of smaller firms. He also noted, “I try to staff for a comfortable level. I’m not in the habit of hiring people and then laying them off.” [#3]

One business owner indicated that the firm’s employment size sometime fluctuates seasonally. The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, “When things are slow, I keep the part-time employees busy doing maintenance. I just can’t afford to lose them. This work can be seasonal, and workforce is tight right now.” [#19]

A trade association representative reported that most member firms have 30 employees or less. The non-Hispanic white female representative of a trade association said, “We have 260-member firms throughout the state that employ over 11,500 people.” When asked about the size of member firms, she said, “Seventy-five percent of our members are 30 people or less. They’re comfortable being that small size, but at the same time they need to be sure that they’re in a position to be a successful business. So, they look to us for that.” [#38]

Capability of businesses to perform different types and sizes of contracts. Business owners and representatives discussed the types, sizes, and locations of contracts that their firms perform. Contract sizes range from \$100 to tens of millions of dollars. Comments include:

- The Black American veteran male owner of a general contracting company stated, “My contracts are usually \$15,000 up to about \$30,000.” [#29]
- The non-Hispanic white male owner of a goods and services firm stated that they usually work directly with clients and that orders range between \$10,000 and \$30,000. [#10]
- The non-Hispanic white male owner of a construction firm stated, “[I] work on small and large jobs. The jobs my company performs are approximately \$30,000 to \$50,000. It depends on the job, but if it’s too big I will hire other electrical contractors. There are lots of independent contractors out there, and I work with many of them.” [#24]

- Regarding his firm’s annual revenue, the non-Hispanic white male owner of an engineering company said, “The revenues vary. We don’t make a lot of money, but [it’s] enough.” [#25]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said that her preferred contract size is 7,000 to 50,000 square feet. [#35]
- The non-Hispanic white male representative of a majority-owned specialty services firm reported that their contracts range from \$100 to \$100,000. [#34]
- When asked about the sizes of contracts his firm pursues, the Black American male co-owner of a veteran-owned specialty contracting firm reported that they bid contracts ranging anywhere from \$5,000 to \$100,000. [#7]
- Regarding the sizes of contracts his firm pursues, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that they have completed contracts ranging from \$100 to around \$350,000. [#9]

The same business owner later said, “We’ve worked with a couple of primes [where] the projects were really, really small in relation to some of the other projects that we’ve done. [For example], \$10,000 or \$15,000 versus \$100,000 or \$250,000 [contracts].” [#9]

- The non-Hispanic white male owner of a specialty services firm said, “[Our] contracts range from \$500 to \$500,000 in size, [though] those very large contracts are hard to come by now. [#30]
- When asked what size contracts her firm bids on or performs, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that her firm’s design budgets range from \$2,000 to \$15,000. She added, “Then our construction observation fees probably run about the same. We have construction fees that run up to \$30,000. The projects we build range in value from \$20,000 up to half a million dollars” [#12]
- The Hispanic American male owner of a specialty contracting firm reported that his firm only obtains business in the Front Range. He added, “At first, my biggest contract was \$50,000, then it was \$100,000, then it was \$200,000, and now it’s \$300,000. Right around that \$300,000 or \$500,000 mark is about my limit right now, as far as keeping up with labor wages and material costs and other costs.” He added, “I don’t want to grow too much because I don’t want to get to a point where I try to tackle a million-dollar job and don’t have the backing for it.”[#4]
- When asked about the types and sizes of contracts her firm pursues, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “The largest contract we’ve had was just shy of \$300,000, and [that] lasted for three years.” She continued, “Right now, our largest contract is \$200,000. I think we could go up to \$500,000 before we start to be crushed under the load [of work].” [#5]

- The non-Hispanic white male owner of a professional services firm reported that their firm's largest contract was over \$1 million, which he described as being difficult for a firm with only four employees. The firm's average contracts range from \$250,000 to \$500,000 per project. [#3]
- When asked what sizes of contracts/orders the firm bids on or performs, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, "The fee range is anywhere from \$5,000 to \$1 million." [#22]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated, "Last year we had 120 projects and \$4 million in revenue ... We perform anything from \$500 to \$1,000 jobs all the way up to a single project size of \$1.7 million." [#19]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, "Our contract sizes are about \$2 million. We are definitely looking to grow that number by continuing to seek other projects. I'm not sure if there are similar companies that have adopted this model of self-performing the work." She went on to comment, "Our company reputation speaks for itself. We often are sought after for other project work." [#28]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that his firm can handle contracts ranging from a few thousand dollars to millions of dollars. [#14]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that the firm's contracts are generally in the range of \$1 million to \$2 million. She added that they only do time and materials (T&M) contracts and avoid "hard bids." [#20]
- When asked about the sizes of contracts his firm pursues, the non-Hispanic white male owner of an engineering company stated, "Their sizes are in the millions [of dollars]." [#26]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm reported that her firm bids on projects ranging from \$50,000 to \$4 million. [#2]
- The Hispanic American female co-owner of an SBE-certified professional services firm reported that the firm bids on contracts ranging from \$100,000 to \$30 million, and that tenant improvement can range up to \$50 million. [#15a]
- The non-Hispanic white male representative of a majority-owned construction services firm said the company has grown to become a top-ranked contractor in Colorado and the United States in general. He said they mainly do large and small commercial and industrial projects; their five-year average is almost \$82 million in revenues. [#21a]

One business owner reported not bidding often due to the nature of the firm's work. The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said,

“Because it is a wholesale type commodity, there are not a lot of things you bid on. If ... it’s like the City and County of Denver putting out a bid for [one of our products], we bid on that of course. Also, the other municipalities put out bids as well for fuel that we will try to bid on. The rest of the commercial market doesn’t have a line item.” He added, “Some of the big transportation companies might have bid opportunities, but they are out of reach for us because they’re national in scope.” [#36]

A trade association representative reported that members perform a wide range of contract sizes. The Black American female representative of a trade association said that the contracts member firms bid on range from tens of thousands of dollars to millions of dollars. She said the largest contract among members to date was valued at over \$90 million, and added that 60 to 75 percent of her chapter’s members are engaged in transportation-related construction and engineering work. [#6]

Many firms reported working on contracts throughout City and County of Denver. Some firms reported working only in the Denver metro area, while others reported working statewide and out of state. For example:

- Regarding the areas where his firm performs, the non-Hispanic white male owner of an engineering company said, “I try to stay in the metro area, including the mountains.” [#26]
- Regarding the areas where his firm performs, the non-Hispanic white male owner of a construction firm stated, “I try to stay in the Denver metro area, but will work around the state.” [#24]
- The non-Hispanic white male owner of a construction-related firm stated, “We prefer to work in the Denver metro area, but will travel around the state [if necessary].” [#25]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that the firm services the Denver metro area, and areas ranging north and south of Denver. [#35]
- The non-Hispanic white female co-owner of a specialty services firm reported that the company works in northern and southern areas of the state. [#8]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that the firm is headquartered in the Denver area. She indicated that they work only in the Denver metro area. [#20]
- Regarding the regions where the firm works, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm reported that the firm is headquartered in Denver and services the I-25 corridor, “about 80 miles north and south of the Denver metro area.” [#36]
- The non-Hispanic white male representative of a majority-owned specialty services firm reported that the firm is headquartered and conducts most of their business in the Denver metro area. He went on to say that they have one out-of-state client. [#34]

- The non-Hispanic white male owner of a professional services firm stated that his firm works in the City of Denver and in communities along the Front Range, as well as doing work with the Colorado Department of Transportation, the Colorado Division of Wildlife and the Denver Water Department. [#3]

The same owner reported that his firm has done a small number of international projects, but the firm no longer pursues those projects due to difficulties receiving payment. [#3]

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm is headquartered in Parker and that they seek business as far away throughout the state. He added that they also do a lot of work along the Front Range, Denver metro area, and other areas. [#7]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said that her company seeks business only in Colorado, specifically the Denver metro area. She went on to say that they have performed in other areas of the state. [#2]
- Regarding the regions where his firm performs, the Hispanic American male owner of an architectural engineering firm reported that they are headquartered in Boulder and generally perform work along the Front Range. He added that they used to do work in several states, but currently only have licenses in Colorado and California. [#16]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that they seek business along the Front Range and “up into the mountains,” but go as far as New Mexico or Wyoming, or anywhere in “the arid west.” She reported that the firm is located in Denver. [#12]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm reported, “[We] work all over the state and are starting to do jobs in Wyoming.” [#19]
- When asked about the regions where her firm works, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said that she has licenses in 19 states. She added that they’ve proposed on projects in Mongolia, Qatar, and Guam, though they have yet to work internationally. She reported that her firm is located in Denver with one office location. [#5]
- The Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm said, “We have started doing work in California over the last few months. That addition to the company has been good so far.” [#32a]
- When asked where she works, the Hispanic American female co-owner of an SBE-certified professional services firm stated that they do work statewide and are licensed in numerous other states. Denver, she added, is the firm’s sole location. She went on to say that they have regular nationwide work for one of their clients. [#15a]

- The non-Hispanic white male representative of a majority-owned goods and services firm said that the firm does business nationwide and is headquartered in Texas. [#23a]
- When asked about the firm’s service area, the non-Hispanic white male owner of a specialty services firm stated, “We will provide [our] service to any company or anyone across the nation, [and] we have provided this service across the nation.” He later added that the firm is headquartered in the Denver area. [#30]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that his firm works nationally. He said that his firm is headquartered in the Denver area, but also has offices in other Colorado cities. He went on to say that the majority of his out-of-state work is with the U.S. Fish and Wildlife Service. [#14]

A few business owners and representatives reported that their firms also work internationally. For example:

- The non-Hispanic white male representative of a majority-owned construction services firm reported that the company has offices in Colorado, Utah, and Arizona, and has performed work throughout the Western United States and internationally. [#21a]
- When asked what regions the firm works in, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “We normally work in the Denver metro area. The only time we venture out is when a local client has a project in another state. We have done projects as far away as Taiwan, but that was through a local pharmaceutical company ... Some of the federal project managers cover wide regions, and that takes us to other states. We’ve had projects in Texas, North Dakota, et cetera.” He added that the firm’s sole location is in the Denver metro area. [#22]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that the firm’s sole headquarters is in Denver. He added, “Our primary market is North America, although we have done a couple of projects outside of that market. One [was] in Australia and one in Germany.” [#9]
- The non-Hispanic white male owner of a goods and services firm reported that the firm operates internationally. He added that the firm’s sole location is in Colorado. [#10]

Some trade association and business assistance organization representatives reported on the regions where they seek members, and where members primarily work. For example:

- When asked how far the organization typically seeks members, the Asian-Pacific American male representative of a business assistance organization reported that the organization’s members are concentrated within the Denver metro area. He noted that the organization has had events with Colorado State University in Fort Collins, and that they also have events in Colorado Springs. He went on to say that the organization is headquartered in Denver. [#33]

The same business assistance organization representative continued, “Membership over the last four years has grown approximately 10 percent. More importantly, we have expanded our position and brand across the United States, and also ... international[ly] ... due to a focused effort on international trade [and] working with our consular offices. There are consular offices for Japan, Taiwan, and Singapore which are looking to build a consular office here. We also have a relationship with the consular office of the People’s Republic of China which is based in Chicago. We go on delegation trips [and are] looking at potentially going to Vietnam later this year.” [#33]

- The non-Hispanic white female representative of a trade association said, “The [heaviest] concentration [of members] is along the Front Range from Fort Collins to Colorado Springs ... but we have members and provide programs or have meetings in other parts [of] the state, whether it’s north, south, [or the] Western Slope.” [#38]
- When asked how far the organization typically seeks members, a Native American female representative of a business assistance organization said, “We serve Indian communities around the United States, and have a few contacts abroad.” [#37]

When asked where the organization is headquartered, the same business assistance organization representative reported that they are based in Denver. However, she noted that they serve Indian communities throughout the country. [#37]

- The non-Hispanic white male representative of a trade association reported that the organization serves the greater Colorado area. [#40]
- The Hispanic American male representative of a trade association reported that the organization is located in Denver, and that most members are from the Denver metro area, though they have members as far south as Pueblo, and as far north as Fort Collins. He added, “One of the goals that we hope to explore within the next year is doing an open house in the Colorado Springs/Pueblo area, and possibly up to Fort Collins and Greeley to introduce our organization and what we are all about.” [#11]
- When asked where the organization’s members reside, the Black American female representative of a trade association said that because it’s a national organization, members are nationwide through 35 active chapters. She noted that some members work internationally. [#6]

When asked about her local chapter specifically, the same trade association representative said, “We have at least one member down in Colorado Springs. We had a member from Wyoming at one point, too Some of our members have memberships in other states [too], [in] cities like Seattle [and] Boston.” [#6]

Local effects of the economic downturn. A few interviewees shared comments about their experiences with the barriers and challenges associated with the economic downturn. For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, "I think between 2008 and 2009 our gross revenue dropped by 50 percent, and tons of architecture ... engineering and construction companies went out of business in the Great Recession. It was very, very significant. Companies say, 'Yeah, we made it through,' and that's a big deal. Everyone just limped along. We were making it on Hail Mary prayers [and] not really anything else. Then in 2011 [through 2012] things started to really pick up, and then it's just been [great] since then." [#12]
- The non-Hispanic white male owner of a professional services firm reported that due to the recession in 2008 his firm had to reduce the number of employees from "six or seven" to four, and that number has "remained at that level since that time." [#3]

The same firm owner explained that public sector work was slow for his firm until about two years ago, but before that they had more private sector work. He stated, "It was about two years ago that we saw the market start to come out of the recession in a way that impacted us. I think the private sector spending was picking up faster than [in] the public sector." [#3]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified construction firm said, "The [hiring] issue ... comes from the loss of talent and experience, and knowledge that we had as a result of the 2008 [recession]. I think it's finally caught up." She added, "I think we now have all of these ... people in the construction side that don't know how to draw drawings So, on big sets of drawings, they bury details. They don't detail things properly" [PT#3d]
- The non-Hispanic white male representative of a majority-owned specialty services firm stated, "There are fewer companies [in my business] due to the recession, and everything is more digital." [#34]
- The Hispanic American male owner of an architectural engineering firm said that the company used to have 14 employees instead of four, but they were forced to downsize during the recession. [#16]

Current economic conditions. Most interviewees reported a good or improving economy in the marketplace. [e.g., #20, #21a, #35, #37, #39] Several described local marketplace conditions as "booming." Comments include:

- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, "Marketplace conditions are great. There just seems to be so many opportunities available. Not only for a company like ours that self performs, but [for] those traditional construction companies. I have heard that it is strong in the private sector [with] residential building too. We just don't see things slowing down in the construction area at all ... any time soon. I believe [if] you ... have a good reputation out there [then] you can find work." [#28]
- When asked about local marketplace conditions, the non-Hispanic white female owner of a DBE-certified construction firm stated, "There is so much work out there, [so] I would

describe the marketplace conditions as very good. Right now, our company goes from one contract to another, [and] I don't believe any other ... company [in our field] is experiencing difficulty or lack of work." [#27]

- When asked about the marketplace conditions, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm commented that there is work "everywhere" in the local marketplace. She said, "You can't really complain that you're not making money. I'm complaining that we can't do public sector work, but we're doing great [otherwise]. You'd have to be a moron in this industry to be doing poorly right now, but a year from now, it could be a whole different story." [#12]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated, "There is a lot of work out there. Not just government, but private work because the economy is so good." She continued, "My business model is flexible. I don't need just the big jobs all of the time [because] the company can do small [projects] too." [#19]
- Regarding current marketplace conditions, the Black American veteran male owner of a general contracting company said, "There is so much work out there now [that it's] best to take full advantage of it. I hope it doesn't slow down anytime soon." [#29]
- Regarding overall marketplace conditions, the Hispanic American male representative of a trade association said that due to a large number of ongoing projects in the local marketplace, he feels there is a lot of competition that exists between companies and contractors. He added, "There are a lot of new, emerging businesses, and we're seeing that. That is why we put a lot of focus on relationship-building and training to make sure that folks are prepared to do the work when they get the work." [#11]
- The non-Hispanic white male representative of a trade association said that marketplace conditions have been steadily improving over the past several years, especially in the private sector. He stated, "Construction in the Denver area has stayed at a steady rate of growth, and private owners primarily work for these big commercial buildings And there's a lot of flexibility over whom you can select. You might know a lot of ... companies, but you're like, "They are busy right now. These other guys are not. They have got their all-star superintendent available. I want them on my job" [#40]
- When asked to describe current marketplace conditions, the Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, "I believe the marketplace conditions are very good. Companies are looking to increase their technology all the time, [and] increasing technology includes adding new equipment and systems." He went on to say, "I don't know how other companies in this industry are doing, [but it's] a good time for us." [#32a]
- The non-Hispanic white male representative of a majority-owned goods and services firm indicated that current marketplace conditions are good. He stated that there is currently a lot of work in the Denver metro area in both the private sector and public sector. He noted that the firm is very busy. [#23a]

- The same business representative later said, “We’re in an extremely hot spot. Parts of California are pretty tough for us today. On the East Coast there is not much you can do when you’re as built out as they are. Seattle, San Francisco, Denver, Dallas, [and] Austin are pretty hot today.” [#23a]
- When asked about current marketplace conditions, the non-Hispanic white male owner of a construction services firm stated, “Things are very good right now. I don’t know any small company that is [struggling] to get jobs. Having a good reputation goes a long way. I know it’s busy on the public side too [because] I see all the construction cranes around town.” [#31]
- When asked about current marketplace conditions in Colorado, the non-Hispanic white male owner of a goods and services firm stated, “We do what we can to work with local businesses whenever and however possible I would say from what we’re seeing, there are a lot of local businesses coming to us for our manufacturing services.” [#10]
- The male representative of a non-Hispanic white male-owned professional services firm reported that currently “there is a higher level of public sector work than [we] would normally see” because of their firm’s continued involvement with airport projects. He added, “The airport has a massive impact on the entire market because these are monstrous projects ... [and the] private sector is booming” [#1a]
- The Hispanic American male owner of a specialty contracting firm stated, “I think our local marketplace is at an all-time high in work There are a lot of people here, and that generally drives our service industry really well The market's better than I've ever seen it.” [#4]
- The non-Hispanic white male representative of a majority-owned specialty services firm stated that marketplace conditions in the local area are excellent in all sectors. [#34]
- When asked about local marketplace conditions, the Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said they are good. She noted, “The bond program that got approved by voters in November for the City and County of Denver is excellent [because it will benefit new construction work].” [#2]

The same business co-owner continued, “Marketplace conditions are positively impacted by the overall growth that we have seen within the metro area, and because many ... of the other government entities are putting their money towards reconstructing and improving roads. [This] has positively impacted the marketplace conditions.” [#2]

- When asked about current marketplace conditions, the non-Hispanic white male owner of a construction firm stated, “It is so busy now in the Denver area. If you want to work, you can find it.” He also noted the benefit of having a good reputation, and said, “[If] a company has ... a good reputation out there ... the work will come.” [#24]
- A public meeting participant indicated that current marketplace conditions are good. She commented, “The women’s movement has just been on fire these last couple of years, and

women have been entering into business ownership or entrepreneurship at a very high rate.” [PT#4]

- The Subcontinent Asian American male owner of a specialty contracting firm indicated that marketplace conditions in his industry are good. He stated that he is not interested in growing the company any larger at this time, and added that he has enough business now as it is. He went on to comment that he does not want to grow his company larger because the quality of his work may suffer. [#18]
- When asked about local marketplace conditions, the Hispanic American male owner of an architectural engineering firm stated, “There always seems to be work available.” He reiterated that they had to downsize after the recession, but noted that they were able to survive on small projects. [#16]

Some interviewees and survey respondents reported that while economic conditions are good, a lack of qualified labor presents challenges. [e.g., AS#49] For example:

- When asked to describe local marketplace conditions, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “The conditions are robust, [but] it’s hard to get people to bid. You can’t find subs and subs can’t find workers. The public sector is 25 percent more active than the private sector.” [#22]
- A survey respondent said there is “oversaturation in Colorado,” and added, “Labor force is the hardest issue.” [AS#23]
- The non-Hispanic white female representative of a trade association said, “There’s a lot of work going on just in Denver alone. There’s a lot of work out there, and that competes against all the other work that is in the private sector All we have to [do is] look around, and we see buildings and ... multi-family development going up. That’s a competition in a way, for talent. That’s the biggest concern that a lot of people have, is [whether] there [is] enough talent to do all of these projects. It’s tight, [and] it’s very hard to find people.” [#38]
- The non-Hispanic white male representative of a trade association said, “The biggest thing [firms] are saying is that the city is about to do a [tremendous] amount of work and there’s not enough quality minority-certified firms to deliver 15, 20, 25, or 30 percent of the city’s buildings that they’re building in the next five years. There’s just not enough. And we desperately would like the city to actually do an assessment” [#40]

The same trade association representative continued, “But if that’s only 12 percent and not 30 percent ... we’re going to start running into problems when we force a higher number than the minority firm capacity can handle, while we go through this large, large bubble. And this happened when [Denver International Airport] was built in 1995 We have [some] of our members on the [City and County of Denver’s] goal committee. But ... it’s scary for us to ... raise our hand and say, ‘Maybe you ought to reevaluate the goal,’ because it can look like we’re anti-minority and that’s the furthest from the case. [So], our natural inclination is to just sit back and say, ‘Well, we see this problem coming but we’re not sure what to do about it.’” [#40]

He later said, “Probably the biggest issue out there is the workforce itself, and the fact that we’ve gone from 104,000 to 172,000 [employees]. We should probably be at around some 180,000 to 185,000 employees based on the amount of construction in the market.” [#40]

- A survey respondent reported, “The biggest challenge today is staffing. There’s no trained workforce readily available to hire.” [AS#14]

One business owner said that while marketplace conditions are good, his firm struggles to stay competitive as a small business. When asked about local marketplace conditions, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that his segment of the industry is less supportive of small businesses as it was when he started the firm. However, he added, “The market is great, [but] everybody [is] busy but me You don’t see a lot of new folks trying to get into this business. It’s mostly multigenerational businesses, and they are being bought out by bigger companies My volume is to the point where my pricing is still not where it should be to compete on a volume basis. The big guys are buying by the rail car” [#36]

Some business assistance organization representatives commented on current marketplace conditions and its effect on members. For example:

- When asked about the overall conditions in the marketplace, the Asian-Pacific American male representative of a business assistance organization said that many members are struggling with employee recruitment and retainage. He said, “With the low unemployment, my members tell me they have trouble finding and retaining employees. We have a very healthy local economy, [and] our exports are great. Our overall trade economies are good. That does trickle down to our members, but the smallest ones are struggling.” [#33]
- When asked to describe the overall market conditions for members, the Native American female representative of a business assistance organization said, “We have seen a lot of growth in the Denver metro area, and everybody wants to get in on the action. [However], the big struggle is finding employees, so that is limiting the opportunities ... they are even turning down work. And trying to attract work force from another area doesn’t work because housing is too expensive.” [#37]

Some interviewees indicated that current economic and marketplace conditions are poor, or slowing down. One interviewee indicated that poor marketplace conditions are due to few prime contractors willing to engage small, minority businesses. Comments include:

- The non-Hispanic white male owner of a construction-related firm reported that “the economy is starting to slow down.” He added that the projects they bid on are “much smaller” than those from a few years ago. [#25]

The same business owner later noted that his company only works in the private sector, so he can only speak in regards to that. He said, “There are a lot of apartments and commercial building projects going on, [and] we have been very successful in that area. Even though I

think things are slowing down, the private work can keep you very busy.” He added, “You just have to get out there and sell yourself and what your company can do.” [#25]

- Regarding the current economic conditions, the female owner of a small business indicated that challenges exist for small business owners in the Denver marketplace. [PT#2b]
- Regarding marketplace conditions in his industry, the non-Hispanic white male owner of a specialty services firm said, “Unfortunately, the number of orders and the size of contracts have slowed down considerably. Technology advances have given companies an opportunity to do their own [work] in-house. If the needs of a customer are small enough, and not a very large job, they find it more economical to do it themselves.” [#30]

A trade association representative indicated that conditions in the local marketplace can be a barrier for some members. When asked about local marketplace conditions, the Black American female representative of a trade association commented, “No doubt, they are tight.” She continued, “It’s very interesting to see and hear from small businesses that they have a choice of which projects they want to participate on. I heard that some primes were requesting certain criteria, whether bonding or what have you, and the sub elected out of participating on the project and went to a different project [This] is something you don’t hear of often, or see often.” [#6]

The same trade association representative said that there is “minimum participation” of prime contractors, as they “elect not to participate in the space where owner entities are requiring goals for minority participation.” She added, “They’d rather not deal with that. Some find it labor-intensive in the amount of documentation, and just the steps [needed] to engage small, minority businesses.” [#6]

She went on to say, “I’ve been to a couple of hiring fairs where I walked around as if I were looking for a job, and inquired with different folks, [asking], ‘Do you participate in projects that require DBEs [or] MWBEs?’ And they would say, ‘Oh, no. That’s too much work.’” She continued, “They’ll let you know right up front. They think it’s too much work, or they’ve had trouble, or they say there’s too much work out for them to do what they need to in order to go that route and pursue those kinds of contracts.” [#6]

Many interviewees discussed whether local marketplace conditions have changed in recent years. Most indicated that conditions have changed significantly. For example:

- Regarding changes in marketplace conditions, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “In 10 years we’ve gone from a recession to this incredible expansion. I thought things were going to tank four years ago, but it just keeps going.” [#22]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “The big guys are getting bigger and the small guys are getting smaller. [A large firm] just got bought, and they were huge ... everyone’s buying each other up. I remember when they broke up [a firm] and all the opportunities that created, [and] now we’re back to where it started.” [#36]

- When asked if and how marketplace conditions have changed, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said that the “booming” economy of Denver has made all the difference for her firm. She went on to say, “They estimate that \$10 billion is going to come in over the next 10 years. Usually only the first fraction of that work is in design, while the rest is construction, maintenance, and operation.” [#5]

The same business owner continued, “In other words, this \$10 billion worth of work is probably going to be two years’ worth of work in the design field, so I’m already looking ahead and trying to position myself to get federal work so that when these city projects wane down, I’ll be starting to bring in federal work around the country that will help [to] keep us where I don’t have to lay anybody off.” [#5]

- When asked if marketplace conditions have changed in recent years, the Black American male co-owner of a veteran-owned specialty contracting firm reported that the private sector has become more saturated in the last year and a half. He added, “It’s really happened alongside the growth of Colorado. Lots of companies are coming in from out of state. You run into them and they say [they’re] from Texas [or] Kansas.” He went on to say, “They’re late to jobs because they don’t know how to get there. They [don’t] know a different way than the highway because they’re all new. So, it’s an influx of people that are coming in.” [#7]

- When asked to describe current marketplace conditions in the local area, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said, “I always tell our guys ... that there’s one constant in all this, and that is [that] things are always changing. So ... if there’s a client out there that you’ve been trying to get [work with], just be patient enough and you’ll get in He’s either gonna be gone, or somebody else is gonna be in his place [to give business].” [#14]

- The non-Hispanic white male owner of a construction-related firm said, “I think our firm compares [to] other local engineering companies, but I believe the economy is starting to slow down. We bid on some projects and win them, but the size of those projects is much smaller than a few years ago, and getting [even] smaller.” [#25]

- When asked if marketplace conditions have changed in recent years, the Hispanic American female co-owner of an SBE-certified professional services firm said that “big firms” have recently been acquiring smaller firms, leading to architectural firms getting bigger, on average. [#15a]

The same business co-owner went on to comment, “[In] all the years we have been in business, even [during] the worst downturn, we never laid anybody off because there wasn’t money for the salaries. We did decrease everyone to 90 percent of their salary, but it was a decision made by the group. In a big firm, you’d never have the opportunity to help make that decision.” [#15a]

- When asked about any changes in marketplace conditions, the non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, “There is an

enormous amount of work along the Front Range, but it has also brought in a lot of out-of-state contractors who are now vying for business with local companies, especially small businesses.” [#20]

- Regarding past and current marketplace conditions, the Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm stated, “I’ve seen recession, depression, no work, too much work, [and] you know, the boom right now. So, I’ve seen all of it.” [#13]
- The male representative of a non-Hispanic white male-owned professional services firm said that marketplace conditions have been pretty stable and that the nature of the work has remained about the same. However, he noted, “It ebbs and flows through the years, depending on the economics.” [#1a]
- The Subcontinent Asian American male owner of a specialty contracting firm said that conditions have not changed much since he started his business almost 10 years ago. He went on to note that there has always been steady work in Denver. [#18]
- When asked what changes he has seen in marketplace conditions, the non-Hispanic white male representative of a majority-owned goods and services firm stated, “Other than the speed of business, there’s not much I can think of. Things happen a lot faster than they used to, [and] technology drives that. Expectations have moved up quite a bit [because of] culture. People want things today.” [#23a]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm reported that he has not noticed any changes in marketplace conditions. [#39]

A few trade association and business assistance organization representatives discussed changes in local marketplace conditions. Comments include:

- When asked if she has noticed any recent changes in marketplace conditions, the Native American female representative of a business assistance organization said, “In the last 18 months, the issue of not enough employees and people turning down contracts [has increased].” [#37]
- When asked about any recent changes in marketplace conditions, the Asian-Pacific American male representative of a business assistance organization noted that he sees more and more public opportunities and is seeking ways to get more members involved. However, he commented, “To get into a [Denver International Airport] concourse it is at least a \$2 million build, then your overhead and everything else [on top of that]. That hurdle is prohibitive for many, many folks.” [#33]
- When asked about changes in marketplace conditions, the Hispanic American male representative of a trade association said that he has seen growth among some of the minority- and women-owned businesses that comprise the organization’s membership. He explained, “I have seen some growth in their businesses, which has been wonderful to see

happen, to the point where they can be primes. Maybe not on the very largest projects, but they are primes and they are competing out of that marketplace.” [#11]

The same trade association representative continued, “I see expansion of businesses. I see folks who care more. I’m also seeing, on the primes’ side, more respect towards the certification process and the need for goal setting and their willingness to participate in those programs. Not just because it is a requirement, but because they also are trying to build more capacity in our community, and the way to do that is with our small businesses and certified firms.” [#11]

Some business owners and representatives discussed whether marketplace conditions differ between the public sector and private sector. Comments include:

- Regarding local marketplace conditions, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “In the private sector there is a lot of opportunity, but there are more small companies doing [her line of work]. In the public sector there is also a lot of work, but not as much competition for [her line of work] because it requires certification.” She added, “They are about the same. Right now [City and County of Denver] is getting a lot of work [with] the museum, the convention center, and the airport.” [#35]
- When asked if marketplace conditions differ in the public sector versus the private sector, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm indicated that conditions are better in the public sector due to DBE/MWBE contract goals. She said, “Public primes are becoming aware of and complying with MWBE and DBE requirements. Private sector [primes] have no such requirements, and work with their ‘good [ol’] boy’ partners whom they’ve worked with for the past 25 years I have no chance of winning that work.” [#5]
- The Black American male co-owner of a veteran-owned specialty contracting firm said that marketplace conditions differ in each sector. He explained, “In the private sector, the local marketplace is saturated with companies that do what I do. It’s very competitive and it’s all about relationships that you build as far as referrals. In the public sector, I don’t feel it’s that competitive at all. I think it’s just given to a certain group of companies, and [if that] group of companies ... can’t do the work, they sub it out.” [#7]
- When asked if marketplace conditions differ in each sector, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that they do. He explained, “There is more scrutiny in the public sector. In the private sector they just slap something together. There is probably a 25 percent surcharge for public work because of all the paperwork, but because of that there is less risk.” [#22]
- When asked if marketplace conditions differ between sectors, the Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm indicated that they do not. He said, “I think the economy is such that people, whether you are private or public ... are still looking at value. You still have to be competitive. They have to have a comfort level. It’s the same whether it’s public or private.” [#39]

- When asked if current marketplace conditions differ between sectors, the non-Hispanic white female co-owner of a specialty services firm reported that as far as she can tell, they do not. She went on to say that any recent changes in marketplace conditions have not been noticeable. [#8]
- When asked if marketplace conditions are the same in both sectors, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that they are. He added, “I think with all the projects that we have going on right now ... [with] what Denver’s trying to do with mobility, I think it is great.” [#9]
- The non-Hispanic white male representative of a majority-owned goods and services firm said that marketplace conditions in the Denver area do not differ between sectors. He commented that both sectors are “booming.” [#23a]
- The non-Hispanic white male representative of a majority-owned construction services firm reported that marketplace conditions are excellent in both sectors. However, he commented, “It seems whenever you have a boom, more contractors move in, which generates lower margins.” [#21a]

One trade association representative noted that marketplace conditions do differ between sectors. The Hispanic American male representative of a trade association explained, “In the public sector you have goals that the entity is trying to achieve, so therefore the primes are more dedicated in trying to achieve those goals and bringing on certified firms. However, I am seeing more activity with the primes in the private sector as they take along some of the certified programs with them on those [private sector] jobs as well.” [#11]

Business owners’ experiences pursuing public and private sector work. Interviewees discussed their experiences with the pursuit of public and private sector work. Some discussed the differences between public and private sector work. For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm noted that it is easier to perform public sector work because of her familiarity with it and the relationships that she has forged. She added, “It’s a different approach to private work in how you bid, which becomes more about costs than relationships.” [#13]
- When asked about the differences between working in the public sector versus the private sector, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that she prefers public sector work. She explained, “In the private sector, there are two spaces you can work in. One is the residential space, [which] we’re super familiar with But a lot of private sector work involves developers, and developers are the clients we don’t really want to work for and who basically tend to be [difficult to work with]. They’re very aggressive, very price driven, [and] very deadline driven.” [#12]

The same business owner continued, “Most of the time when we’ve worked for government entities, the [public representatives] have at least known what they’re doing. They understand they’re going to build a sculpture park.” She noted however that it’s easier to

secure private sector work because the public sector is dependent upon past performance on similar projects. [#12]

- When asked how he goes about securing work and if it differs between sectors, the Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said, “You must identify the department and person that handles your commodity and services, and then work through the maze to reach out to them.” He explained that to penetrate the “maze,” he generally reaches out to specialized departments to help guide him through the process. He noted, “We stay within our disciplines, so we don’t reach out and do other disciplines that we are not really sure of.” [#39]

The same business owner added, “We go after private, government, and tribe [work]. We’ve been in business for [almost 30] years, so [we] focus on government contractors and tribes.” He explained that he directs his efforts in this way due to his familiarity with the marketplace. [#39]

Regarding differences between public sector and private sector work, he said, “With the government, you have to dot the i’s and cross the t’s more. Could be more regulations on the government side.” He went on to say that his experience in both sectors has been good, as has the profitability in each. He noted that he does not regard one sector more favorably than the other. [#39]

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that his firm used to focus on private sector work until 9/11, when “a lot of contracts ... just stopped.” He said, “All the developers just walked away from projects and left architects, engineers, and contractors holding the bag. I decided then to focus on public work, because a public entity would never start a project unless they had the money coming in.” [#22]

The same business owner continued, “The other thing about public clients is that you’re usually dealing with professionals [like] architects, engineers, [and] contractors that have been trained in those fields, so they know the process. All private developers are concerned about is making money in the end. They are impatient and don’t have much appreciation for the process. So, we made the shift and I got certified as an [SBA] 8(a) with the federal government, and we still do a lot of federal work.” [#22]

He later reported that an advantage to public sector work is that it is more “stable.” However, he noted, “In a way, the public sector is more difficult in that it’s a very rigorous process. Once you master the process, it becomes easier over time So, in that respect, the public sector is [fairer.]” In contrast, he reported that private sector work is “riskier because it’s more demanding.” He added, “Plans are more incomplete.” [#22]

- The female representative of a non-Hispanic white male-owned professional services firm reported that public sector projects have specific goals to meet and “boxes to check” that inform the dynamics of a team for a project. She explained that in comparison, private sector projects are more relationship-oriented and based on qualifications rather than the logistics of team formation. She noted that in the private sector, their firm is more likely to

talk about why they are the best firm rather than focusing on public requirements that must be met for work in the public sector. [#1b]

- When asked about the differences between public sector and private sector work, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “In the private sector, some of the projects are [based on] bid, but some are relational. Someone may like what we’re doing and ask for a price on it. They may get three bids and then say we won the bid.” He said that this is in contrast to public sector work, where all of the work is bid out. [#9]

The same business owner later said that the process of getting work is more difficult in the public sector, largely due to the “back and forth” nature of securing a project. He said, “On the private side, you may have an entity that’s going to do a project There’s an owner there [and] you have an opportunity to get with the owner to get involved with the project. Then there’s a contractor, [and] you have another opportunity.” [#9]

He continued, “[However], on the public side you end up with four or five prime contractors. You go through the whole process, but when you get to the contractor part you have ... five primes who are bidding on the same project, and four of those five aren’t gonna get it. If you were smart and had the resources, you would provide pricing to all of them.” [#9]

- The male representative of a non-Hispanic white male-owned professional services firm reported, “I think that the private sector is much more based on pure qualifications and your ability to show that you can meet their schedule, budget, and the lead’s expectations.” [#1a]

The same business representative stated that obtaining work in the private sector is based on a firm’s qualifications, but sometimes the work is more dollar-driven than public sector work. [#1a]

- The non-Hispanic white female co-owner of a specialty services firm said that it’s more difficult to get work in the public sector than the private sector. She explained, “Coming from a finance background, I believe that once a company or public sector person gets married to [a particular company], it takes quite a bit to get them to decide to go with somebody else. For instance, they can have complaints for years, but it may be too much of an effort to change vendors.” [#8]

The same business co-owner added that doing work in the public sector is easier than in the private sector. She indicated that public sector work tends to be less complicated than private sector work, and said, “When we worked with the City of Longmont, they had their design, and it was my job to [decide] how we [would] solve [their] problem.” [#8]

When asked if it’s easier or harder to receive payment for public sector work, she stated that it’s much easier. She explained, “They have payment cards when they’re ordering. They put down their deposit, and when they come to pick it up they pay their entire payment. [In

the private sector], a single person may order four things and say they will pay in a week and a half when they can get up here." [#8]

- The non-Hispanic white male owner of a professional services firm said, "Our private sector work seems to focus a lot around contractors while our public sector clients seem to value engineering more than a private sector client" He added that at times public sector clients will take a low contract bid without considering that someone with more expertise and a higher price may provide a better product. He went on to say that there are not significant differences between public and private sector work. [#3]
- When asked about the differences between public sector and private sector work, the Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, "There really isn't that much difference working in the private or public sectors. You work on the bid, review to make sure you've included everything, and submit. We are starting to get recognized as a quality company, and that reputation goes along way." [#32a]
- The Hispanic American male owner of a specialty contracting firm reported that the bidding process in the private- and public-sectors are essentially the same. He added that wages are the most noticeable difference between the two sectors, explaining that "In the public sector we pay Davis-Bacon wages. In the private sector, it varies." [#4]
- The same business owner also noted, "I think both sectors have their trade-offs. I think as far as [working with] management, it's easier in the public sector. But as far as the amount of paperwork, it's harder." [#4]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, "The [nature] of the construction sector mix of work has changed. Everyone is looking for MWBEs right now, which has made a huge difference. If they do away with this MWBE program, all these MWBE firms will fail." [#5]

The same business owner later said, "It is next to impossible to get work in the public sector because public work is this giant thing that [not everyone can] break ... into [or] sink [their] teeth into I interviewed for [a public sector project] and I said we can handle projects of \$500,000. And the guy sat there and looked at me like I was out of my mind, and he said they couldn't break it up into something that small." [#5]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said that she does not see substantial differences when working in the public sector versus the private sector. She explained, "My company has been very fortunate in getting work in both sectors. [Our] positive reputation is out there The type of work the company does is basically the same [across sectors]. The work depends on what the owner wants." [#19]

The same business owner went on to say that the payment structure is different between sectors and that different material is used. She said, "Adjustments are made based on the

customer. We have a mix of customers and sizes of contracts. We couldn't just do small jobs and succeed." [#19]

- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, "I don't think there are considerable differences in working either public or private. There is always someone coming out to inspect your work, and there are deadlines. The municipalities we have been working with pay on a timely basis so long as the paperwork is submitted correctly and timely." [#28]
- The non-Hispanic white male representative of a majority-owned goods and services firm said that there is no difference as a supplier in attempting to do work in one sector compared to the other. He commented, "A construction project is a construction project." [#23a]
- The non-Hispanic white male representative of a majority-owned construction services firm said that work in each sector is similar and commented that the firm is successful in both sectors. He went on to say that one minor difference is that there is generally more paperwork involved in the public sector. [#21a]
- The same business representative added, "Both the private sector and public sector [have their] own challenges, but the public sector is more rigid in terms of policies and procedures. However, the private sector work can also have rigid policies and procedures, depending on the client." [#21a]
- When asked if there are any substantial differences between working in the public sector versus the private sector, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that there are no such differences in his line of work. He explained, "It all comes back to getting the order, executing it and making sure your customer is satisfied." [#36]
- When asked if there are any differences when working in the public sector versus the private sector, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said that based on her experience with one public sector job, she does not see any. She explained, "[I] get a schedule, see how many people I need, make sure the work is good, and then get paid." [#35]

When asked if her process of getting work differs between sectors, the same business owner said, "In the public sector, it is harder to get to know the right people for the big contractor. Some of my competitors have people who do the estimating and they can give a better price. I do all of my [own] estimating. In the private sector, it is more about who knows me." She added that it is easier to get work in the private sector because she has been working there longer. [#35]

She later added, "Doing the work is stressful in both sectors I think that's because there is more competition for this work in the private sector. A lot of companies won't get certified." [#35]

Many interviewees indicated that their firms conduct both public sector and private sector work. [e.g., #13, #15a, #16, #28, #30] For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said that “probably 90 [percent]” of her work is in the public sector. She said her goal is to achieve 20 percent private sector work by 2019. When asked why she’s striving for more private sector work, she said she has to diversify her portfolio because many public sector opportunities in which she previously supplemented her business have been moved or delayed. [#13]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “In the first eight years of my business, 90 percent of it was private sector. In the last two years, 80 percent is public.” She went on to say that this ratio constantly changes because of the size of her business. She explained, “Because we are so small, when I get a big contract it dominates. Ask me in six months what proportion of our work is public sector versus private, and it [may] be the other way around.” [#5]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that his firm works mainly in the public sector. He said that due to a large amount of available public sector work, roughly 80 percent of his firm’s work currently comes from the public sector. [#14]

When asked if this amount of public sector work varies yearly, the same business owner commented, “It’s always a juggling act.” He said that it all depends on public sector agencies’ funds to support public projects. He went on to say that it is important to have a balance of public and private sector work because there are always “ups and downs” regarding the health of both sectors. [#14]

- When asked what proportion of his work comes from each sector, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated that 60 percent comes from public sector and 40 percent from the private sector. He said there has been a trend towards public work that is driven by the economy. [#22]

When asked if this mix of work varies year-to-year, the same business owner reported that it does. He explained, “It depends on the economy. In a recession you will survive on public sector work. [And] actually, we do better in a recession. During the good times, the big firms do a lot of private work [like] the casinos [and] hotels. When the economy goes south, they jump back into the public sector and it takes them a while to get traction. Meanwhile we’re there humming along doing public work.” [#22]

- The non-Hispanic white male representative of a majority-owned construction services firm reported that currently the firm performs mostly in the public sector. However, he noted that this is because of a large Denver International Airport contract, and commented that they usually perform more private sector work. [#21a]
- The female representative of a non-Hispanic white male-owned professional services firm noted that public sector work represents approximately 40 percent of their projects, with

aviation work representing about 35 percent of that percentage. Meanwhile, she said private sector work represents about 60 percent of their projects. [#1b]

- When asked what proportion of his firm’s work comes from the public sector versus the private sector, the Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, “I believe our project work is close to being 50 percent public and 50 percent private. We have an ongoing two-year [public sector] contract ... to do ... desktop support. That happened as a result of a contract we won to install 5,000 feet of cable for [the same client]. They like the way we work [and] we have never missed a deadline. I would really like to get a few more of those ongoing service contracts, and we continue to bid on them. We bid in the public and private sector.” [#32a]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm reported that her firm performs in both sectors. She said, “There are so many projects going on now [and] there is considerable public work out there. However, I don’t shy away from a parking lot job.” She continued, “The company business cycle doesn’t vary year to year, it varies by season. Our smaller jobs are usually in the winter months.” [#19]
- The non-Hispanic white male owner of a professional services firm explained that their projects do not differ much between public sector and private sector work. He added, “Basically we like to envision ourselves as an extension of the client’s staff, whether that be a public sector or a private sector client. Most of our work is in the public sector however.” [#3]

The same firm owner also noted that their proportions of public and private sector work vary each year based on what public projects are happening at the time. He explained, “It is easier for us to get work in the public sector because we are specialized.” [#3]

- The Hispanic American male owner of a specialty contracting firm reported that his firm does about 40 percent of their work in the public sector and 60 percent in the private sector. He also noted that the mix of public and private sector work has been relatively consistent over the years. [#4]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that about 70 percent of his firm’s work comes from the private sector. When asked if there has been a trend towards or away from private sector work, he said that it has remained the same for a while. [#9]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that 80 to 85 percent of her firm’s work is in the private sector while 15 to 20 percent is in the public sector. She reported that this mix has been steady year-to-year, and commented that they are trying to increase their public sector work. [#12]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that 90 percent of his firm’s work comes from the private sector. He said that his firm has trended away from public sector work due to the difficulty they have trying to get on

vendor lists as a prime. He added, “For school boards ... cities [and] municipalities, the process is just daunting” [#7]

- The male representative of a non-Hispanic white male-owned professional services firm reported that public sector projects are more challenging to work on as a subcontractor due to prime consultants’ inclination to hire small, minority-, and women-owned subcontractors first. [#1a]
- When asked what percentage of the firm’s work comes from each sector, the non-Hispanic white female co-owner of a specialty services firm reported that the majority of their work is in the private sector. She added, “I would say probably less than eight percent comes from the public sector.” [#8]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that her firm works almost exclusively in the private sector. [#35]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm reported that 99 percent of his work has been in the private sector since losing a Regional Transportation District contract. [#36]

Trade association and businesses assistance organization representatives reported a healthy number of members working in each sector. [e.g., #6] For example:

- When asked what percentage of members’ work comes from the public sector versus the private sector, the Native American female representative of a business assistance organization indicated that between 50 and 90 percent of members’ work is in the public sector.” [#37]

When asked if this mix of work varies year-to-year, the same business assistance organization representative said, “There is a lot of public work right now. A couple of years ago there was a burst of marijuana-related construction, but that has slowed down. So yes, it does vary.” [#37]

- The Asian-Pacific American male representative of a business assistance organization reported that while most members work in the private sector, one long-time member has regular contracts with Regional Transportation District. [#33]
- The non-Hispanic white female representative of a trade association reported that members work in both sectors. She added, “Some of the [small firms] that are doing work in the public sector are also doing work in the private sector. I always encourage the MWBEs, or any of them ... to do work in the private sector too. You’ve got to have your foot in both [sectors]. That [can be] hard for a small firm.” [#38]
- The Hispanic American male representative of a trade association reported that most member firms work in the public sector. He added, “The public sector has goals on their projects, and so there is a requirement for the big guys to have subcontractors that are certified, and so a lot of them are in that arena.” [#11]

The same trade association representative added that some members have never worked for a public entity, or only work for one public entity instead of branching out. He explained, "For instance, doing work at the airport can be very difficult and a lot more expensive than doing a project at a rec center or [with Denver Public Schools]. And so, for them to do work at the airport, I always remind them, 'Make sure you know all the costs associated before you go out there and bid on something.'" [#11]

He later said that he believes there to be a trend for more private sector work among members. He explained, "I think as folks have developed relationships and you do good work, [the prime contractors] want to take you on their work, whether it is public or private. [#11]

Some interviewees reported that they prefer public sector work to private sector, or that there are benefits to public sector work. For example:

- The non-Hispanic white male owner of a professional services firm stated that there are benefits to working in the public sector. He explained, "The private sector can be more demanding schedule-wise. It's been our experience that sometimes the private sector is not as organized as they should be, and that the schedule demands can be greater. Sometimes those in the private sector do not know what they really want." [#3]
- The Hispanic American male owner of a specialty contracting firm stated, "In the public sector, I believe the employees see much more gratification not only in the pay but also in the work environment. I think they feel much more appreciated [They seem] a little more excited to work publicly than privately. I think there's a safety standard that also makes them feel more secure." [#4]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm stated, "Most of our work now comes from the public sector. Counties and municipalities in this area are looking to upgrade many structures and facilities. I believe [it's] because we have a self-performing business model [that] we are asked to bid on those jobs. The fact that we have in-house staff to handle the beginning to the end is an attractive option for them." [#28]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that for the type of work his company does, it is easier to get work in the public sector. [#14]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that payment is faster in the public sector which can lead to more profitability. [#7]

Some trade association representatives indicated that there are advantages to working in the public sector. For example:

- When asked if members work more often in the public sector or private sector, the Black American female representative of a trade association reported that members most often work in the public sector. She commented, "It is in [the public sector] that they are given an

opportunity through the goals and programs that are in place. They can build their capacity, their expertise, and their knowledge base, and then feel more comfortable to expand into the private sector. We've seen that happen a lot. We've also seen a lot of folks who prefer to stay in the public space." [#6]

- The Hispanic American male representative of a trade association said that payment is more reliable when working with public entities. He commented, "The payment takes longer to get sometimes, but you are going to get it." [#11]

A few business owners reported working exclusively in the public sector. For example:

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said all their work is in the public sector, mostly on industrial projects such as restoration and new construction. She added that this work takes place across several different counties around the Denver metro area. [#2]
- The non-Hispanic white female owner of a DBE-certified construction firm stated, "All of our company's work comes from the public sector, specifically CDOT." We work primarily on highways. Those roads are the responsibility of CDOT. That is why they hire us." [#27]
- The same business owner went on to say, "[CDOT] know[s] the quality of our work. They keep us very busy. We don't have a lot of employees, [so] sometimes there are projects available that we don't go after because of the number of people we have on staff. Fortunately, we have enough to get the job done [most of the time]." [#27]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that her firm works only as a subcontractor on public sector contracts at Denver International Airport. [#20]

Some interviewees reported that they prefer private sector work to public sector, or that there are benefits to private sector work. [e.g., #1b, #10, #15a, #24, #30] Many said that payment is considerably faster in the private sector. For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm stated, "The private sector is easy because decisions are fast," compared to the public sector. She added, "You don't have to go through a lot of iterations of things." [#13]

The same business owner went on to say, "Even if the private sector requires an RFI, a reply is generally received within 48 hours." She said in the public sector it can take 30 to 45 days for a reply, and added, "There was a delay of up to 90 days for an RFI reply from a public sector business. Over the years [response time] depends on who the general contractor or project manager is." [#13]

- The female representative of a non-Hispanic white male-owned professional services firm noted that getting work in the public sector is more difficult because of all of the factors involved in contracting out certain portions of the project and achieving certain goals in the

hiring of team members. She mentioned that sometimes her firm gets passed over or has to delegate out a portion of the project to another business in order to meet mandated requirements. [#1b]

- The male representative of a non-Hispanic white male-owned professional services firm reported that private sector projects are much more straightforward than public sector projects, as there are more direct channels of communication and decision-making. He stated that public sector projects cost more “because the projects get extended over longer periods of time, and there are multiple reviews and processes that you have to go through.” He added, “When that starts to extend over months, it just becomes a highly inefficient process” [#1a]
- The same business representative went on to explain that, unlike public sector projects, private sector projects typically have a point person who is responsible for communicating decisions and is empowered to make decisions on the spot, rather than spending time deliberating and negotiating. He recommended that the process be improved by “empowering ... project managers to make decisions.” [#1a]
- The Black American male co-owner of a veteran-owned specialty contracting firm said there are stark differences in getting private sector work versus public sector work. He explained, “In the private sector, if the customer trusts you and you can do the work, that’s what it’s all about. It matters if you have a good reputation. In the public sector, it’s more who you know than what you know, or the experiences you have or what qualities ... or what qualifications you bring. All of those aspects are secondary because you can’t even show your qualifications because you can’t get in the door.” [#7]
- The Hispanic American male owner of an architectural engineering firm reported that they mainly focus on the private sector, though they currently have a contract with Boulder County. He went on to say that receiving payment is never an issue in the private sector. [#16]
- The non-Hispanic white male owner of a construction services firm said, “Working in the private sector for a homeowner or a small business, like a mom and pop store, will get you paid much quicker than going through large contractors.” [#31]
- The non-Hispanic white male representative of a majority-owned goods and services firm indicated that private sector work can be advantageous due to less paperwork. He said, “There is more paperwork [involved] on public sector jobs.” [#23b]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm indicated that it is easier to get work in the private sector because the contracts are price-based. [#36]

One business assistance organization representative reported that most small member firms work mainly in the private sector. The Native American female representative of a business assistance organization said, “The small firms work primarily in the private sector. When we try to tell people they have to go after contracts with the city or state, the biggest concern is that it’s

cumbersome to get through the paperwork. They often say that for what they do, the hassle won't pay off in opportunities. So, they choose not to do it, especially since they can get contracts more quickly in the private sector. We are encouraging them to fully look at the full portfolio of work they can pursue, and that includes public [work]." [#37]

The same business assistance organization representative later commented that members prefer private sector work because "they can turn a dollar quicker." She added, "There are more restrictions in the public sector that you won't encounter in the private, like what kinds of windows or door hardware you're allowed to use." [#37]

Some business owners reported working exclusively in the private sector. Comments include:

- The Subcontinent Asian American male owner of a specialty contracting firm reported that he only works in the private sector. He went on to say that he prefers private sector work because decisions are made quickly and payment is almost immediate. [#18]
- The non-Hispanic white male owner of a construction-related firm reported that all of his work comes from the private sector. He said, "Private jobs are still out there, they are just getting smaller. I have bid on public work a few times, but haven't been successful. The agency [or] department doesn't share with you why your bid wasn't accepted. After a period of time [of] not hearing from them, you just assume your company didn't get the job. Anyway, you are notified almost immediately in the private sector if you got the job, and you are paid quickly." [#25]
- The non-Hispanic white male owner of an engineering company reported that all of his work comes from the private sector via residential construction projects. He added, "[I] have never worked for [and] would never work for the City of Denver. I worked for city governments before [starting my firm], [and] I don't like it." [#26]
- The Black American and veteran male owner of a general contracting company reported that all of his work is residential and in the private sector. He stated, "I have heard from other contractors that have tried to do work with Denver for a long time, and [no contracts come] out of their attempts. So, why should I even try to get work there when I have more than enough the way I run my business?" [#29]

One interviewee said that his firm is limited to private sector work because of its low capacity. The non-Hispanic white male owner of a construction services firm stated, "My firm doesn't have the capacity to work in the public sector. All of my work comes from private contracts, and that is how I make a living." [#31]

Several trade association and business assistance organization representatives commented on members' experiences pursuing public and private sector work. For example:

- Regarding the differences between public and private sector work, the Native American female representative of a business assistance organization said, "Obviously in the private sector things move quicker, but it is more uncertain. The public

sector moves a lot slower, but there is more certainty that the funding will be there, the project will finish, and you will eventually get paid.” [#37]

The same business assistance organization representative later said, “Relationships are important in both [sectors], but in the public sector the buyer is more reluctant to develop a relationship because they don’t want to be seen as having a preference. [So], they tend to go by what’s on paper.” She said, “If there are no DBE goals, it’s more [driven by] relationship[s].” [#37]

She added, “When [members] do work in the public sector, they know they will eventually get paid, and that is reassuring. In the private sector there is more liability ... When working with the Native American tribes, you really have to know what you’re doing. In addition to strong relationships, you need to understand the tribal legal issues, because there are no recourses if something goes awry. If the tribe doesn’t want to pay you for some reason, that’s your problem. I don’t see it happening a lot, but there’s always that risk.” [#37]

- The Asian-Pacific American male representative of a business assistance organization stated, “In the public sector there is more of a cash crunch because they pay so slow. Private [sector work] is more straightforward.” He added, “Private work has less paperwork and regulations. Those eat up a lot of time for a small business.” [#33]

The same business assistance organization representative went on to say that in the public sector “there is more lip service regarding minority programs [than] follow-through.” [#33]

- When asked if there are any substantial differences between working in the public sector versus the private sector, the Black American female representative of a trade association reported that there are. She said, “The essence of having the programs in place, the compliance ... reporting, the management of it, the oversight, all of those things make the public sector experience different.” She noted that this can make it easier or more difficult for firms, depending on how well their engagement and habits line up with program requirements and compliance. [#6]

In addition, when asked which sector is easier for members to secure work in, the same trade association representative said, “The opportunities in the program have allowed [members] to come in and have a space to perform at ground level, or at a level where they can come in and then grow.” She added that she is unsure if there is the same “tolerance” for new firms in the private sector, and said, “In terms of processes in place to support [new firms], I’m not sure that exists in the private sector, at least not to the degree that our programs do.” [#6]

- Regarding the differences between public sector and private sector work, the non-Hispanic white male representative of a trade association said, “You get over in the public arena, and to be fair, a lot of the adjustments that make logical sense can’t be done because everyone has to have an equal shot Typically, the public agency can’t just go and design the project and get some early numbers from a couple of general contractors. Later on, they have a

much more linear process where they've hired the architect [and got] the drawings to a certain point, and then take proposals." [#40]

The same trade association representative continued, "One of the things I'll say [City and County of Denver] is doing better is they're using some design-build/at-risk [bids] and not just a low bid environment so they can get some of those private sector advantages in their projects The convention center is a good example. They brought in the architect, but they'll get a certain amount of design and then they will do a solicitation for a contractor, at least at the general contractor level, and so on." [#40]

When asked about MWBE members' experiences working in both sectors, he said, "If they're competent, certification ... is a good way to get involved in the public [sector]. But, there are many, many firms on the list that get certified and never do a single job. We're still trying to figure that out." [#40]

Some interviewees discussed how the profitability of public sector and private sector work compare. Responses as to whether public sector or private sector work is more profitable were broad. For example:

- When asked if there are differences in the profitability of public sector versus private sector work, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, "It depends. If you're doing Taco Bells or auto dealerships, it's probably highly profitable because you have a niche. In the public sector your profit is probably more predictable In the private sector, you're subject to the whim of the developer. They may not get their financing so the work stops and you may never get your money. Or, the market changes and the projects have to change, and you either make the change so the developer can get their money, or you don't and you lose your money. In the public sector there is a lot of scrutiny [in the] scope [of] services, so it's far more predictable." [#22]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that the profitability does differ between sectors. He explained, "There's more profit in the public sector because you don't have to go fight for your money. You're not going to go sue the public sector for not paying you. You're not going to have to market as much in the public sector [either]. In the private sector [however], it's all marketing and you have to go chase down your dollar It's different in the public sector [because] there's a set time, net 30 [or] net 60, and your money's coming to you. So yes, everyone would prefer to work in the public sector [because of that]." [#7]
- When asked if profitability differs between the public and private sectors, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said that it does. He explained, "I think you have a little more leeway on the private side. If somebody likes your product, they've set a standard for what they want. On the public side, they say, 'It needs to be something similar to this,' and there are a variety of qualities within that." [#9]

- The male representative of a non-Hispanic white male-owned professional services firm stated that private sector projects are more profitable than public sector projects. He attributed this difference to the lower cost of facilitation, the shorter and more concentrated time frame for each project, and the more straightforward process, with fewer “layers of people” associated with private projects. [#1a]
- When asked to describe the firm’s experience attempting to get work in the public and private sectors, the non-Hispanic white male representative of a majority-owned specialty services firm said, “It is pretty much the same for both. We just identify what projects are needed. Whether it’s an individual, a corporation, or a public entity, they all have a budget. You quote them a price We are willing to work with them if our price doesn’t meet their expectations.” [#34]

The same business representative added, “In the public sector, it sometimes takes longer to get a decision because you don’t always know exactly who the decision maker is. [For example], it [could be] someone in a department or in purchasing. In both sectors, time is a key element. Everyone wants things faster. Sometimes you have the customer with lead time and another who needs something tomorrow. We try to work with both at the same time.” [#34]

When asked if it is easier to get work in one sector compared to the other, he said that it is easier to secure private sector work because they have more relationships in that sector. He later noted that the experience of performing work does not differ between sectors. [#34]

- The non-Hispanic white male representative of a majority-owned goods and services firm stated that profitability does not differ between sectors. He explained, “I think that for the most part it’s pretty close. It’s part of the bidding process [and] you’re still competing against everyone looking at the same work. It’s pretty similar.” [#23a]

The same business representative went on to say, “On a public job there’s more influence from around the country. There’s a lot of state work and city work where people from outside the state are bidding on [it], and sometimes they do things that are different from our profitability standpoint.” [#23a]

- The Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, “The profitability between private and public isn’t any different, at least not in the cabling industry.” [#32a]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm reported that profitability in each sector is about the same, and described his profits as “good.” [#39]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “In both sectors the margins are really squeezed. People will bid a penny over their cost and carry the paper for 30 days.” He added, “In the public sector I might be able to compete if they broke it into smaller quantities.” [#36]

- Regarding each sector’s profitability, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified structural engineering firm said that the profitability does not differ, though the public sector can be more difficult if a business owner is not prepared for its more time-consuming nature. She commented, “Public sector projects require so much more meeting time, but if you’re smart, you put that time in your contract and you’re okay.” [#5]
- The non-Hispanic white female co-owner of a specialty services firm reported that profitability is generally the same in both sectors. She noted that in the public sector she can write off part of an expense as a donation. She explained, “I can write off part of their bill as donation by way of a discount I did [this] with the school district.” [#8]
- When asked if profitability differs between sectors, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that for her firm it does not. She explained, “I think that’s a little bit on us We need to be smart in how we write. I think a lot of people lose their shirts, but I haven’t been in business for [over 25] years by giving stuff away.” [#12]
- When asked if profitability generally differs between sectors, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that profitability depends on how well you negotiate a contract, not whether it is public or private sector work. [#14]
- The non-Hispanic white male representative of a majority-owned specialty services firm indicated that profitability does not differ between sectors. He said, “The key to profitability, whether public or private, is understanding what the client wants and if their budget is realistic. If their budget is not realistic, we will then discuss options with the client that fit in their budget.” [#34]
- When asked if profitability differs between sectors, the non-Hispanic white male representative of a majority-owned construction services firm said it is about the same “in the long run.” He explained, “There are years when we have better profits than others, and a lot of it probably has more to do with the [fact that the] private sector allows you to do things that the public sector doesn't. For example, value engineering. The public sector has a spec and you can't change that.” [#21a]
- When asked if profitability differs between sectors, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm stated, “It depends. It’s a matter of insurance costs ... [and] how many hours I need to spend in the office doing paperwork. It also depends on how often we have to look for that prime if we have questions that need answers.” [#35]

Trade association and business assistance organization representatives also discussed the profitability of each sector. A few indicated that profit margins are easier to manage in the private sector. For example:

- When asked if profitability differs between sectors, the Asian-Pacific American male representative of a business assistance organization said, “That’s a tough one. I can think of companies that work in the public [sector that] are very profitable. However, in the private sector the business owner can better manage his profit margins. It’s not as constrained.” [#33]
- The non-Hispanic white female representative of a trade association said that many of her members that are small firms concentrate on private sector work because it is more profitable for them. She said, “I think it depends on the discipline, [but] right now on the vertical side there’s a lot of private work That’s where they’ve developed the relationships, but it’s varied. You could imagine how many clients they have versus ... just [having] the City and County of Denver, or ... CDOT.” [#38]
- When asked about the profitability of both sectors, the Black American female representative of a trade association said that the profitability generally differs. She explained, “In the public sector we talk about breaking the project down into smaller, more feasible packages. Whereas in the private sector, if you can do the work, you can just do the work. There’s a space for both and there’s consideration for both. Breaking projects down can be good for small firms that need the opportunity.” She added that there should still be “meaningful opportunities for [larger] firms that ... can handle more work.” [#6]
- The Hispanic American male representative of a trade association said that profitability differs between sectors. He said that in the public arena there are sometimes unforeseen costs such as bonding and insurance that small firms may not know about. [#11]
- When asked if profitability differs between public sector and private sector work, the Native American female representative of a business assistance organization stated that it does not, but noted that the “speed at which a company gets paid” does. She reiterated that payment is faster in the private sector. [#37]

C. Keys to Business Success

The study team asked firm owners and representatives about barriers to doing business and about keys to business success. Topics that interviewers discussed with business owners and representatives included:

- Keys to success in general;
- Relationship-building;
- Employees;
- Equipment, materials, or products;
- Competitive pricing (pricing or credit);
- Financing and access to capital;
- Bonding;
- Insurance; and

- Other keys to business success.

Keys to success in general. Many business owners and representatives expressed the key factors to success as professionalism, communication, teamwork, training, experience, and reliability. [e.g., #12] Examples of related and other factors include:

- The non-Hispanic white male owner of a professional services firm cited communication, customer service and experience as keys to success in their line of work. He stated, "If our clients want something done, they know that they'll get me or one of my staff members on the phone At our firm we have a personal relationship with each and every one of our clients We keep them informed as to the progress of the work as well as problems we may encounter They also know that we are working hard for them, that we are pleasant to work with, and that we bring good ideas to the table" [#3]
- When asked what it takes for a firm to be competitive in her industry, the Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said that owners must pay attention to safety, as workers' compensation costs have a big impact on a company's bid. She explained, "If your workers' compensation [costs] are twice or triple that of your competitor, then that's how much more [money] you have to put into your bids. Materials cost the same for everybody. Overhead [costs] vary by the entity, [but] labor is what fluctuates the most. So, safety is a tremendous part of it." [#2]
- When asked what it takes for a firm to be competitive in his line of business, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said it takes the right pricing, the right product, and products that are unique. He explained, "There are a lot of [product] providers in the marketplace, and often a successful manufacturer will come along, so everybody carries that same style. But if you really want to be different, you have to have something that's different than styles that other firms have an interest in." [#9]

The same business owner continued, "Having something different can be both an advantage and a disadvantage. As an example, almost everything the City of Denver does is based on a standard that was done back in the 1950s. But the market has changed a lot since then. You still need a 300-pound [product] that [will] last for 50 years, but now people are looking for experiential environments [and] things that are unique. And so, if others are only allowing for more traditional styles to happen, then it makes it difficult for someone who has unique stuff to be more successful in doing work with the city." [#9]

- When asked what it takes for a firm to be competitive in his line of work, the non-Hispanic white male owner of a goods and services firm said it takes "agility" to be competitive. He added, "It also requires being up to date, because a lot of things move at the speed of the internet Something may be very hot and very popular one day, [but] it might fizzle and die the next week. So, it's being prepared and up-to-date on what is popular so that we can move quickly enough and capitalize on those opportunities." [#10]
- When asked what it takes for a firm to be competitive in his line of business, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm

said that because engineering work is based on qualifications, a successful firm must have good qualifications. He added that to be competitive, firms also need to [understand] what clients' needs are. [#14]

- When asked what it takes for a firm to be competitive in her industry, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said that it comes down to “exposure.” She added, “If I can convince you to hire me, you’ll see our competence, but I can’t get you to hire me if you can’t see me.” [#5]

The same business owner also said that she attends several expos and trade fairs that occur because of the MWBE requirement. She commented, “I can’t emphasize enough [that] there is no place I can go to get the type of exposure [that] being a MWBE firm gives me. Even if I go to my trade partners or my professional networks, I might get in front of [them], but they’re not required to hire a MBWE ... If they’ve used the same firm for the last 15 years, why would they consider hiring someone else?” [#5]

- When asked what it takes for a firm in her industry to be competitive in the local marketplace, the non-Hispanic white female co-owner of a specialty services firm reported that firms should have knowledge on how to obtain contracts and how to market to the public sector. [#8]
- When asked what it takes for a firm to be competitive in his line of work, the Black American male co-owner of a veteran-owned specialty contracting firm said that marketing is key. He added, “For one, we have to market better with our plumbers ... Right now, it’s really competitive ... so doing that and trying to get on the insurance company’s preferred vendor list ... is really important, even though it is another daunting task.” [#7]
- When asked what it takes to be competitive in his industry, the Hispanic American male owner of an architectural engineering firm stated, “In order to be competitive in this line of business you must be knowledgeable; [you must] listen to what the client wants; stay up-to-date on construction practices [regarding] what can and can’t be done, and communicate that clearly to the client. Most critical [is] know[ing] when to say, ‘I can’t do that.’” [#16]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, “You need to prove your company can do the work, whether it’s private or municipal. Also, because we have different types of equipment, our company can do things small companies can’t. We have positioned ourselves for a great future.” [#19]
- When asked what makes firms in her industry competitive, the Hispanic American female co-owner of an SBE-certified professional services firm said, “A full-time marketing [and] business development person, but [we don’t] have the money for that. We had a part-time marketing person several years ago, but couldn’t afford her salary ... It takes four or five years for marketing seeds to germinate, and small firms are on a shoestring budget.” [#15a]

Importance of a good reputation. Many noted the importance of a good reputation. [e.g., #5, #18, #19, #25, #28, #31, #32a] Business owners also discussed the importance of experience, quality work, and other key factors. [e.g., #12, #39] Comments include:

- The non-Hispanic white male owner of a professional services firm highlighted the importance of both relationship-building and expertise. He explained, “Our clients are our best marketers. We had one client recently recommend our firm to a large prime consultant. The client recommended that the prime ... include us in their team because we knew more about the facilities than any other sub that they could think of.” [#3]
- When asked what it takes for a firm to be competitive in his line of work, the Black American veteran male owner of a general contracting company stated, “I’m a good contractor with a great reputation. Word of mouth goes a long way. People talk. I’m asked if I could do jobs when I haven’t even met the people, because I have a good reputation.” [#29]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm’s reputation with primes helps them to secure subcontracting work. He added, “The primes contact us because of our military and minority status, and they know that we do very personal work. They know we’ll go out there, as owners, on the beginning and the end of jobs to make sure it’s done correctly.” [#7]
- The non-Hispanic white male owner of a construction firm said, “There is a lot of work out there and I have a good reputation, and much of my work is repeat customers and word of mouth. I believe I am doing as well as other independent contractors.” [#24]
- The non-Hispanic white female owner of a DBE-certified construction firm stated, “Of course, the reputation your company ... goes a long way to getting jobs. Our reputation is very good.” [#27]
- When asked what it takes for a firm to be competitive in the industry, the non-Hispanic white male representative of a majority-owned goods and services firm stated, “In our line of business, it’s value. [We have to get] materials there on time. Our contractors want nothing more than to get their materials exactly when they want them. In order to do that, we have to have a pretty hefty lineup of goods in the back, ready to go.” [#23a]

The same business representative added, “And [there’s] knowledge. When you think about the intricacies of an electrical project today, they are much more complex than they used to be. So, [we have to make] sure we have quality people on staff to answer technical questions, and a project management team to make sure that customers get whatever they want.” [#23a]

- When asked what it takes for a firm to be competitive in her line of business, the non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated, “The key things for a firm to be competitive in this line of business is cost and reputation.” [#20]

A trade association representative commented on the importance of members' work quality and performance. When asked what it takes for member firms to be competitive in the local marketplace, the Black American female representative of a trade association said that quality work and performance are key. She added, "It's one thing to be a great widget maker, but in this day and age [it's] incredibly important to have a strong back office. It's incredibly important to have a level of education and expertise about your own scopes, and where they're headed in the future." [#6]

The same trade association representative continued, "Big data is such a big part of what's driving a lot of the decisions in municipalities, owner agencies, et cetera. Our small businesses really need to know how that's going to roll down to them, how requirements are going to change, how delivery mechanisms are going to change, how engagement mechanisms are going to change" [#6]

Relationship-building. Across industries, most business owners and representatives identified relationship-building as a key component to success.

Whether easy or difficult to achieve, many considered relationship-building a key to business success. [e.g., #13, #19, #33, #35, #37, #39] For example:

- The male representative of a non-Hispanic white male-owned professional services firm stated, "We're a consulting firm and the ability to interface with clients and to understand their needs and to be responsive to their needs is the key to being successful" [#1a]

The same business representative reported that their private sector business comes primarily from word-of-mouth referrals and that clients seek the firm because of its capabilities for specific projects. [#1a]

- The non-Hispanic white male owner of a professional services firm noted that client referrals lead to new business for his company, especially as a subcontractor. He explained, "Our best marketers are our clients We're a small firm ... so [clients] would suggest that maybe another firm could be the prime and we could be the sub" [#3]

The same business owner went on to say that most of his firm's subcontracting work is with repeat clients. He said, "They find out that we can do the work for a lot less ... so it makes them more cost-competitive, and we frequently have more expertise in the area than they do." [#3]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, "When you get into the design side of it, it's all about relationships and communication. [It's] because you have to be able to communicate to me your vision, and I have to be able to take that vision and go do my work. In terms of being competitive, it's about relationship first, reputation second, competence ... or maybe price, third." [#5]
- The non-Hispanic white female owner of a DBE-certified construction firm said, "It's a matter of maintaining relationships. Being a business owner is not a part-time commitment. I stay very busy running this business." [#27]

- The non-Hispanic white male representative of a majority-owned goods and services firm stated that because repeat business is vital to the company's success, they have a long history with many of their customers. [#23b]

One business owner noted the importance of relationship-building in public sector contracting. The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said that relationships are especially important in public sector contracting. He explained that some buyers are accustomed to dealing with particular suppliers and are more comfortable continuing that relationship. [#39]

Some trade association representatives commented on the importance of relationship-building to members' success. [e.g., #6] For example, the Hispanic American male representative of a trade association said that he believes relationship-building is one of the keys to getting work in the industry. He continued, "I firmly believe [that] once you develop relationships, when someone needs something they are going to call people they have built a relationship with It does not matter whether it is a public sector job or private sector [job]. Not all the primes self-perform everything. Many of the primes sub out a lot of their work. When they need a subcontractor, they are just looking for somebody who they have faith in and who can do the work. It has nothing to do with certification when it is in the private sector." [#11]

Employees. Business owners and representatives shared comments about the importance of qualified employees. Many interviewees and survey respondents indicated that high-quality workers are a key to business success and sometimes difficult to find. [e.g., #28, #40, AS#3, AS#4, AS#6, AS#8, AS#14, AS#17, AS#21, AS#23, AS#24, AS#25, AS#29, AS#30, AS#33, AS#41, AS#45, AS#50, AS#53, AS#56, AS#57, PT#3d] For example:

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, "In my case, the major item increasing my costs is labor. It is getting harder and harder to find qualified, experienced laborers." She added, "Labor is a big issue in this market. It is very hard to find the right people. Millennials do not have the same work ethic as past generations. In addition, too few people are getting trained in skilled trades." [#20]

The same business owner later said, "From the company side I have the experience and expertise, but finding qualified employees with the right expertise is increasingly difficult." [#20]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm indicated that it's difficult to find personnel and labor. She explained, "I went to the [Colorado State University] career fair this year trying to recruit because there are labor issues ... and I could definitely see those young, male graduates gravitating towards the bigger, male-owned firms." [#12]
- The same business owner continued, "The schools are perpetuating that. That was how it was when I went to school. [Schools say], 'You need to go work for these big firms, [they're] the real thing.' You could see that alpha males at this career fair were all heading to talk to

them and a lot of females came and talked to us. It's hard for us not to be pigeon-holed as an all-female company." [#12]

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said her main concern is finding a skilled workforce. She said there is a stigma associated with working construction, and noted that little is done to alleviate that perception, particularly with Black Americans. [#13]

The same business owner continued, "It's really hard to find those who want to go through the apprenticeship program, and really be pipefitters, sheet metal workers, and plumbers, and all those things. It's just not what people think of as a career." [#13]

- The non-Hispanic white male representative of a majority-owned construction services firm stated that it can be difficult to find qualified craftspeople. He explained, "Colorado's economy is more diversified than it was in the 80s, so there is more pressure on the workforce. Everyone is competing for workforce." [#21a]
- A survey respondent said, "Labor resources [are scarce]. It is a struggle to find employees, and we are short-staffed." [AS#9]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified professional services firm said that finding good geotechnical engineers has always been a challenge. He said that this is because geotechnical engineers need an advanced degree, and that most civil engineering students go to work right after they get their undergraduate degree. He added that geotechnical engineering is very specialized, and that most people prefer a wider range of opportunities. [#14]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated, "I know the labor market is very tight right now, but I know how to treat my people and they stay around. I've even set up a bonus program, and it is working." [#19]
- The non-Hispanic white female owner of a DBE-certified construction firm said that she wishes she could hire more employees. She explained, "I have gone through many sources to find employees I might find one or two employees here or there, but they just don't stay when there are other types of work out there." [#27]

The same business owner later said, "The only problem my company is experiencing is the lack of available employees. The labor market is so tight [that] we can't find anyone that will stay around long term." She added, "[And] that is not a barrier experienced because of race, ethnicity, [or] gender. The workforce is just not there." [#27]

- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, "Finding drivers right now is definitely a problem. Maybe it's just my mindset. What kind of talent will I be able to attract as a Black owner? Would they rather work for someone who they think has more longevity? [If so], that starts to shrink the employee pool." [#36]

- When asked about barriers regarding labor and personnel, the Hispanic American female co-owner of an SBE-certified professional services firm said that finding someone who wants to work for a small firm is a challenge. She explained, “There is a perception that the firm will go out of business. We’ve had three individuals who would have been fabulous fits, [but] they went back to their firms [after they] were offered raises and other accommodations.” [#15a]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that the firm does face barriers in finding employees with the appropriate experience and expertise. He explained, “Technology is changing so rapidly. Finding employees with the right experience and expertise is a challenge.” He added, “[There’s] not enough young people ... entering our field.” [#23b]

A few trade association representatives commented on the importance of quality labor for member firms. One noted that members have no issues finding quality personnel, whereas another reported it is one of their membership’s biggest challenges. For example:

- The Black American female representative of a trade association said that members select subcontractors through relationships and capabilities. She added, “Especially as a DBE, you want to make sure you have a good team of folks that you can bring on for different projects. You want to be able to trust your work and trust your people.” [#6]
- The Hispanic American male representative of a trade association indicated that members have no issues finding personnel with adequate experience and expertise. [#11]
- The non-Hispanic white female representative of a trade association said that one of the biggest challenges her members face in the marketplace is finding qualified employees. She said, “Ten years ago, we had a recession [and] people left the industry Engineers have very transferrable skills. They can go into other things [like] business, finance, a ... variety of things, [so] they don’t come back.” [#38]

Regarding students that are studying engineering, the same trade association representative said, “There’s a fair number of people, students, going into science and engineering. But ... [a lot] would rather go into aerospace, biotech, [or] IT, [where] they can make a whole lot more money than being a civil engineer. Civil engineers’ salary starting out is at the bottom of the barrel.” [#38]

Some business assistance organization representatives indicated that member firms struggle to find quality employees. One representative noted that some potential workers face language-related barriers. For example:

- The Native American female representative of a business assistance organization said that for members, “the big struggle is finding employees.” She reiterated that this limits opportunities because some members “are even turning down work” due to a shortage of qualified workers. She added that the lack of employees is a problem for all members, not only those in construction. [#37]

- When asked about barriers that members face regarding personnel/labor, the Asian-Pacific American male representative of a business assistance organization stated, “A lot of members, especially in the restaurant industry, are having trouble hiring due to the impact of the marijuana industry. Why work at 10 to \$17 an hour in a restaurant when they can make \$35 or more?” [#33]

The same business assistance organization representative continued, “Language can also be a problem because immigrants use their native language in the back room of a restaurant, so English speakers may be uncomfortable. [However], that is changing because of the shortage of workers. You now see Mexicans working in a Chinese restaurant.” [#33]

When asked about barriers regarding experience and expertise, he commented that while immigrant members have good experience and expertise, they still face barriers due to language challenges. [#33]

One business owner reported that employee recruitment is a challenge when competing against larger firms. The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that it is difficult for a firm his size to compete with large, 60-person firms for employees, as his firm is viewed as less stable in the long term. [#22]

Some business owners indicated that hiring good employees is not a challenge for their firm. Comments include:

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm indicated that hiring good employees is not a challenge for firms in her industry in the local marketplace. [#2]
- The Hispanic American male owner of an architectural and engineering firm reported that his firm has no problems retaining good engineers. He went on to comment, “The good ones have the gumption to go out and look for the kind of job they want. If they don’t know the formula for calculating loads off the top of their head, [we’re] not interested in them.” [#16]
- The non-Hispanic white male owner of a goods and services firm reported that finding quality employees is not an issue for the firm. [#10]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm indicated that finding good employees is not a barrier for her firm. She stated, “[On] occasions when I need to hire, I contact Mi Casa Resource Center and also check with friends and family.” [#35]

Equipment, materials, or products. Some interviewees discussed equipment and materials needs, and the importance of having the right operational equipment and materials at a reasonable cost. [e.g., #2, #33, #34] For example:

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm indicated that having the right operational equipment at a

reasonable cost gives her firm an advantage over others in the industry. She reported that their equipment is maintained in-house, which allows them to keep maintenance costs down. Others in the industry, she explained, have to take their equipment to outside companies to have the maintenance work done. [#19]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that her firm does not have a huge investment in equipment. However, she added, “Don’t get me wrong, I spent over \$20,000 last year in software maintenance, and that’s just standard upkeep. That’s not because we had a problem. That’s just the price of licensure for the software and licenses that we hold.” [#5]
- Regarding how to stay competitive in his industry, the non-Hispanic white male owner of a specialty services firm said, “You have to be extremely flexible in what you print to be competitive these days. Our machinery [tries to be] flexible. There are only one or two machines that could do [the] many different ... types of jobs out there now.” [#30]
- Regarding equipment, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “It’s terribly expensive. I’m probably looking at a truck lease, which of course is more expensive.” [#36]

A business assistance organization representative commented on the high cost of construction equipment. The Native American female representative of a business assistance organization stated, “Some of the construction equipment is very expensive. We have a relationship with [a national rental firm], and they sometimes give us a heads-up when they are selling their equipment at an auction.” [#37]

For some interviewees, equipment is not needed or is not a challenge to obtain for their firm. [e.g., #12, #22] Comments include:

- The Hispanic American female co-owner of an SBE-certified professional services firm indicated that the firm has no issues acquiring the equipment that they need. [#15a]
- The non-Hispanic white male representative of a majority-owned goods and services firm indicated that acquiring equipment is not an issue for the firm. He added that they have no issues obtaining inventory or other materials and supplies. He explained, “Most large ... wholesalers stay well stocked. The only barrier for any contractor doing business with us is meeting our credit standards.” [#23b]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that equipment is not an issue for the firm because they generally use prime contractors’ equipment on projects. She added that they have no issues obtaining inventory or other materials and supplies. [#20]
- The non-Hispanic white male representative of a majority-owned construction services firm stated that subcontractors who can meet a supplier’s credit requirements should have no problem obtaining necessary materials and supplies. However, he noted that if they cannot meet the credit requirements they face a barrier to doing business. [#21a]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she has no problems getting the equipment she needs. She added that she has no issues obtaining inventory or other materials and supplies, and noted that she has an MWBE-certified contact who sells her cleaning supplies. [#35]
- The non-Hispanic white male owner of a goods and services firm reported that obtaining necessary equipment is not a challenge for the firm. [#10]

One trade association representative said that small firms sometimes get equipment “through their prime.” The Hispanic American male representative of a trade association said that he is not aware of members experiencing barriers related to equipment. He added, “A lot of our guys, small guys, will go through their prime to get the equipment that they need, especially for specific projects.” [#11]

Competitive pricing. Business owners and representatives discussed the need for competitive pricing and credit when seeking business success. [e.g., #20, #34] However, for some, staying competitive is a challenge. For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said that cost and pricing are important factors to business success. She added, “MBEs are often concerned that they won’t get the job unless they cut themselves off at the knees regarding pricing.” She said she has been advised to analyze how much it really costs to run her business as opposed to only telling customers what they want to hear. [#13]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said that he has experienced a few “ups and downs” since starting the firm, though he stuck to his business plan. He went on to say, “You still have to compete on price, and I will. Corporate America’s perception is that small businesses are unable to compete, but we’ve been able to defy that because we can compete on service and technology.” He also noted that he has a GSA Schedule Contract with the federal government, which he believes contributes to his competitiveness. [#39]
- The Hispanic American male owner of a specialty contracting firm highlighted the importance of competitive pricing as vital in running a successful business. He explained, “It takes the willingness to accept small profit Most people’s biggest mistakes happen when they put their bottom line as their number one priority. If they don’t make 30, 40, 50 percent profit on the job, they’re done. They’re ready to hang it up and they’re not willing to do the work and pay the price that it takes to get to that level. To be successful, you have to be disciplined enough to stay a steady course, [one] that will not get you rich overnight.” [#4]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that in his industry materials and supplies are very expensive, which means he has to buy them in large quantities to get favorable pricing. He noted that this large volume creates a storage issue, which is also expensive. [#36]

One business assistance organization representative noted the importance of competitive pricing for goods and services firms. The Native American female representative of a business assistance organization reported that competitive pricing is a key to business success, especially for goods and services firms. [#37]

Financing and access to capital. Many firm owners reported that obtaining financing was challenging and important in establishing and growing their businesses. [e.g., #12, #21a, #28, #35, #36] Some indicated that financing was necessary to purchase equipment or survive poor market conditions. Comments include:

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said obtaining financing was a challenge when she started her business. She said the first bank she approached for a line of credit turned her down. She said the second bank she approached, a local bank, granted her the line of credit and has been her bank ever since. [#2]
- The Black American and veteran male owner of a general contracting company stated, “When I first moved here, getting financing was a challenge. I didn’t have a lot of credit I needed cash for supplies and updated equipment. But because I have money coming in now, that isn’t an issue anymore.” [#29]
- When asked about financing, the non-Hispanic white male representative of a majority-owned goods and services firm said that financing can be a problem for firms of all sizes if they have cash flow issues. [#23b]
- When asked what it takes to be competitive in his industry, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “A lot of money. You need to be very well capitalized because [you] need to be able to buy a commodity at a good price, then hold it long enough to make money. In order to be a distributor you’re going to need storage ... and the trucks to deliver [my product] are very expensive.” [#36]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, “Obtaining financing as a small business has been an issue. The way that banks evaluate small businesses makes a line of credit a real challenge. I do not have much W-2 income because I just utilize business income to help pay the mortgage ... and they do not count that as income.” [#20]

One business assistance organization representative reported on his own challenges in obtaining financing as a small business owner. When asked what it takes for a firm to be competitive in the local marketplace, the Asian-Pacific American male representative of a business assistance organization stated, “It boils down to financial resources and capacity. I have a small business myself, so I speak from experience. It takes a high level of integrity, professionalism, [and] accountability. Being able to secure a 2 to \$4 million loan to enter into the airport or have the capacity through employees ... is very difficult.” [#33]

Some business owners indicated that financing has not been a challenge. [e.g., #8, #22] For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said that, to her knowledge, obtaining financing is not a barrier to firms in the local marketplace. [#5]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that his firm is self-funded and that financing is not a barrier. [#9]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that financing is not a problem for his firm. [#14]

Bonding. Business owners and representatives reported on their access to bonding. Some experiences reported are positive, some are negative. For some, bonding is misunderstood or not obtainable.

For more established businesses, bonding is obtainable. But for newer, smaller, and poorly capitalized businesses, securing bonding is difficult. [e.g., #28, #31] Comments include:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said her firm is represented by a good bonding company and have had no claims. She said the city requires a bond for contracts over \$50,000, and said the bonding company considers the level of risk when it comes to collecting on invoices, paying suppliers, and whether a firm has a line of credit as a backup in the event of non-payment. [#13]

The same business owner added, “It’s different if you are a minority-owned business It’s just the way of the world. You know, if I could do a magic wand and change it, and make everybody equal, I would, but that’s not how it works. It’s just different.” [#13]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated that her exposure to potential barriers is limited. She explained, “When I first started my business, my bonding limits were very low. That can be very prohibitive because you know you can do bigger work, but low limits essentially keep your revenues at a cap.” She said that she was able to acquire additional bonding limits through a bank she had an established relationship with. [#19]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “Bonding is always a question for us because we tend to be suppliers and installers, and normally that involves companies that are much larger in size.” He went on to comment, “You can mark N/A [for bonding on the proposal], but how is that interpreted? Are they interpreting [that] it’s not available or [that] you’re not the size to be able to bond, or [that] you don’t have a bonding capability?” [#9]
- The non-Hispanic white male owner of a construction services firm stated, “It’s difficult to get large liability insurance coverage and ... bonding. [Because] my company is small, insurance companies and bonding companies don’t want to take the chance. Even though I have the experience, it is difficult.” [#31]

Other interviewees reported little or no problems obtaining bonds, or that bonding was not required in their industry. [e.g., #5, #14, #35] For example:

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, “I’ve been able to secure and obtain bonding when needed, but I haven’t recently had to bond. It is a big reason why I stick to subcontracting.” [#20]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm indicated that bonding is not an issue for her firm, and said it is usually not required in her industry. [#2]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that in their industry bonding is not required. [#23b]
- The non-Hispanic white female co-owner of a specialty services firm reported that bonding is not required in her industry. [#8]
- The Hispanic American male owner of an architectural engineering firm reported that he has never had to bond for anything. [#16]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said that, to her knowledge, obtaining bonding is not a barrier to firms in the local marketplace. [#5]

Insurance. The study team asked business owners and representatives whether insurance requirements and obtaining insurance presented barriers to business success.

Some could secure insurance, but the challenge of sustaining it, especially for small businesses, is reported to be a barrier. [e.g., #36, #38] For example:

- In regards to obtaining insurance, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “Health insurance is a barrier. Trying to attract quality people away from larger firms and being able to provide benefits is a huge barrier for small businesses.” [#5]
- The Hispanic American male owner of an engineering firm said that sustaining professional liability insurance has always been challenging for his firm due to its high cost. [#16]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, “Insurance is a big issue working at [Denver International Airport] because I pay almost double for my general liability [there], but without it I can’t work at the Airport.” [#20]
- Regarding barriers to working in the local marketplace, a survey respondent said, “It’s impossible to meet requirements to even start the bidding process [due to required] insurance coverage.” [AS#16]

- Regarding insurance requirements, the non-Hispanic white female representative of a Hispanic American female-owned DBE-, ACDBE-, MWBE-, SBE-, and EBE-certified consulting firm said, “The city [requires] minority business partners to carry insurance at the level of the prime contractors. As a self-funded start up, insurance at this level is difficult to afford, particularly as a MWBE on an on-call contract at [Denver International Airport].” [WT#7]

Some interviewees reported that insurance requirements or obtaining insurance were not barriers, but indicated that insurance is an important, and sometimes costly, business expense. [e.g., #23b, #35] For example:

- Regarding insurance, the Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said it is very important to work with quality insurance companies that know your firm well. She said, “It’s a matter of having the [right] network to make sure you’re getting the most accurate information [about] what you need. It’s expensive when you start, but it pays off. It really does.” [#2]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that his firm faces no barriers regarding insurance. [#9]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that his firm always shops around for the best insurance rates and indicated that acquiring insurance is not a problem. He went on to say that if they get a large project that requires an increase in liability insurance, such as \$3 million instead of \$1 million, it usually requires a change in carrier because some carriers have a cap on what they will cover. [#14]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that he has not experienced any barriers or discrimination regarding obtaining insurance or insurance requirements. He commented, “Just pay what they ask.” [#22]

Other keys to business success. Several business owners and representatives mentioned keys to success that do not fall into the above categories. One interviewee noted the importance of keeping up with technological advancements in the industry. Comments include:

- When asked what it takes for a firm to be competitive in his line of business, the non-Hispanic white male representative of a majority-owned construction services firm said, “I’d say [it’s] innovation, consistent processes ... trained staff, and good management. That’s how you’d be more competitive. If you’re not on top of your game, you can’t make it.” [#21a]

The same business representative continued, “The technologies that are coming out are going to be way beyond what they’ve ever been. A lot of different control systems are done completely different now. You can’t just put in a light fixture anymore. You have to build a programmed computer before you can turn that light on, so it’s getting pretty technical.” [#21a]

- When asked what it takes for a firm to be competitive in his line of business, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “[It takes] creativity. Thinking outside the box. Bringing innovative solutions to the table, even in the RFP stage.” [#22]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that learning each public agency’s process is a key to business success. He said that working with CDOT is easiest for his firm because they are very familiar with their processes and people. [#14]
- When asked what it takes for a firm to be competitive in the industry, the non-Hispanic white male representative of a specialty services firm stated, “[It’s] price, capabilities, ability to meet deadlines on everything from weddings to seminars in Keystone. We work daily on all of these factors.” [#34]
- When asked what it takes for a firm to be competitive in her line of work, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “[It’s] who you know, [and having] good references, certification, and accessibility to opportunities.” [#35]

A trade association representative said that monitoring a firm’s growth is a key to business success. The Hispanic American male representative of a trade association said that in order for a firm to be competitive in the local marketplace, owners need to ensure that they carefully monitor the growth of their firm. He stated, “If you grow too fast and not wisely, you are going to lose your business. I have seen that happen. Or you slide backwards, so it is a matter of knowing how to grow your business. Do not take too much that you cannot handle [it].” [#11]

D. Doing Business as a Prime Contractor or Subcontractor

Business owners and representatives discussed:

- Mix of prime contract and subcontract work;
- Challenges for small and minority- and women-owned businesses when seeking work as prime contractors/consultants;
- Challenges for small and minority- and women-owned businesses when seeking work as subcontractors.

Mix of prime contract and subcontract work. Business owners described their experience working as prime contractors and/or subcontractors.

A number of firms that the study team interviewed reported that they work as both prime contractors and as subcontractors/subconsultants, and discussed their experiences. [e.g., #1b, #4, #7, #8, #12, #13, #15a, #16, #26] For example:

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated that her firm “subcontracts about 98 percent of the time.” She added, “Occasionally there will be a job that we prime, but not very often.” [#19]

When asked about the firm’s work as a prime or subcontractor, the same business owner stated, “Customers are starting to know what type of quality of work we do. [We don’t] have problems in finding work.” She added she is networking with companies that could possibly use their services. [#19]

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “I would say that we’re prime 90 percent and sub 10 percent.” When asked why his firm typically functions as a prime contractor, he stated, “It’s that whole issue that we’re only hired by engineers on a large project to satisfy their goal. We eat at the table where an eight-person firm is invited. [#22]

When asked if primes that use him on public sector work also use him on private sector work, the same business owner said, “Nope. Most of the big primes we work with don’t do private sector work.” When asked if he markets the firm to primes, he said, “Yes, at the networking events. It’s been very successful for us.” [#22]

- The non-Hispanic white male owner of a professional services firm reported that his firm works as a prime contractor 75 percent of the time and as a subcontractor 25 percent of the time. [#3]

The same firm owner explained that sometimes his firm begins a contract bid as a prime contractor then teams up with another firm to get the contract. He stated, “A common experience for us is that we would consider responding as a prime ... then a potential prime contacts us and asks if we would like to team [up] with them as a sub and reduce the competition.” [#3]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that her firm works most often as a prime contractor. When asked how the firm finds work as a subcontractor, she said they use Rocky Mountain BidNet. She explained, “You can identify who has downloaded RFPs for any given project, then you can call them up and schmooze them, and tell them that you’d like to be on their team. We do that sometimes. We’ll just randomly cold call architects and try to be on their teams.” [#12]
- The non-Hispanic white male representative of a majority-owned construction services firm reported that the firm performs as both a prime contractor and subcontractor. He noted that this mix of work varies yearly. [#21a]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm indicated that her firm works as both a prime contractor and a subcontractor. She later noted that they prefer to work as a prime contractor. [#2]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that his company performs an equal amount of prime contract and subcontract work. [#14]

The same business owner added that they usually perform certain specialized work as a subcontractor. He said that their construction management work is often performed as a prime contractor. [#14]

Most trade association and business assistance organization representatives said that members work as both prime contractors and subcontractors. [e.g., #6, #33, #40] One said that most perform as subcontractors because they lack the “resources” to work as a prime. Comments include:

- When asked if members work as both prime contractors and subcontractors, the Native American female representative of a business assistance organization said, “Obviously there are not as many prime contractors because it takes a lot of resources The majority are subs.” [#37]

The same business assistance organization representative continued, “I think many people find a sweet spot regarding their company size. For those who want to grow and eventually prime, it can take a long time. We encourage them to develop a relationship with the SBA and take advantage of their programs, like the [SBA] 8(a), if they want to grow their companies.” [#37]

When asked how members get on projects as subcontractors, she said, “Usually they’re out networking. They’ll come to one of our events and ask me to make introductions. They’ll go out to the community themselves. Sometimes a member will provide a venue. [A large sub] recently had an open house and introduced members to primes and other subs.” She noted, “Construction is relationship-based.” [#37]

- The Hispanic American male representative of a trade association reported that certified members mostly perform as subcontractors. When asked how members find this subcontract work, he said that it’s usually through prime contractor outreach. He explained, “Typically, when they are getting ready to put their packages together, primes reach out to firms that they have relationships with and talk to them about submitting a bid proposal to be part of a team. For the record, they do send communications out to all certified firms, but the personal [out]reach is only to firms that they have relationships with.” [#11]

When asked if members prefer to work with some primes over others, the same trade association representative said, “A lot of it has to do with prompt pay, cost of materials, and a various number of other things.” [#11]

- The non-Hispanic white female representative of a trade association reported that members work as both prime contractors and subcontractors. [#38]

Some business owners said they sometimes hire second-tier subcontractors when they are hired as a sub. [e.g., #21a] Others said they do not. [e.g., #2, #20] Comments from the in-depth interviews include:

- Regarding second-tier subcontractors, the non-Hispanic white female co-owner of a specialty services firm reported that she will sometimes hire second-tier subcontractors. [#8]

When asked how she selects these firms, the same business co-owner said that her first step is to obtain a sample and check their product's quality. [#8]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that his company does hire second-tier subcontractors. [#14]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that she hires "specialty" subcontractors to perform as second-tier subcontractors to her firm. She added, "We typically focus on commercial, industrial, and transit-related design, but I know people who can [be a] subcontractor on the portions of work we don't do." [#5]

When asked how she selects these second-tier subcontractors, the same business owner commented, "I'm going to steer business to somebody who is going to steer business to me." [#5]

- When asked if his firm hires second-tier subcontractors, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that his firm always subs out the installation services to other small business. [#9]

When asked how he selects these subcontractors, the same business owner said he usually works with those whose work ethic and capabilities are familiar. He explained, "Because of what we do, we have to know the people that are going to work. So, we have two different subcontractors that we work with, and one of them we've worked with since the inception of our business. The second company is one that we've done work with over the last two years." [#9]

He went on to say, "We work with a lot of different entities, so we work with landscape architects, developers, and commercial property management firms. And sometimes, particularly with the commercial property management and the development firms, we may have somebody who really wants to use our product. They may [ask if we can] handle [it]. He said that he might interview a few firms that they have done business with and invite them to work with them on that particular project. [#9]

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that he occasionally hires second-tier subcontractors. He explained, "Building system subs, structural, mechanical, [and] electrical. Generally, it's when an engineering firm is the prime and they want us to do the building, so we do everything associated with the building." [#22]

- The non-Hispanic white male representative of a majority-owned specialty services firm reported that their process for selecting sub-vendors is driven by what the customer wants. He said that the company depends on relationships to find suppliers that carry specific items that customers might need [#34]

The same business representative later said that there are sub-vendors that they try to use all the time. Regarding these sub-vendors, he said, “We all know what needs to get done, and we know the quality of their product.” [#34]

- When asked if she ever hired second-tier subcontractors, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm stated, “For [one] project I hired an MWBE supplier for my ... products.” When asked how she selected this subcontractor, she said, “[I knew] them through the meetings I go to” [#35]

Some firms that the study team interviewed reported that they primarily work as prime contractors/consultants or prefer prime contracting work. [e.g., #2, #4, #7, #15a]

For example:

- The non-Hispanic white male owner of a goods and services firm reported that the firm works exclusively as a prime contractor. He explained, “It’s extraordinarily rare that we are subcontracted out with someone else. We usually work directly with the people. The nature of the industry is such that there are very specific needs that people have, and either they don’t know what they need or it’s not something that can be farmed out. So, it’s easier to find the person who can take care of the thing for you rather than go shopping around for vendors.” [#10]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm stated that his company is “all prime.” [#39]
- The female representative of a non-Hispanic white male-owned professional services firm reported that her firm prefers to be a prime contractor, as it involves more client interaction and more responsibility to ensure that the deliverables and the requirements of the client are met. [#1b]
- The non-Hispanic white female co-owner of a specialty services firm reported that they mainly work as a prime contractor, though there have been cases where they served as a subcontractor. She added that their role depends on the scope of the project. [#8]
- The non-Hispanic white male owner of a construction-related firm reported that the company is almost always the prime contractor on the contracts they pursue. He added, “I can’t imagine a project so large that we ... would require an additional engineering company.” He explained, “Engineering companies are usually the upfront piece that designs the job from the owner’s vision. It really isn’t necessary to bring in more than that initial company.” He went on to say that they have never used a subcontractor, and commented, “We have all the assistance we need from our own staff.” [#25]

- The female representative of a non-Hispanic white male-owned professional services firm indicated that she prefers to work as a prime contractor. When she does work as a subcontractor, she said there is little difference working with public sector versus private sector primes. She later said that private sector primes expect her to be a mentor in addition to “getting [her] work done.” [#13]
- The Subcontinent Asian American male owner of a specialty contracting firm reported that he works primarily as a prime contractor. He added that he sometimes hires other contractors to assist him, as needed, and commented, “I trust the companies I have worked with before, and I try to use them when I have a bigger job.” He went on to say, “I don’t know if the companies I use are certified, I just want someone that can do the job.” [#18]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm indicated that he prefers prime contracting work because it allows for more control over the project and often includes faster payment. [#14]
- The non-Hispanic white male representative of a majority-owned construction services firm indicated that the firm works mostly as a prime contractor. When asked how they select subcontractors, he reported that they select through a qualification process “to make sure that whatever work they perform, they’re qualified to do [it] and don’t get themselves in trouble, or [the firm] in trouble.” He noted that this process is the same for both public and private sector work. [#21a]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm indicated that he prefers prime contract work. When asked how he hires subcontractors, he said, “We select our subs based on their knowledge of the project type, if they have worked with the client before, if they’ve worked with us before, and their fees. That’s the same for private as well as public sector work.” He noted that in the private sector he doesn’t have to consider goals when hiring subcontractors, while in the public sector he does. [#22]

When asked if he uses the same subcontractors on multiple projects, the same business owner said, “Yes, it’s driven by good relationships. I know I’m going to get the best service. [I use them if] they are going to be responsive, they are good solid performers, [and] they’re not going to get me in trouble.” [#22]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that they always work as a prime contractor “on the residential side,” which accounts for most of the firm’s work. Regarding subcontracting, she said, “The role of subs on big projects for [my field] is a pretty undesirable role because you are very far downstream in the process [of] working on deadlines You’re the last person who gets the drawing set.” [#12]

The same business owner continued, “I have made it a priority for our company that I won’t have my staff work all day Saturday and Sunday to meet some developer’s goal. Also, [that] type of work means zero creativity. So, we really shy away from that subcontractor work. We have not pursued it because we are more interested in doing creative work.” She

added, “On government contracts it’s the same thing. We have a [Denver Public Schools] contract, and we’re always last [receiving the drawings].” [#12]

When asked if her firm hires subcontractors, she reported that they never sub out design work, though they partner with other types of firms. She added, “A lot of times, we’ll have the client hire a civil [engineer] or someone for the things that we can’t do rather than administer contracts. We’re a small company [and] we just tell the owner, ‘You know what? You need to hire the civil engineer. You can hire them yourselves. I’ll do the report we need or provide the information, and you can just pay him and then we won’t mark him up’ So, we don’t put together big teams. We haven’t had that experience yet.” [#12]

Some firms said they do not hire subcontractors. [e.g., #34, #36] Comments include:

- When asked if the firm works mainly as a prime contractor or subcontractor, the Hispanic American male owner of an architectural engineering firm stated, “We prefer to contract directly with the owner of a project. If a subcontractor is needed, we will recommend a firm to the owner, but the client has to hire them directly. On rare occasions we sub to an architect, but would rather contract directly with the owner.” [#16]
- When asked if he works primarily as a prime contractor or subcontractor, the non-Hispanic white male owner of a construction services firm stated, “I’m not interested in those roles. I worked for a large mechanical company and saw first-hand the difficulties both of those entities had in trying to satisfy the owner. The way my company works is someone calls me, I investigate what exactly they want me to do, [and] I agree to do the job and get paid.” [#31]

The same business owner continued, “If the job is too big, occasionally I will ask other independent contractors if they are interested in working with me. Occasionally, I will get a call from another independent contractor and he will ask me if I’m interested. That arrangement works best for me at this stage in my business.” [#31]

- The Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, “We don’t prime or subcontract projects. We are hired to do the [work] and we have the employees to do the entire job. I can’t imagine when a company would call us in as a prime or subcontractor. The type of work we do is done by us completely.” [#32a]
- The non-Hispanic white male owner of a construction firm stated, “I am an independent [contractor]. I don’t work with primes or subs. When I need help on a project, I will call others that I have done work with on other projects.” [#24]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, “The firm has the business model of self-performing contracts now. We don’t really have prime and sub relationships anymore. There are occasions when we do have to hire subs to do a particular piece of a job, but those instances are really becoming fewer and fewer. We have found that the self-performing model allows us to be more in control of the schedule and quality.” [#28]

The same business representative continued, “[We] don’t [anticipate] going back to the traditional process of acting as a prime and finding subs to work under the company. If we did go back to the traditional model and found that we needed subs for contracts, we would use those we have used before. I believe some of them are certified, but I don’t know [for sure].” She added, “We have been in the construction business for a long time. We have a list of subs that we would reach out to and determine if they would be interested in the project.” [#28]

- The non-Hispanic white male owner of an engineering company indicated that he works mainly as a prime contractor. He said, “I am a principle engineer on the residential work I do. I don’t work with primes or subs. As an engineer, I am in charge of my projects.” [#26]
- The Black American and veteran male owner of a general contracting company indicated that he works mainly as a prime contractor. He said, “I work for myself and get my own contracts. I don’t consider the individuals and companies that work for me as subcontractors. We are all independent contractors. They just do what I ask them to do and I pay them.” [#29]
- The non-Hispanic white male representative of a majority-owned goods and services firm said that the firm is neither a prime nor a subcontractor. He explained that they sell mainly to subcontractors, and only to primes “when [we’re] told [we] have to.” He went on to say that they mainly sell to subcontractors because subs perform the majority of electrical work. [#23a]
- When asked if the company works as a prime contractor or subcontractor, the non-Hispanic white male owner of a specialty services firm said, “Our company doesn’t have those types of business relationships. Our work is between a customer and the company. We have never worked in that way, and I can’t imagine that type of business model in the future at all [due to] the type of work we do.” [#30]

Many business owners and representatives discussed their firms’ efforts to include MBEs, WBEs, and other small businesses in contracts, and shared experiences working with these firms. Most reported soliciting SBE/MBE/WBE small businesses for bids or quotes. Comments include:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported, “We’ve hired subs to do some asbestos jobs that are too large. We typically stick with minority subs, and then we use subs that don’t have a bad reputation with the BBB or Yelp, or things like that. But, it’s primarily small business subs that we use.” [#7]
- The non-Hispanic white male representative of a majority-owned construction services firm reported that they do solicit SBE/MBE/WBE subs for bids, mainly when there are contract goals. He said they have relationships with some certified firms, and that others approach them for opportunities. He went on to say that if there is a need and they are qualified, they will be hired. [#21a]

The same business representative later indicated that the firm does not make these same solicitations for private sector work. However, he noted that there are MWBEs they use for private work due to their expertise. [#21a]

When asked if the firm's experiences working with SBE/MBE/WBE subs versus non-SBE/MBE/WBE subs differ, he reported that they do not because the firm holds all subcontractors to the same standard. He explained, "We have a consistent way of enforcing our policies and procedures, and making sure that they bond their work if it's anything over \$50,000 That's [just] company policy." [#21a]

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said that when he does contract out, he does so with "people of color when [his firm] can." He added, "I think that is important." He noted that he does business with subcontractors he knows and has a relationship with. [#39]

The same business owner continued, "You still have to compete. The sub still has to be competitive [and] have their resume. Just because someone is Black, Hispanic, or Indian doesn't mean they are going to do business with me A sub is a sub. It doesn't matter what color they are. They either do the work or they don't do the work." He added that he takes the same approach for hiring subcontractors in both the public sector and private sector. [#39]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that he often solicits MBE/WBE/SBE firms for bids and quotes. He said that he has built reciprocal subcontractor relationships over many years, and noted that he uses some of the same subcontractors for both public sector and private sector work. For example, he said that he frequently uses a particular WBE-certified drilling company because they have appropriate equipment. [#14]
- When asked how often he solicits SBE/MBE/WBE subs for bids/quotes, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that he frequently does. When asked how he goes about this, he said, "Usually at networking events, and they also generally find me. They market themselves to me." [#22]

When asked why he solicits SBE/MBE/WBE subcontractors, the same business owner said that he is generally expected to help meet the goals with his subcontractors on public projects. He went on to add, "I know what it's like to be a DBE/MWBE/SBE." He noted that he has used the same certified subs for both public and private sector work, and that he experiences no differences when working with certified subs versus non-certified subs. [#22]

- The female representative of a non-Hispanic white male-owned professional services firm indicated that she makes efforts to include other small businesses in contracts. She said it's important to "reach back and help people the best as you can, or at least give them an opportunity." She went on to comment, "I can't guarantee you a job, but I can definitely guarantee you an opportunity." [#13]

When asked about her experience working with minority- and women-owned firms versus non-Hispanic white male-owned firms, the same business owner said, “It’s access to capital. I find that my SBEs are white firms with more access to capital. They just [have it]. They have a lower bonding rate than the MBEs that we work with.” [#13]

The same business owner added that the expense of hiring MBE/WBE firms is higher than it is for non-Hispanic white firms. She added, “They’ll have more opportunities in the private sector than my MBEs [or] WBEs ... so they have worked more and know different people.” [#13]

- The Hispanic American female co-owner of an SBE-certified professional services firm said that the firm uses a select group of subcontractors that they are familiar with in disciplines like electrical, HVAC, and plumbing. She explained that these subcontractors are generally small firms, and added, “In the end, it is very price-generated.” She went on to say that they do not check certifications because they do very little public work. [#15a]
- When asked if she solicits MBEs, WBEs, and other small subcontractors for quotes as second-tier subs, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “I always try to hire a MWBE, [and] I find quite frankly [that] I get better service. They take me seriously. When I [try] to hire a larger firm, I’m just such [a] small potato to them that I don’t get service.” [#5]

The same business owner continued, “Sometimes I’ll put out an RFP For instance, recently I had a project in North Denver that my client wanted a soil engineer [for], so I wrote up an RFP and sent it out to three companies that I had done business with before [When I] got their proposals back ... it became very clear whom to hire. Another time, for residential work, I just went to the person I [knew was] competent. That was for a private contract.” [#5]

- When asked if she solicits SBE/MBE/WBE subs for bids/quotes, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she used an MWBE-certified cleaning supplies company on her only public sector contract. She added that she also uses MWBE firms on private work. When asked why she solicits help from MWBE companies, she said it’s because she “know[s] what it’s like to be an MWBE company.” [#35]

When asked if the process of utilizing SBE/MBE/WBE subcontractors differs from non-SBE/MBE/WBE subcontractors, the same business owner said, “It is the same, [though] there is more paperwork to use an SBE/MBE/WBE on a public project.” She added that they sometimes use the same subcontractors repeatedly because “[they] trust each other.” [#35]

- The female representative of a non-Hispanic white male-owned professional services firm reported that the firm looks for minority- and woman-owned businesses to work as subcontractors. She explained that the firm uses a list published on the City and County of Denver website, but notes that the list is not often updated. [#1b]

- The Hispanic American male owner of a specialty contracting firm stated that his firm does hire SBE/MBE/WBE subconsultants when there is a requirement in place. He noted that this does not happen often, however, as there are rarely goals on bids that his firm pursues. He also added that for private-sector projects, his firm has never been required to seek out subconsultants with specific certifications. [#4]
- When asked about her work as a prime or subcontractor, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said that she does not specifically target MBE/WBE or SBE companies when hiring subcontractors. She stated, “[My firm] doesn’t use subs that often. I am looking for companies that can do the work of the scope. I have the same philosophy for public and private work. There are not that many ... companies [in my field] out there. We are trying to build a good reputation.” [#19]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm stated, “I think I’ve worked with an SBE-, WBE-, [or] MBE-certified firm maybe once so far, but the potential does exist to do [more of] that.” [#9]
- When asked about his firm’s efforts to include minority- and women-owned firms in contracts, the male representative of a non-Hispanic white male-owned firm said many firms included on the list published by the City and County of Denver are not able or interested in doing the work. [#1a]
- When asked if the firm solicits SBE/MBE/WBEs for bids/quotes, the non-Hispanic white male representative of a majority-owned goods and services firm stated that the firm does not solicit bids because they function as a supplier. Therefore, he added, contractors approach them for business. He went on to say that the firm does not ask about certification because the certification status of firms they supply to is irrelevant to them. [#23a]
- The non-Hispanic white female owner of a DBE-certified construction firm reported, “There have not been any jobs in the private sector because the road work responsibilities are handled by municipalities. As a result of the type of work we do, there is no need to solicit SBE, MBE, [or] WBE companies.” [#27]
- The non-Hispanic white male representative of a majority-owned specialty services firm said that they are not aware if their sub-vendors are certified firms. He commented, “We’ve never asked who owns the business or if they were certified It’s probably something we should ask about with other vendors we know” [#34]
- Regarding finding subcontractors in the public sector versus the private sector, the Black American male co-owner of a veteran-owned specialty contracting firm said, “Public sector subs typically already have a contract agreement with a school district or a city, or something like that. The private sector is pretty much general marketing, and there’s no set format within the private sector. In the public sector, usually you have a set price point and set standards.” [#7]

When asked if his firm uses the same subcontractors in both sectors, the same business co-owner said that they rarely do. He explained, “On occasion we will, but we typically use public sector subs because they understand the work environment in the public sector. They understand what ... what certifications you must have, the standards you must have, and things of that nature.” [#7]

Trade association and business assistance organization representatives also discussed member firms’ efforts to include DBEs and other small businesses in contracts. Most indicated that members make a genuine effort to include such firms. For example:

- When asked if members solicit DBE subs for bids/quotes, the Asian-Pacific American male representative of a business assistance organization said that they do. He noted that the frequency in which they solicit DBE subs is “a function of how often they get contracts with the big primes.” He added, “When they do solicit DBEs, they rely on a network of cohorts because small businesses feel more comfortable working with another small business.” He went on to say that members using DBE subs do so for both public and private sector work. [#33]
- The Native American female representative of a business assistance organization reported that members do solicit bids/quotes from DBE subs, and noted that “the [organization] is very invested in the DBE program.” She added, “[Members] will first do direct solicitations. If they’re not getting the response they want, they will contact me because the [organization] has a database that identifies members by keywords. So, based on the keywords I can send out targeted solicitations. If that doesn’t work, the American Indian Procurement Technical Assistance Center will jump in there and help contact DBEs. So, we have a couple layers in our outreach.” [#37]

When asked why members choose to solicit bids/quotes from certified firms, the same business assistance organization representative said, “It’s to help meet the goals. But it’s also to help members of the [organization] because they remember how hard it was to start a company.” She also noted, “For the public work they select subs based on the requirements of the project, and they check whether potential subs have ever worked on a public project ... [and if] they know the expectations In the private sector they are more open to giving people a shot.” [#37]

When asked about members’ experiences working with DBE subs compared with non-DBE subs, she said, “If they’re working with DBE subs on a public project, they know those people are pretty familiar with the work processes. If they use a non-DBE on a public project, they ask [themselves], ‘What is the learning curve going to be?’” [#37]

- The non-Hispanic white female representative of a trade association reported that members working as prime contractors find other small businesses to team with by attending networking events. She added, “We have meetings all the time. That’s one of the benefits of belonging to an organization like ours. You’re part of a membership, and networking opportunities are available with the people that you want to team with, that go after the work that you’re interested in, whether it’s CDOT or whether it’s the City and County of Denver.” [#38]

The same trade association representative later noted that it can be difficult for members to find DBE subcontractors specifically. She said, “[Members] need to have them. They need to meet the goals, so they’re looking for them and the number is shrinking. I have a number of MWBEs that have been sold to large companies.” She continued, “We’ve got a lot of certified firms, but they may not be enough in all the different disciplines to get a good pool of people going after that work. And because there’s so much work out there, you would even have less.” [#38]

She went on to say that many large primes meet DBE goals by using geotechnical firms, because the primes do not provide those services. She added, “You know [that] when they have to meet the goal, that’s how they’re going to do it. [However], some of those [geotechnical firms] have grown quite well over the years, and one in particular has already graduated. A second one will graduate [in the] next few years.” [#38]

- When asked what members’ experiences have been working with DBE subs versus non-DBE subs, the non-Hispanic white male representative of a trade association said that members first look for firms that are capable of the work. He explained, “If they find a firm that’s competent, they have to be careful or they’ll just work them right out of business. Because they’re so good, they’ll give them all the work they have, and they [may] give them more than they can handle They’ll grow them out of the program.” [#40]
- The Black American female representative of a trade association said the relational and trust aspect of selecting subs is similar in both sectors, though certified businesses have a somewhat different approach in the public sector because they want to give opportunities to other small and minority-owned businesses. She said, “I think the first person they’re looking for is somebody just like them, somebody who is also certified, maybe an underutilized firm [that] can use an opportunity. That’s not necessarily the first go-to for primes.” [#6]

The same trade association representative added that this effort to choose and work with other minority and underutilized firms is to maintain the level of participation that they themselves bring to the project. She added, “If they sub out to a non-DBE, [it] diminishes the amount of participation that the prime is going to get. Another factor is the fact that mentor-protégés and joint venturing is being promoted more so [recently]. Finally, I think the ... mentality of paying it forward and doing the same for others is a growing [trend].” She later noted that members solicit DBE bids by going through the DBE/MWBE directories. [#6]

When asked about members’ experiences working with DBE subs compared to non-DBE subs, she said that member experiences vary. She added, “Being a DBE and engaging or subbing out to a DBE and getting the opportunity to do the paperwork from a different perspective and review it can be helpful. They know what to expect [regarding paperwork]. As far as subbing out to a non-DBE excessively, it’s going to be a project that’s highly specialized ... or a firm that can help bolster the DBE’s status. So, if I’m a DBE and I’m subbing some work out to a [non-DBE] ... that has a particular look to it too.” [#6]

A few business owners said that certifications are irrelevant when soliciting other contractors.

For example:

- When asked if he solicits SBE/MBE/WBE firms, the Black American and veteran male owner of a general contracting company reported that all of his work is in the private sector and that certifications do not matter to him. He explained, “I don’t work on public jobs, [so] I don’t know if any of the other contractors I use have those certifications. I just use the people that I know that can do the work. If I don’t like the way someone does a project that I’ve hired them to do, I won’t use them again.” [#29]

When asked if he uses the same contractors all the time, the same business owner said, “Of course ... I don’t go out trying to find others to do the work when I know what I’m getting with the contractors I have used before.” [#29]

- The non-Hispanic white male owner of a goods and services firm reported that the firm does not make distinctions about who they are going to work with based on gender, race, ethnicity, or certification status. He stated, “We’ve worked across the spectrum. The industry is predominantly ... white male-owned companies, but there are a number of [other] people that we do work with.” [#10]

The same business owner continued, “One of them, for instance, is owned by a woman in Seattle, Washington. She’s one of our favorite clients actually. [But] do we distinguish? Not so much. It’s rare that that ever comes up as a factor. But it is [also] rare to have anything but that main demographic just because that’s how the industry is broken down.” [#10]

One business owner described her experiences working with MBEs as positive, and described such experiences as mentorship opportunities.

The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said that she likes to mentor MBEs and help them figure out how to better their business. She added, “As far as a non-minority or non-certified company, I think they have the resources and knowledge [necessary] and it’s different [for them], but I don’t feel it’s in any way discriminatory, or harder, for the non-minority firms than the minority to get the experience, training, and certifications they need.” [#2]

Other businesses reported preferring subcontracting opportunities, being limited to subcontract-based work or having difficulty breaking into the prime contracting arena.

[e.g., #19] Comments include:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that her firm never works as a prime on city or county projects. When asked why, she commented, “We don’t really have project management in our skill set, and we provide one thing, which is structural engineering.” She later commented that she has never worked with an MBE/WBE/SBE prime contractor. [#5]

When asked how she markets her firm to primes, the same business owner said that she reviews plan holders lists and then markets by sending an email or calling them and setting up a meeting. She also noted that she networks with professional organizations. [#5]

- The non-Hispanic white male owner of a professional services firm noted that although his firm works mainly as a prime contractor, there are advantages working as a subcontractor. He explained, "What we really like to do is the engineering, and the other company [can] be responsible for management of the project." [#3]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that his firm has never worked as a prime contractor. He added, "We've always been a sub or a supplier, or an installer." He said that he gets subcontract work through either a preexisting relationship or when a specialty product is needed. He explained, "In the case of [a] property management firm, they may call us and say, 'Hey, we need 10 [specialty products],' or 'Oh, by the way, can you install these?'" [#9]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that the firm only performs as a subcontractor. When asked why, she said that that they are "too small" to do prime contract work. [#35]
- The non-Hispanic white female owner of a DBE-certified construction firm reported that her firm always operates as a subcontractor because of the type of work they do. She said, "We are always the subcontractor, just by the nature of what we do. We are hired by a prime to handle that portion of their contract." [#27]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated, "I only do subcontracting work. I don't have the capacity, bonding, insurance, [or] line of credit to do prime work because the projects are too large. I also never hire subcontractors." [#20]

A trade association representative commented that most members are limited to subcontract work because they lack the capacity and bonding ability to prime. The Black American female representative of a trade association reported that most members work as subcontractors rather than primes. However, she noted, "We have had an increase in the amount of [prime] opportunities." She went on to say that CDOT is "looking at projects for the latter half of the year where DBEs or ESBEs will be able to prime on ... projects for the first time ever," and commented, "That was a huge win for us" [#6]

When asked why most member firms are subcontractors rather than primes, the same trade association representative said that most members are "still building capacity," and are limited to subcontract work "due to bonding requirements and capacity requirements." [#6]

A business assistance organization representative reported that most members are limited to subcontract work. The Asian-Pacific American male representative of a business assistance organization stated that most members work as subcontractors because they lack the capacity to perform as prime contractors. When asked if primes that use members on public sector work also use them on private sector work, he said that they do. [#33]

When asked how members identify prime contractors to work with, he said that members doing public work go to outreach events to learn about projects and meet key contractors. He added

that members also go to bid openings, and that some are very successful at securing public work. [#33]

Some interviewees discussed how working with MBEs, WBEs, and other small businesses compare to working with non-certified firms. A few indicated that working with SBE/MBE/WBE prime contractors has benefits. Comments include:

- The non-Hispanic white male owner of a professional services firm reported that he cannot differentiate between SBE/MBE/WBE and non-SBE/MBE/WBE prime contractors or subcontractors. [#3]
- The Hispanic American male owner of a specialty contracting firm reported that based on his experience, SBE/MBE/WBE prime contractors tend to be more organized than non-certified primes. He stated, “Bad money management typically ends up being the biggest issue with non-certified primes, which trickles down to a lot of other issues. I think they're not held to any standard, so they go off of their hip.” [#4]
- Describing his experiences, the Black American male co-owner of a DBE/MBE/ WBE/ SBE/ESB-certified goods and services firm said, “My experience working with SBE, MBE, [and] WBE firms has been clouded by the fact that, for a lot of the projects that have been going on probably for the last, I'd say, six or seven years, we've gone to the outreach meetings, we've provided line cards, we provided conversations about our capabilities and what we [can] do, [but] we have been unsuccessful in winning any of those bids And in one particular instance, our category of product was actually awarded to a drywall contractor by an SBE prime.” [#9]
- When asked about her experiences working with certified primes, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “I think I have only worked with one SBE/MBE/WBE prime, and that was doing final clean on a [project] in Boulder. I have just gotten to know them and hope to work with them on other jobs.” [#35]
- When asked to describe the firm's experience working with certified primes compared with non-certified primes, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that her firm is on a team with an MBE prime in the proposal phase, so they have yet to complete any work with them. She said that thus far she has not observed any differences. [#12]

A few business assistance organization representatives discussed members' experiences working with DBEs and other small businesses. Comments include:

- When asked about members' experiences working with DBE primes versus non-DBE primes, the Asian-Pacific American male representative of a business assistance organization stated that because DBE primes are smaller, “nimbler,” and require less paperwork, there is an advantage to working with them. He added that there is “less overhead and bureaucracy” as well. [#33]

- When asked about members’ experiences working with DBE primes versus non-DBE primes, the Native American female representative of a business assistance organization said, “If they work with a Native American-owned prime, I think the prime has a little more patience because they want to get them to the point of success. They will sometimes even provide additional resources to help them get where they need to go, because they are more invested in Native American companies.” [#37]

Challenges for small and minority- and women-owned businesses when seeking work as prime contractors/consultants. Business owners described their experiences and any challenges they faced when seeking prime contracting/consulting opportunities.

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, “There is no opportunity, in my opinion, within the diversity program for minority-owned firms to get prime work. What [minority subcontractors] bid out is scoped so large that a firm of ours wouldn’t be qualified to do that. There are definitely ways some projects could be broken down into smaller projects so that they could bring in firms that don’t have capacity to do \$3 million work.” [#12]
- A public meeting participant said, “Today it’s harder to be a minority woman-owned business than ever in the City and County of Denver. I don’t even know how small businesses do it. I look at the way I started, and the hoops and the walls and the obstacles that a small business [has] to put up with today to actually be functional, [and] it’s almost impossible. I mean, I could not do it again” [PT#4]

The same public meeting participant continued, “Another challenge that smaller businesses have is [that if] you have a firm that sells \$200,000 [or] \$100,000 in total revenue, how do you put that business to compete with a firm that falls in the same category that sells \$10 million [or] \$12 million a year? It does not make sense.” [PT#4]

- The Black American male co-owner of a veteran-owned specialty contracting firm said, “There are larger firms that always have a connection to get right in on a bid, and you find yourself fighting an uphill battle. Even once you get in, the bid closed or they already have a small group they’re going to select from. So, if you don’t know anyone you’re most likely not going to get a chance to bid.” [#7]

One trade association representative commented that a “catch-22” prevents new and small firms from bidding as a prime on public agency contracts. The Hispanic American male representative of a trade association said that experience requirements prevent these firms from bidding on some projects, saying, “Well if you’ve never done school construction, you do not get to check that box. [And] if you do not check that box, you do not get moved to the next level. [Some public agencies] continue to use the same folks all the time because they are the only ones who have experience.” [#11]

Some mentioned barriers including a preference on some jobs for large primes with greater resources, prompt payment issues, and other challenges. [e.g., #12, #15b, #35, WT#3] For example:

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said that in his industry there are sometimes consequences for buyers that deviate from norms and buy from small manufacturers, particularly if problems arise. He explained that there is a perception within corporations that fewer problems arise when working with larger, more established companies. [#39]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “Because my company is very small, finding a project in the public sector that is small enough for me is difficult.” [#35]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said that he thinks his firm is sometimes dismissed because they are a smaller firm. He added, “We don’t have the brand name like one of the big three [competitor] companies. I would say that the [products] we do offer competes quite favorably with the big guys.” [#9]
- Regarding “on call” contracts, the non-Hispanic white female owner of a WBE-certified professional services firm said, “I’m invited to participate on an ‘on call’ contract as a subconsultant [and] I have to sign a form called letter of intent. And ... I get those blank, so I have no way of ever tracking ... what their projected participation of my firm is or how my firm is going to contribute to the goal that has been set But I don’t have any [information]. I don’t know if it’s one percent. I don’t know if it’s half [a] percent.” [PT#3c]

The same business owner continued, “They have to meet a goal, but they’re not gonna tell me what percent. If the goal is 10 percent, they’re not gonna tell me.” She added, “I have no way of knowing what [the percent] is, and there’s this really crazy expectation that I’m just gonna sign [the forms]. I mean ... I’ve been doing it [though]. I sign the blank forms.” [PT#3c]

- A survey respondent said, “[It’s] difficult to get in the mix of big municipal work when larger firms have done a million of [those projects].” [AS#36]
- A public meeting participant said, “A really big problem that I see [is] letter of intent, which says that we’re going to provide this amount of money for this type of opportunity to minority businesses I think what happens is that the letter[s] of intent aren’t being met in all cases. I’m not saying every one of the, but not in all cases. Now, the DSBO will say there’s been a good faith effort.” [PT#4]

A trade association representative said that high overhead costs make it difficult for small engineering firms to be competitive. The Hispanic American male representative of a trade association said that relationship-building is what makes firms most competitive in construction-related industries. However, he noted that small engineering firms are at a disadvantage in competing with larger firms because of overhead costs. He stated, “The problem with engineering is [that] a small, certified engineering firm can’t compete with the larger guys on most projects. For a school they can compete with them, but the overhead cost is what prohibits them from being truly competitive because they are smaller.” [#11]

A few business owners and representatives described “on-call” contracts as barriers preventing small businesses from working as prime contractors. Comments include:

- The Hispanic American female representative of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said “on-call” contracts is a barrier for her firm. She explained, “[It’s] a way to circumvent everything we’re paying for as a taxpayer in all these small businesses ‘On call’ contracts have no goals, no representative order 101, absolutely no access to participation.” [PT#3b]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, “[City and County of Denver] have on-call contracts. So, when a small, little piece of [work] needs to get done, they have five on-call [firms] that work for them, firms that can decide what 12 shrubs need to go in this bed.” She continued, “It would be perfect to set aside three of those on-call contracts for firms that hadn’t worked for the City of Denver before” [#12]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “On-call contracts are often used as a work around for city staff who want to avoid the effort of putting projects out to bid. In doing so, opportunities are lost for SBE/MWBE/DBE firms. The selecting and awarding of individual on-call projects is not open for public review.” [WT#3]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “There have not been many projects that have been issued from the defined pool for architects to prime. I believe this is because Denver has on-call architectural service contracts that they use to do small projects.” [WT#2]

Some interviewees reported that they try to avoid working with some subcontractors. For example:

- When asked if there are subcontractors that he will not work with, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “The one [subcontractor] I will never work with again will remain anonymous. I don’t think it has anything to do with the MWBE classification, it’s more about the [contractor’s] personality. [They were] very difficult to work with.” [#22]
- The male representative of a non-Hispanic white male-owned professional services firm said there are subcontractors his firm will not work with, but did not specify between minority- or woman-owned subs versus other subs. He said relationships and past history are very important to his firm. He added that collaborative relationships are critical, and noted that forcing those relationships for other reasons can hinder the progress of a project. [#1a]
- Regarding subcontractors that his company chooses not to work with, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that there are some drilling companies that his firm will not work with because they do not have the right type of equipment for his industry. He went on to indicate that he

rarely works with subcontractors focused in residential work. He said that many of these subcontractors are not aware of public sector requirements for road and bridge work. [#14]

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that there are subs his firm will not work with because they either have unethical business practices or are considered unreliable. [#7]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that there are subcontractors that they will not work with. He explained, “It’s more along our general business practices regarding credit references and credit terms.” [#23a]
- The non-Hispanic white male representative of a majority-owned construction services firm reported that there are subcontractors the firm will not work with, “primarily because they don’t have the ability to do the job.” He added, “It’s all based on [qualifications], and they are pretty consistent throughout the company.” [#21a]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm stated, “If I feel they are not qualified, I am not going to work with them. I’ve done work on the reservation before for a ... project, and I try to make sure I have a person of color working that because I think there will be less conflict, or ups and downs. But I’ve also used Caucasians, [so] it’s not necessarily the color.” He added that “Caucasians” sometimes have to earn the trust of tribes. [#39]

A trade association representative indicated that members’ relationships with hired subcontractors have improved in recent years. When asked if there are subs that members will not work with, the Black American female representative of a trade association said, “Years ago, I would hear more of that than I’m hearing now. I think with the increase of support [and] services that have been offered, this doesn’t happen as much as it used to.” [#6]

One interviewee reported facing challenges finding qualified subcontractors when the need arose. The female representative of a non-Hispanic white male-owned professional services firm reported that on one occasion the firm hired a small minority-owned business as a subcontractor, but found the business was too small and unqualified for the work. She went on to note that it is difficult for her firm to subcontract out for projects in the public sector. She explained that the diversity requirements do not account for how many firms are actually capable of doing the work specific to the projects. Therefore, she noted it is challenging to meet the diversity requirements and ensure that the projects are done by those with relevant experience. [#1b]

The same business representative added, “We [had been] told in previous contracts that we didn’t get it because our diversity plan wasn’t strong enough and we only included one specific firm and gave them a large role. And they said they wanted us to include five firms and give lots of people roles.” She also mentioned that the firm subcontracted out to a firm in Dallas because no minority- or women-owned firms were qualified, and the firm needed to meet the technical

minority requirements. She explained, “You’re hurting businesses in the city because of that requirement. Now we’re going out of state.” [#1b]

Challenges for small and minority- and women-owned businesses when seeking work as subcontractors. Business owners and representatives described their experiences and any challenges they faced when seeking subcontracting opportunities.

- The male representative of a non-Hispanic white male-owned professional services firm said, “When you have participation requirements for small business requirements, then the easiest thing for the prime firm is to not impact their workload. Then we are always in the position of how to compete with smaller or minority- or women-owned businesses. The prime firms don’t want to decrease their work, and so it’s easier for them to just say, ‘We’re going to have the engineering done by a small business.’” [#1a]
- The female representative of a minority- and women-owned business stated that large primes often argue for lower participation goals than those set by Mayor Hancock. She said, “They advocate this goal and say, well, there’s no capacity How can someone tell me what my top capacity is that doesn’t even know me, my company, my employees, our growth strategy?” She commented that this behavior is a barrier to minority- and women-owned businesses attempting to grow. [PT#1b]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said it can be difficult for minorities to get lines of credit to purchase equipment for subcontract jobs. She noted that striping requires expensive equipment, and added, “There are various ... companies who are non-minority and have all this equipment, and there are very few minority companies in that work code. So, it’s a lot more difficult for them to get to that point when they’re starting because this equipment is so expensive. The experience is there, it’s just a matter of finding the right piece of equipment to help them out.” [#2]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that sometimes he will resupply potential primes with the information they request, though it’s “exhausting” to submit information again. He commented, “I’ve done this five times with this particular prime and I didn’t get selected the previous four times, so why should I redo this? Chances are we’re not going to get anything out of it.” [#9]
- The Hispanic American female representative of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said, “There are barriers in access to all primes. It’s a barrier [A prime] who has [a] \$173 million contract at the airport [meets] their DBE goals with the same vendor [and] with cheap labor at \$8.50 an hour. That’s what they pay the drivers in the vans, and they pay less for the people that push the wheelchairs.” [PT#3b]

The same business representative continued, “We cannot operate with, nor would we operate under that type of situation in our communities to offer those type of wages. We wouldn’t be left standing. Those individuals that are making those wages ... are Ethiopians. If that’s not a form of cultural and ethnic oppression, I don’t know what is [These large primes] tell us these individuals can live on tips [and that] they’re allowed to take tips. It’s a

barrier for competitive wages and our ability to answer RFPs. It's a way for gigantic corporations to undermine our dollars, our bids, [and] our numbers." [PT#3b]

- The Black American female representative of a trade association said that one of the biggest challenges for minority- and women-owned firms is figuring out how to make points of contact with primes, and knowing how to "get in." She explained, "There are so many different groups out there. It can be difficult for them to know who to align themselves with and [how] to find opportunities to build relationships, and rapport, with different primes." [#6]

The same trade association representative continued, "Knowing the different nuances and building relationships with a variety of teams can be difficult, [especially] because a lot of small businesses can't take time away from their [firms] to attend all these different events. It's like darned if you do, darned if you don't They don't have the level of support of a larger business or a back office, so it can be a catch-22." [#6]

- When asked how his firm finds out about subcontracting work, the Black American male co-owner of a veteran-owned specialty contracting firm said, "We'll know of a job or they'll contact us through my co-owner or myself, and then we'll submit a bid to them for us to do the work via Xactimate, which is the system we use." [#7]

When asked if his firm prefers to work with some prime contractors over others, the same business co-owner said that there are. He added, "We like to use them because of their level of work and detail, and because they do what they say they're going to do when they say they're going to do it." [#7]

- A public meeting participant said "it takes a lot more capital to work out at the airport" for minority and women business owners. [PT#4]
- The Hispanic American female co-owner of an SBE-certified professional services firm said that the company relies on "word of mouth" to secure subcontracting work. She said that the firm is rarely asked to be on design-build teams, and added, "It is usually word of mouth. A contractor will call and indicate they are pursuing a project, then inquire whether we are interested or too busy." [#15a]

One trade association representative discussed small businesses' lack of resources as a barrier to securing work. The non-Hispanic white male representative of a trade association said that small businesses can be at a disadvantage because of their lack of resources when trying to get on projects. He explained, "The big businesses have dedicated business development people. These are people that know how to build, but they also have sales skills and they're going out for the specialty contractors and calling on the [big] general contractors. So, that is a huge disadvantage for small businesses because they don't have [those] level[s] of resources or sophistication as a large company, and one person is wearing all the hats ... doing finance and estimating, and running the field operations." [#40]

Some interviewees reported that they try to avoid working with some prime contractors. For example:

- The male representative of a non-Hispanic white male-owned professional services firm said there are some primes his firm refuses to work with. He explained, “There are some firms that are extremely difficult to work with If the prime doesn’t keep the project under control, then everybody can be spending a lot of time and money on things that they shouldn’t be spending time and money on, and those won’t be successful projects, financially, to anybody working on them.” [#1a]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that there are some prime contractors his firm tries to avoid working with. He explained, “Some of them have unethical business practices, and some are late all the time and their employees are pretty inconsistent in the level of service they give. Sometimes we have issues with payment, too.” [#7]
- When asked if there are some prime contractors that he won’t work with, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “Yes, there are some who are not very ethical. They make it difficult. They’re not responsive to our needs. They have a corporate mentality [and] are not professional.” [#22]
- The non-Hispanic white male owner of a professional services firm stated that in response to a bad experience with a prime he “would just be as diplomatic as [he] could by not teaming up with them again.” [#3]
- When asked if there are prime contractors she prefers to not to work with, the Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said there is a prominent general contractor she worked for previously with questionable business practices concerning field change orders. She said the general contractor allowed change orders to accumulate and avoided meetings to discuss matters, and often disputed the price after her firm completed the work. [#13]

The same business owner said her firm accepted a discounted settlement after almost a year of negotiating with the general contractor. She stated that the DSBO was helpful, however, and concluded that her firm and the general contractor did not “mix well together.” [#13]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that there are no prime contractors that his firm avoids. He noted that his firm is currently building relationships with new primes, and that his firm recently secured work with one of them. [#14]

The same business owner added that there are very few SBE, MBE, or WBE primes in his segment of the industry because the projects are so large. He explained that there are several contracts in the billion-dollar range and that there are no SBE, MBE, or WBE primes with the capacity to do those projects. [#14]

- When asked if there are prime or subcontractors that her firm chooses not to work with, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, “I’ve developed good relationships with them, and a lot of my

business is repeat business. However, there is one prime I will not work with again. I have told them that and I'd rather not say who this is, but they get a lot of work. I just don't like their business practices or business ethics, and I won't compromise mine to work with them." [#19]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm indicated that she will not work with some primes because she isn't yet "prepared" to do so. She said, "One company that was mentoring me took me along to a meeting with [a national contractor], and I learned it was good I didn't have a contract with them." She explained, "I listened to everything that was in the contract [such as] safety, and this and that, and I saw what all the big companies expect. I saw I wasn't prepared yet. It was a good lesson." [#35]

Some trade association and business assistance organization representatives commented on members' preferences to work with certain prime contractors.

- When asked if members try to avoid working with certain prime contractors, the Black American female representative of a trade association indicated that they sometimes do. She said that some members have talked about primes that are challenging to work with. [#6]
- When asked if there are primes that members won't work with, the Native American female representative of a business assistance organization said, "As far as construction goes, I can't think of any. With large corporations there are some that have taken political positions that go against the values of Indian country, and people don't want to work with them." She added that members prefer to work with prime contractors that "give back to the community." [#37]

E. Potential Barriers to Doing Business in Denver

In addition to barriers such as access to capital, bonding, and insurance that may limit firms' ability to work with public agencies, interviewees discussed other issues related to working for public agencies. Topics included:

- Learning about public sector opportunities as a prime or a subcontractor;
- Opportunities to market the firm;
- Access to capital and obtaining financing;
- Bonding requirements and obtaining bonds;
- Insurance requirements and obtaining insurance;
- Prequalification requirements;
- Licensing and permits;
- Size and span of contracts;
- Any unnecessarily restrictive contract specifications;

- Prevailing wage, project labor agreements, or any requirements to use union workers;
- Bidding processes; and
- Timely payment by the agency or prime.

Learning about public sector opportunities as a prime or a subcontractor. Business owners and representatives reported challenges to learning about available work in the public sector. For example:

- The non-Hispanic white male owner of a specialty services firm said, “I have tried to contact the City of Denver, [but] it is impossible to find the right person to talk to. I know that they use [my products] for many of their departments and agencies, [but] whenever I have called I get the runaround. Someone takes a message, but [I] never [get] a return call.” [#30]

The same business owner continued, “I haven’t figured out if it’s procurement or another department, but someone is [using my products]. I’m sure if they do it in-house it’s more expensive than we would quote them. I’ve even asked the people from the state if they have a contact I can call, and they can’t tell me a contact person either.” [#30]

- When asked if it is easy or difficult to find out about public sector work opportunities, the non-Hispanic white male representative of a majority-owned specialty services firm said, “Public agencies are all more of a challenge than private companies because it’s harder to find out who the right contact is.” [#34]
- When asked how the firm learns about work opportunities, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “We subscribe to BidNet. The office also checks all the websites weekly to see what RFPs and RFQs are out there. The websites also list plan holders, so if we are interested we can reach out to those people. The other way is to go to the [pre-bid] conference and meet people.” [#22]
- Regarding barriers or difficulties in Denver associated with expanding the business, a survey respondent said, “Experience is not the issue. However, having bidding opportunities ... [has] been a problem.” [AS#8]

Some trade association and business assistance organization representatives commented on opportunities for members to learn about public sector work. For example:

- When asked how members learn about public sector opportunities, the Black American female representative of a trade association commented, “If they built a relationship within that network, then they’re already kind of tied in and hey then get private sector work from that. Our partnerships are mainly in the public sector, so we don’t typically see how they’re engaging outside of the public sector.” [#6]

The same trade association representative added that relationship-building is the biggest part of the marketing process. She noted, “A lot of the marketing that is done with our

members ... comes through our monthly membership meetings where we bring in the prime project teams or the key decision makers, and allow them to share details not only of current projects, but also in regards to upcoming projects.” She continued, “We have a very strong networking platform. A lot of our members end up having meetings [with primes] immediately after some of these membership meetings” [#6]

- The Asian-Pacific American male representative of a business assistance organization said that the organization puts information on their website, releases email newsletters, and uses social media to disseminate information about public sector work opportunities to members. [#33]
- The Native American female representative of a business assistance organization said that the City and County of Denver is doing a good job with electronic notifications. However, she noted that members complain about BidNet, which gathers federal, state, and local government RFPs from across the country. She said that BidNet only gives limited information for free, and commented, “[Members] don’t want to pay \$299 if they can’t use it.” [#37]

Some interviewees indicated that learning about available work in the public sector is easy. [e.g., #14, #33] Comments include:

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “We get notifications all the time about projects that are going on in the outreach. We see information in the paper. We are referred to different projects because of our contacts in the community, and just by being involved in the community.” [#9]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “For [City and County of Denver], I’m certified and they email opportunities.” [#35]

Opportunities to market the firm. Business owners and representatives shared a range of marketing experience. Some reported being constrained by their own marketing efforts or having limited access to good marketing opportunities. A number reported that word-of-mouth referrals are the extent of their marketing. [e.g., #20, AS#2] For example:

- When asked how the firm markets itself, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that they have a website and advertise in 50 to 80 home magazines. She added, “We’ve partnered with the magazines, and we’re an active participant with them. We also use signs on our construction sites.” [#12]

The same business owner continued, “We pursue public sector work through Rocky Mountain BidNet, and through schmoozing architects, which is a giant waste of time. [It] doesn’t ever seem to work. And [we rely on] word of mouth. Referrals account for 50 to 60 percent of our work.” [#12]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said that when business is slow she “sends out some of the staff with flyers describing the [work] the company can do.” She added, “That is a good marketing piece that I don’t believe other ... companies are doing.” [#19]

The same business owner went on to say that she is “working on a website,” though she hasn’t had time to finish it yet. She added, “We joined Colorado [Contractors] Association because I want to make sure other companies know I’m in this industry.” [#19]

- When asked how she markets the firm, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “I go to [The Blue Book] events, meetings, outreach events, [and rely on] word-of-mouth and referrals.” She added, “For the private sector, The Blue Book sends me opportunities to bid, and I also get referrals.” [#35]

When asked if she markets the firm to prime contractors, the same business owner indicated that she does. She said, “Last September [I] did the Turner University classes, and I’ve done some Kiewit classes I go to different meetings where they talk about projects that are coming up. I find out the contractor that will be involved, and I talk to them. Up to now I just have the one ... contract.” [#35]

- When asked how the firm markets itself, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that some employees are tasked with business development and attend functions and briefings presented by agencies such as CDOT, Denver International Airport, and City and County of Denver. He added that these employees also belong to numerous professional associations such as Colorado Contractors Association, American Council of Engineering Companies, and Hispanic Contractors of Colorado. [#14]

When asked if he markets the firm to prime contractors, the same business owner indicated that it is not necessary. He said that he has long-standing relationships with multiple large engineering firms. [#14]

- When asked how his firm markets itself, the Hispanic American male owner of an architectural engineering firm stated, “We have been around a long time, so most of our work comes by word of mouth, either from customers or referrals from other engineers who don’t do this type of work.” [#16]

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said that his firm networks through a variety of associations, including the Urban Land Institute (ULI). He added that his firm also exhibits at local, regional, and national trade shows and writes a monthly newsletter. [#9]

The same business owner continued, “We blog and we attempt, where possible, to speak at associations or events In addition to that, we attend introductory meetings for all of the different projects that people are doing with contractors, with the city, and find out what other organizations are involved in some of those projects. Finally, we host or participate in

lunch-and-learns at an architectural office, usually, or other places when we get the opportunity to do so.” [#9]

- When asked how the firm markets itself, the Hispanic American female co-owner of an SBE-certified professional services firm said that they employ an hourly consultant who is very familiar with the industry to market the firm, usually via cold calls. She noted that repeat business is key, and commented, “Almost everyone who has used us will use us again when the opportunity arises.” [#15a]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm markets itself primarily through HomeAdvisor and through referrals from plumbers and HVAC companies. He went on to say, “We pay a referral fee.” [#7]
- The non-Hispanic white male owner of a professional services firm stated, “Our clients are our best marketers.” He went on to explain that much of their business is due to word of mouth and referrals from past clients. [#3]
- The Hispanic American male owner of a specialty contracting firm reported that he does not market his business. He explained that he still works with the same clients that he worked with when he first began his business, but new business typically comes from word-of-mouth referrals. [#4]
- Regarding the firm’s marketing efforts, the non-Hispanic white female co-owner of a specialty services firm reported that they market through online presences such as Facebook, and that some customers come to her because of word-of-mouth referrals. [#8]
- When asked how he markets the firm, the Subcontinent Asian American male owner of specialty contracting firm stated that he does not. He explained that his jobs come from word-of-mouth referrals, and that because he has been around for almost 10 years his reputation for quality work is well known. He went on to say that he has a sign on his truck showing his company’s phone number, and commented, “That’s enough.” [#18]
- When asked how his firm markets itself, the non-Hispanic white male owner of an engineering company stated, “My experience is that builders are very loyal to engineers they have worked with before. So, [it’s] word of mouth.” [#26]
- When asked about the firm’s marketing, the Black American veteran male owner of a general contracting company reported that he does not market the firm. He explained, “People know what type of work I do, and it’s through word of mouth. I haven’t had any problem getting work.” [#29]
- When asked how the firm markets itself, the non-Hispanic white male owner of a construction-related firm stated, “Our company has a great reputation in the industry. However, we do a considerable amount of networking. We belong to the Rotary [Club of Denver], [National Society of Professional Engineers], and the Denver Mayor’s task force for bettering small business.” [#25]

- The non-Hispanic white male representative of a majority-owned construction services firm reported that the company has a marketing staff charged with staying informed of planned construction projects. He noted that they also have excellent relationships with a wide range of general contractors that contact them regarding opportunities. He added that they are also involved in a number of construction trade associations. [#21a]
- When asked how the firm markets itself, the non-Hispanic white male representative of a majority-owned goods and services firm said, “We have outside sales representatives assigned to accounts to develop and maintain relationships. The company also belongs to as many ... associations as possible.” [#23a]
- When asked to describe how the firm markets itself, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “Basically, the retail division has people who go out and knock on doors. I knock on doors [too]. Inside sales people call customers. So, it’s a lot of B2B sales. We joined the Associated General Contractors ... about 18 months ago, and I have a salesperson who attends their events. [Still], we probably need to get a little more active.” [#36]
- The Hispanic American male representative of a trade association said that, universally, their members spend a lot of time marketing both in the public and private sectors. He added, “I know firms that do a lot of private sector work. I know firms that do repeated work at Coors [Brewing Company] because they’ve done good work and they continue to market They also will do work with [Regional Transportation District] and CDOT at the same time, so it all depends on where they found a little footing. But those are probably bigger organizations that have the opportunity to spend some time on marketing and development of work. A small shop does not have that opportunity ... [which] is why organizations like ours provide a big benefit to them.” [#11]

A trade association representative said that one barrier for small businesses in the marketplace is understanding how to market. The non-Hispanic white female representative of a trade association said, “Their ability to market, to learn how to market, [and] to know when to start that marketing [is a challenge]. I’ve had some that do work for some of the entities because of their MWBE programs, like ... CDOT with their ESB program, [and] they’ll literally tell me [that they] don’t have to market anymore ... because firms want to partner [then].” [#38]

The same trade association representative continued, “It’s not a good thing that they don’t know how to market to other [places]. At the same time, they’re small. It’s hard to be able to do all things to expand their client base because they don’t have enough bodies, and ... a lot of times ... they’re stretched.” [#38]

A business assistance organization representative reported on members’ efforts to market to prime contractors. The Native American female representative of a business assistance organization reported that members do market themselves to prime contractors. She said, “They use our events and our website They actively monitor projects in the pipeline and the primes that are going after the work, and try to connect with them. It also helps if the prime makes Native American companies a priority.” She added, “The established companies have a good success rate, but new companies have difficulties getting their foot in the door.” [#37]

One business owner reported adjusting the firm’s marketing strategy in hopes of improving its effectiveness. When asked how her firm markets itself, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “I’m going through a whole marketing upheaval right now and just turning everything on its [head]. What we’ve done historically [for marketing] is ... make contacts through the professional societies of which I am a member, [though] I am no longer using that as a marketing strategy.” [#5]

The same business owner went on to say, “We ... subscribe to a couple of agencies that gather information on capital improvement projects that are coming up for various agencies and private entities They publish memos saying an RFP is out for [a] project, and that there’s a pre-proposal meeting on such and such a date. I have a marketing person who looks every day to see what projects are coming up and if it has a structural component to it. If so, we put an email blast out to all of the plan holders introducing our firm We hook some people that way.” [#5]

Another business owner reported relying on repeat business and being disillusioned by the fact that there are “fewer and fewer” opportunities in the marketplace for new work. When asked how the firm markets itself, the non-Hispanic white male owner of a specialty services firm stated, “Most of our work comes from repeat business. The fact that we have been around [over 30] years helps in promoting our business. Occasionally, there is an inquiry about making a custom [product], [but] those inquiries are becoming fewer and fewer. The entire ... industry is slowing down because there are other options to communicate with customers.” [#30]

Some business owners reported minimal challenges when marketing. For example:

- When asked about the firm’s marketing efforts, the non-Hispanic white male owner of a goods and services firm said that they primarily market online through social media via Facebook Ads, Google Ads, and occasionally through ads on YouTube and Instagram. [#10]
- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said her firm “[doesn’t] really market for [themselves].” She added, “We really have benefited from great clients, word of mouth kind of stuff People find us more often than us marketing ourselves.” [#13]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said that there is no marketing involved, as her firm is all “hard bid.” [#2]

Prequalification requirements. Public agencies, including state agencies, sometimes require construction contractors to prequalify in order to bid or propose on government contracts.

Many business owners and representatives reported that prequalification requirements in the public sector present barriers to obtaining or performing work, including for the City and County of Denver. [e.g., #7, #24, AS#44] For example:

- Regarding prequalification requirements, the Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said, “I do have friends who have had some sort of barriers with, not [necessarily] the prequalification, but ... the licensing portion [needed to] work within the city.” [#2]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that she sometimes avoids opportunities because the prequalification requirements are so “onerous.” She explained, “Big general contractors do not differentiate [prequalification requirements] between large and small businesses.” [#20]
- The non-Hispanic white male representative of a majority-owned construction services firm stated that some subcontractors do have problems meeting prequalification requirements because they lack the financial depth and experience for a particular type of construction project. [#21a]
- When asked about barriers or discrimination regarding prequalification requirements, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that prequalification requirements have been a barrier. [#22]

One trade association representative noted that while there are a lot of opportunities for “the small guys” to bid projects with public agencies, requirements can prevent them from doing so. The Hispanic American male representative of a trade association said, “[Denver Public Schools], for example, will say, ‘[Tell] me the experience you have in building or working in school construction.’ Well if you’ve never done school construction, you do not get to check that box. [And] if you do not check that box, you do not get moved to the next level. And so, as a catch-22, you continue to use the same folks all the time because they are the only ones who have experience.” [#11]

Some interviewees, however, indicated that prequalification requirements are not a barrier, or are not standard in their industry. [e.g., #9, #10, #23b, #33, #36, #37] For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that all public agencies she has worked with required prequalification. She explained, “You have to submit this proposal that has a lot of qualifying information, [such as] resumes [and] how much insurance you have. We’re used to submitting that stuff. We’re comfortable doing that.” [#12]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that prequalification requirements are not a barrier for his firm. [#14]
- When asked about prequalification requirements, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “We get proposals and we submit proposals. Because we [act as] consultants to the primes, we don’t get bonded [or] prequalified.” [#5]
- The non-Hispanic white female co-owner of a specialty services firm reported that prequalification was not required for any of the public sector work she performed thus far. [#8]

- The Hispanic American female co-owner of an SBE-certified professional services firm reported that prequalification is not necessary for the firm because they are qualifications-based. [#15a]

Licensing 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.

Many business owners and representatives reported that obtaining licenses and permits is not overly difficult or not required in their industry. [e.g., #8, #12, #20, #35] For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that obtaining licenses and permits is not a barrier for his firm. [#7]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm indicated that his firm faces no barriers with licensing or permits. [#9]
- The Hispanic American female co-owner of an SBE-certified professional services firm reported that they have no issues obtaining required licenses and permits. [#15a]
- The non-Hispanic white male representative of a majority-owned construction services firm reported that while special licensing is required in his industry, it is not a barrier for the firm or their employees. [#21a]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that obtaining licenses and permits are not a barrier for the firm. [#22]

A number of interviewees and survey respondents reported that obtaining licensing or permits could be more of a barrier for small and minority- and women-owned businesses than larger firms. [e.g., AS#18, AS#55] For example:

- Regarding barriers with licensing through City and County of Denver, a survey respondent commented, “Their testing process for licensing is not very friendly towards anybody that has a disability.” [AS#22]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm stated that her female colleague struggled to obtain licensure for sidewalk repairs. She explained, “You have to go and get the license and show that you are not only capable, that the business is capable, but also that the person is capable of doing the work.” [#2]

The same business co-owner continued, “When that female business owner applied [for the license], she was turned [down] because she hadn’t done the work herself despite having a company where there are workers who do know how to do it.” She went on to say that some licenses require about five years’ experience, which can be difficult for newer firms to demonstrate. [#2]

- Regarding licenses required in their industry, a survey respondent said, “Having to secure licenses for each city or county to do work versus other states [is a barrier].” [AS#29]
- Regarding obtaining permits in the construction industry, a survey respondent reported, “Getting permits for construction is very difficult. It's not an easy process.” [AS#48]
- Regarding barriers or difficulties in Denver, a survey respondent commented, “The permit process takes a long time.” [AS#11]
- A survey respondent described the process of obtaining permits as “difficult.” [AS#27]

One business assistance organization representative said that obtaining licensing and permits is challenging for all firms. The Native American female representative of a business assistance organization commented that the time it takes to get some licenses and permits is “way too long,” though she said this is true for everyone, not just minorities. [#37]

Size and span of contracts. Interviewees had a range of comments as to whether the size of contracts presented a barrier to bidding.

Some business owners reported being restricted by contract size or that the size and length of contracts they typically secure do not reflect their capability to perform larger, longer-term jobs. [e.g., #28] For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “There’s no reason that you can’t put out a \$2 billion contract and have the HVAC as a set-aside ... the structural as a set-aside, or the north terminal as a set-aside. You could break it up geographically [or] by specialty, [or] by phasing. I just think that there are so many missed opportunities [for] small business set-asides [like those].” [#5]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, “[Contract] officers further stack the deck in favor of incumbents by assembling large project packages that smaller [firms] can’t compete on, and again bring in the same ‘good ol’ boy’ consultants as they always have. Breaking projects down into smaller components would make City of Denver projects accessible to a much wider range of DBE/WBE/SBE consultants.” [WT#11]

One business owner indicated that clients sometimes avoid working with small businesses because of their small size. The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm indicated that some customers and buyers avoid doing business with small firms because “there’s a stigma out there about small business.” [#9]

A business assistance organization representative indicated that unbundling large contracts would benefit members. The Asian-Pacific American male representative of a business assistance organization said, “Let them demonstrate their performance, then they can tackle a larger amount. Provide the opportunity for them to say, “This is what I do, and I can do it well.” [#33]

Any unnecessarily restrictive contract specifications. The study team asked business owners and representatives if contract specifications presented a barrier to bidding, particularly on public sector contracts.

Some business owners and representatives indicated that some specifications are overly restrictive, do not make sense, or present barriers. One business owner compared complying with specifications to “jumping through hoops.” For example:

- The non-Hispanic white male owner of a professional services firm reported on an issue he had when working with the Colorado Department of Transportation. He explained, “We had been selected for our third non-project-specific contract and the contracting officer told me that we had two projects, and that should be the limit. [They said], ‘Do not bother coming back for a fourth.’ We have not worked for CDOT since You should be selected in terms of your qualifications, not on how many contracts you have done or not” [#3]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “It is harder to get on public sector work because many of the projects are so big There are a lot more requirements, like a safety program.” When asked if she faces barriers with unnecessarily restrictive contract specifications, she stated, “Yes, the specifications are too big and complicated.” [#35]
- When asked if he has faced any barriers or discrimination regarding unnecessarily restrictive contract specifications or bidding procedures, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that he has. He explained, “It’s the jumping through hoops, asking for financials, [and] the [required] experience level. We got a debrief from [Denver Public Schools] work we pursued. There are large firms that specialize in K-12 work. We got marked down because we don’t do 20 schools a year. Doing a school is no different from doing a fire station in terms of what the client needs and what the users need. They build it into their ‘good ol’ boys’ network.” [#22]

Some trade association and business assistance organization representatives indicated that restrictive contract specifications are more of a barrier for small businesses than large firms. For example:

- When asked if she is aware of unnecessarily restrictive contract specifications or bidding procedures as barriers for members, the Native American female representative of a business assistance organization stated, “We definitely see that when bids require things like a certain font, a certain format, submitted in an envelope. Small businesses don’t have departments dedicated to those types of details.” [#37]
- The non-Hispanic white female representative of a trade association said that the biggest barrier small businesses face is “onerous contract language.” She went on to say, “[Public agencies are] asking people to put their firms on the line without insurance coverage. They’ll take on the responsibility, [but] they can’t have that kind of insurance coverage.” [#38]

A small number of other interviewees reported no barriers resulting from overly restrictive specifications. [e.g., #7, #15a, #21a, #33] For example:

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that when contract specifications and bidding procedures are unnecessarily restrictive, they just present their rates and what they will do for that price. He indicated that it is not a barrier for his firm. [#14]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that he is not aware of any barriers regarding unnecessarily restrictive contract specifications. [#23b]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that she has no issues with unnecessarily restrictive contract specifications. [#20]

Prevailing wage, project labor agreements, or any requirements to use union workers. Contractors discussed prevailing wage requirements that government agencies place on certain public contracts. They also discussed other wage- and union-related topics.

Some firms said that prevailing wage requirements are fair and requirements for union workers are not a barrier when working on public projects. Examples follow:

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said she does not work with unions and does not perceive working with unions to be a barrier for her firm or firms in the local marketplace. [#2]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that he is not aware of any issues regarding working with unions. The firm, he noted, works with union and open shop companies. [#23a]

The same business representative added he is not aware of discrimination based on being a union or non-union employer. Both union and non-union employers, he said, are struggling to find workers due to a low unemployment rate and “boomers” retiring from the construction industry. [#23a]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm indicated that requirements for using union workers is not a barrier for his firm. [#14]

Some trade association and business assistance organization representatives said that prevailing wage requirements and requirements to use union workers are not barriers for members. [e.g., #37] For example, regarding union labor, the Hispanic American male representative of a trade association said that while he has not witnessed discrimination based on race, ethnicity, or gender, he has noticed that union shops will not work with non-union shops, and vice versa. [#11]

Another trade association representative described prevailing wage requirements as a barrier for some member firms. The non-Hispanic white male representative of a trade association indicated that prevailing wage requirements can be a barrier for members that seek work in the public sector. [#40]

A survey respondent indicated that prevailing wage requirements and requirements to use union workers are barriers. Regarding barriers or difficulties for the firm in the local marketplace, a survey respondent said, “It is hard to compete against non-union with union contracting.” [AS#1]

Bidding processes. Interviewees shared a number of comments about bidding processes.

Many business owners and representatives said that procedures for bidding present a barrier to obtaining work or put larger firms at an advantage. [e.g., #7] For example:

- When asked about barriers or discrimination in the bidding process, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm stated, “When we bid on lubricants for [City and County of Denver] a while back, I got really aggressive and I lost it by about \$1,000. We were competing against people who buy [our product in large volume]. It was strictly price, there was no other consideration. Why aren’t they trying to strengthen all sectors of the economy? It’s the same people who get the same business. There has to be something for minority wholesale commodity folks.” [#36]

The same business owner later said, “We submitted a bid to Jefferson County and I think we were competitive, but they went with the incumbent. They say it’s about price, but I think it’s about other mitigating factors so they can continue to do what they’ve always done.” [#36]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “The bid process for all of the agencies requires a lot of paperwork. [Also], they want so many things like insurance, a safety program, and bonding.” She added that she does not consider the bidding process a barrier, though it is time consuming. [#35]
- The female representative of a non-Hispanic white male-owned professional services firm expressed her frustration with the current bidding procedure. She stated her perception is that the goals committee has become a way for some members to get advance notice of projects they then bid on, rather than fulfilling the purpose of a city diversity goals committee. [#1c]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said, “Let me just say one other thing, and this speaks to the city, and something has to be done. The procurement office is discriminating severely against us [In] 98 percent of the bids I’ve been in, they’ll stand up and they’ll say yes, this is Representative Order 101, but there isn’t a goal on this project or in this bid. So therefore, just sign up the ... forms. Don’t be concerned about it [and] don’t worry about it.” [PT#3a]

The same business owner continued, “The procurement department of the city and county of Denver is severely taking steps to go out and ensure that the representative order is not encouraged It’s completely impotent.” [PT#3a]

- When asked about barriers or discrimination in the bidding process, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “It’s hard to compete for professional services because the scope is usually not well-defined. When a contractor bids on something, they have a set of design documents. All we get is statements like, ‘We want a building that makes us feel comfortable, that’s cool in the summertime, where we can get in and out safely. How much is that going to cost us?’” [#22]

Some business assistance organization representatives reported on challenges members face in the bid process. For example:

- When asked if she is aware of barriers in bidding processes that affect members, the Native American female representative of a business assistance organization stated, “Sometimes on the larger projects, [bid process are a barrier] because it requires a lot of money to meet all the requirements.” She later suggested that public agencies provide bid process training or similar assistance. [#37]
- When asked about barriers or discrimination that his members face regarding bidding processes, the Asian-Pacific American male representative of a business assistance organization stated, “Members complain that the agencies seem to have preferred contractors, and those companies somehow seem to get most of the work. It’s hard for a new company to get into the loop.” [#33]

One trade association representative discussed whether prime contractors conduct sincere outreach to DBEs, or only reach out to “check off” a requirement. The Hispanic American male representative of a trade association commented that his perception is that this varies from project to project. He stated, “I think there are times when it is very much ... just checking the box off.” He said this happens more often than he is comfortable with, and added, “I’ll hear some of the good, certified firms say they didn’t get [notified] or that they weren’t asked until two days before it was due, [so they] do not have time to submit a proposal.” [#11]

Short deadlines to submit bids/proposals or no feedback. A few reported very short bidding/proposal deadlines on some projects. [e.g., #28] Some commented on a lack of follow-up regarding opportunities or lost bids. For instance:

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said that sometimes RFQ deadlines are too short. He explained that at times, they only have 24 hours to respond. [#39]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that while she gets a lot of solicitations from prime contractors, there is no “follow-up” afterwards. [#20]

- The Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm said, “The type of assistance [we] need is more follow-up from the customer. We never hear from anyone why our bid wasn’t accepted. It feels like we are in the dark when submitting.” [#32a]

One trade association representative recalled members’ experiences with short deadlines in the bidding process. The Hispanic American male representative of a trade association said that certified firms “say they didn't get [notified], or that they weren’t asked until two days before it was due” to submit a proposal and bid. [#11]

Some interviewees reported no knowledge of barriers within the bidding process. For example:

- The non-Hispanic white male representative of a majority-owned goods and services firm stated that he is not aware of any discrimination in the bidding process. He added that he is not aware of discrimination in the factors public agencies or others use to make contract awards. [#23b]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that she has not experienced discrimination or barriers in the bidding process. [#12]

A trade association representative commented that in his own experience, City and County of Denver’s bid process is “relatively easy.” The Hispanic American male representative of a trade association said he is not sure if City and County of Denver’s bid process is easier or harder than other public agencies, though in his own experience he finds it to be relatively easy. [#11]

Timely payment by the agency or prime. Interviewees often mentioned slow payment or non-payment by the customer or prime contractor as a barrier to success in both public and private sector work. [e.g., PT#3c, PT#4] For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm stated that public sector payments can be held up if invoicing is wrong, insurance certificates are not intact, or if prevailing wages are not paid. She said that many times her firm is not made aware that payments will be held, and said the process can take 45 to 60 days to resolve. [#13]
- The Hispanic American male owner of a specialty contracting firm reported problems related to timely payment. He stated, "In Denver I literally will wait up to six months for payments. Even if it's just the retainer at the end, it still doesn't come in until six months after the project is done. So, it is tough." He went on to say, "I don't think payment has been an issue of discrimination. I think it's just poor money management and lack of integrity when there are issues in that matter." [#4]

The same firm owner reported, "I've had one general contractor [in the private sector] not pay me and continually not pay me. And I have to go after him, continually. I've noticed that some of his other subs were not having the same issue." [#4]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said, “I’m very fortunate that we’ve had long relationships with banking businesses that we have a line of credit. You use that entire line of credit. Why? Because you’re always paid late. You are never paid on time. You have to utilize that money. It costs you and so then you start down the road of paying for dollars to subsidize the contract that you already have a very small margin of profit, and I mean skinny margin of profit on.” [PT#3a]
- The Black American male co-owner of a veteran-owned specialty contracting firm said, “Some primes will pay you up front based on negotiated prices [while] some will literally only pay you if they get paid, even when it [wasn’t] negotiated that way.” He continued, “They’ll just not pay you. They’ll say, ‘Hey, we didn’t get all our money so we can only pay you a certain amount, even though we agreed upfront to [pay you] in full.’ It ends up that we have to take on the court, and for us, that gets expensive as a small business.” [#7]
- The non-Hispanic white male representative of a majority-owned construction services firm reported that payment has been delayed a couple of times, and as with most municipalities, it is sometimes hard to find someone to make decisions about invoices. He commented, “Too much bureaucracy. It would be helpful if they had a polite person that can make a decision.” [#21a]

Business owners and representatives indicated that slow payment can be damaging to companies. Interviewees reported that payment issues might have a greater effect on small or poorly capitalized businesses. [e.g., #7, #40, PT#3a, PT#4] For example, the Black American male owner of a DBE- and SBE-certified professional services firm said, “On some projects I have had payment issues. I have experienced wait times of up to and beyond 50 days, and was told by one contractor that I was ‘high maintenance’ when I addressed the payment issues.” [WT#12]

The same business owner continued, “I have also had issues where invoices did not get processed at all. Many of these primes have figured out that they can play a lot of games with the payments to small minority- and women-owned firms. This is a sneaky way to squeeze them financially to the point of begging to get paid. And if you speak up, you are blacklisted and will do a ‘whisper campaign’ to their buddies at other construction firms or architectural firms in the region.” [WT#12]

Some trade association and business assistance organization representatives reported that members struggle to receive timely payment in the public sector. [e.g., #6, #40] For example, when asked to describe members’ experiences getting paid on public work, the Asian-Pacific American male representative of a business assistance organization stated that all public work takes longer to pay than private work. He added, “There are quite a few subs who tell me they are 60 to 90 days out, and it really impacts cash flow. The accounts receivable cycle is just too long, and they’re really stressed out.” [#33]

A number of business owners reported no experience with late or untimely payments by public agencies or primes. [e.g., #15a, WT#3] For example:

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that the firm has no issues with untimely payment by primes on public sector projects. She commented, “One of the primes I’ve worked with for years frequently helps with cash flow issues.” [#20]
- The non-Hispanic white female co-owner of a specialty services firm stated that she has never witnessed any payment discrimination. She also indicated that she has not experienced any late or untimely payments by agencies or primes. [#8]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that his experiences getting paid on projects with City and County of Denver have been generally positive. [#9]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm reported that he never had problems getting paid by Regional Transportation District. He explained, “In this industry you get paid right away. Everybody knows the refiners are the big guys, and they pay in 10 days.” [#36]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that he never has issues getting paid. He later noted, “Payments from CDOT sometimes lag a little, but not very much.” [#14]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm stated, “So far, I haven’t had problems getting paid on time.” [#35]

One trade association representative reported on methods that could be used to enforce prompt payments. The Hispanic American male representative of a trade association stated, “If I’m doing a building and we are working on the sidewalk, when the sidewalk is done and the city has approved the sidewalk being done, payment should be issued. It should not be tied into multiple items by the prime. The concern about that method is it means there are multiple submissions of items and the city likes to take one item at a time and lump it all together, and then pay the prime all of it. But like I said, if signatures are missing off a piece of the documentation, then everything is held up.” [#11]

F. Work with the City and Other Public Organizations

Interviewees discussed the following topics:

- Experiences working with City and County of Denver or other public agencies;
- Learning about prime and subcontract opportunities with City and County of Denver; and
- Recommendations for improving state agencies’ bidding, contracts, prompt payment and other processes.

Experiences working with City and County of Denver or other public agencies.

Interviewees spoke about their experiences with public agencies in general and with City and County of Denver in particular.

Many business owners and representatives interviewed reported working with City and County of Denver or other public agencies. [e.g., #4, #13, #39, WT#8, WT#12, WT#14] For example:

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported working for “just about everybody” in the Denver area. [#22]

When asked about the nature of these projects, the same business owner said, “A big part of our practice is on-call services. We’ve also gone after animal shelters, libraries, vehicle maintenance centers, city halls, historic preservation, aviation, and office renovation.” He added that the firm was a prime contractor for most of the public work he performed in the Denver area. [#22]

- The female representative of a non-Hispanic white male-owned professional services firm reported, “Most of our dealings with the city actually take place at the airport. We actually do work under the City and County of Denver architectural on-call, but our main commercial work is actually large-scale office buildings and large-scale commercial shopping developments like the Cherry Creek Mall.” [#1b]
- The male representative of a non-Hispanic white male-owned professional services firm stated that their firm was “on the City of Denver on-call,” and has worked on five to seven other public agency projects in addition to working on the Denver Airport. [#1d]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that they work primarily with Denver International Airport (DIA) and other airports around the country by installing and maintaining specialty machinery. She later said that she subcontracts consistently on DIA projects, and that this work is the majority of her firm’s business. [#20]
- The non-Hispanic white male owner of a professional services firm reported working with several public agencies in the Denver area. He stated that his firm has worked with the City and County of Denver, the Colorado Department of Transportation, the Colorado Division of Wildlife, the Denver Water Department, and as a sub consultant at Denver International Airport. He added that his firm has done work in and for Fort Collins, Windsor, Greeley, Longmont, Erie, Highlands Ranch, the City of Castle Rock, and Colorado Springs Utilities. [#3]
- The non-Hispanic white male representative of a majority-owned construction services firm reported that currently the firm’s largest prime contract is with City and County of Denver. He added that the firm has also worked with Denver International Airport, Denver Water, Denver Wastewater Management, and a number of federal and other local/state agencies. [#21a]

When asked about the nature of the projects, the same business representative reported that public projects include work for airports, municipal buildings, correctional facilities, and water treatment facilities, among others. He added that the firm performs as both a prime contractor and subcontractor on these projects. [#21a]

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm reported that her firm has worked with the City and County of Denver, Douglas County, Adams County, Castle Rock, the town of Parker, the town of Superior, and CDOT. When asked if she bid as a prime or subcontractor with these agencies, she said she bid mostly as a prime, though she did some work as a subcontractor. [#2]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that his firm has worked with several public agencies in the Denver area, including Denver Public Works, Denver Transportation & Mobility, Denver Environmental Health, and Denver Public Schools. He added that the firm has also worked with CDOT and Regional Transportation District. [#9]
- Regarding her firm's work with public agencies in the Denver area, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that her firm worked as a prime for City of Lone Tree and Metro [Urban Land] Conservancy, and as a subcontractor for Denver Public Schools. [#12]

The same business owner added that the firm also worked for Denver Housing Authority on a few small projects. She went on to say, "The other thing I should say is [that] we've done lots of quasi-public work. Things like churches. We've worked for Hudson Gardens, [which] is a place that's public, but it's not a public agency They're public places." [#12]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm reported that her company has done a lot of work for public agencies, including for CDOT. She said, "I worked for [Denver] Public Works as a sub for them on the periphery, [though] I've never been a prime for them. I did bid on a large ... job and lost by the littlest amount." She commented, "Every bid you submit gives you experiences and how to respond to the next one." [#19]
- When asked about her firm's experience working with public agencies in Denver, the non-Hispanic white female representative of a majority-owned SBE-certified professional services firm stated, "We have done some jobs for [Denver] Public Works The project result was fine. Nothing stands out about the work or the interactions with the staff. However, we do a lot of work for other governmental agencies around the metro area. Examples would be Douglas County, Boulder [Valley School District], and City of Fruita. I believe they find [that] our work is quality and [our] completion is timely." [#28]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that her firm mostly bids as a subcontractor on City and County of Denver projects and for other public agencies. [#5]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that his only public sector work was a contract with Regional Transportation District years ago, and "one small contract with [Denver International Airport]." He added that he attempted to get work with City and County of Denver, Aurora, Denver Public Schools, and City of Englewood with no success. [#36]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that his firm has worked with many public agencies, including City and County of Denver, Denver Public Schools, Douglas County, Douglas County School District, Jefferson County, Jefferson County School District, and CDOT. He added that his firm has an on-call contracts as a prime contractor with City and County of Denver in the past. [#14]

The same business owner said the company's very first project was for Denver Water. However, he said that his firm no longer contracts with Denver Water because they now require a certified Project Management Professional (PMP) on the team, which his firm lacks. He commented, "So, that Denver Water work went away." [#14]

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm typically seeks asbestos and mold prime contract work when pursuing work with public agencies, and added, "Typically, the city already has a vendor they're going to call right away to do [my type of work]. They have vendors they will call instead of bidding that work out because it's more [so] emergency work." Conversely, he reported that his firm has worked as a prime contractor on projects in Aurora, Golden, and Broomfield. [#7]
- When asked which public agencies the firm has worked or attempted to work with in the Denver area, the non-Hispanic white male representative of a majority-owned goods and services firm stated, "I would say all of them We work with Denver Water, [Regional Transportation District], City of Denver, schools, [and] the airport." He reported that they supply components for highways, dams, airports, and schools. He later noted that as a supplier, the firm does not work directly with City of Denver or the airport. [#23a]
- The non-Hispanic white female owner of a DBE-, MWBE, SBE, and ESB-certified professional services firm stated, "We have performed civil engineering consulting services for numerous clients including CDOT, [Regional Transportation District], the City and County of Denver and many other municipalities." [WT#15]
- The non-Hispanic white female owner of a DBE-certified construction firm reported that her firm works exclusively with CDOT." [#27]
- The Hispanic American female co-owner of an SBE-certified professional services firm said that the firm used to do work for Jefferson County School District, but because the firm has not passed a bond in years, they have had no recent opportunities. [#15a]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said that she has attempted to work with all public agencies in the Denver area, though she has only had one public contract. [#35]
- When asked about the company's experiences working in the private and public sectors, the non-Hispanic white male owner of a specialty services firm said that his firm does work for Colorado Public Employees Retirement Association (PERA) about once a year. He noted, "That's the only public work we do. Everything else is in the private sector." [#30]

Trade association and business assistance organization representatives indicated that members work for a wide range of Denver public agencies, and discussed members' experiences pursuing the work. Comments include:

- The Native American female representative of a business assistance organization said, “They work with CDOT, [Regional Transportation District], Denver Public Schools, [Denver International Airport], higher education systems, Denver Housing Authority, Denver Water ... pretty much all of them.” Regarding the nature of this work, she said members do a wide variety of construction, both vertical and horizontal, plus goods and services. She noted that most members bid as subcontractors. [#37]

When asked how many members work on transportation-related construction or engineering work, the same business assistance organization representative said, “We have quite a few. Some of them work on projects like the [Regional Transportation District] rail line out to [Denver International Airport] and CDOT projects. There is also a trend of tribes starting their own construction companies and going after construction projects. [A] tribe out of Oregon partnered with [a local prime] for projects in this region, and they are also doing work in Montana.” [#37]

- When asked about members' experiences in getting work with public agencies in Denver, the Black American female representative of a trade association said that “CDOT ... historically has had a very challenging time, and not so good of a reputation as it pertains to engaging small businesses.” However, she noted, “Over the past three to five years, they have brought on a new team that has been very focused, dedicated to rebranding, reporting, and ... restructuring their program to the point now where you're seeing a lot of traction” [#6]
- The Hispanic American male representative of a trade association reported that prime contractor members generally bid on large, vertical construction projects with City and County of Denver, Denver International Airport, CDOT, and Denver Public Schools. He said that their MWBE community usually bid as first-tier subs on many of the contracts. [#11]

The same trade association representative later said that City and County of Denver is more difficult to work with than other public agencies because they have multiple certification programs within one entity. He explained, “[Denver recognizes] MWBE, SBE, DBE, [and] EBE [certifications], and so it is harder for folks to know exactly which program is being implemented on that particular bid. CDOT and [Regional Transportation District] are mainly DBE. They have no local program So, I would say the City's is a little bit more difficult just for the magnitude of work and the [certification] programs that are in place.” [#11]

- The Asian-Pacific American male representative of a business assistance organization said, “I do have a member who does a lot of the [Regional Transportation District] lighting projects, has been around a long time, and has worked as a sub for some of the major primes. [However], about 90 percent of our small business members do private work.” [#33]

Some business owners reported not working for City and County of Denver, or that such work is slowing down. [e.g., #7, #24] For example:

- When asked if he ever worked with public agencies in the Denver area, the Subcontinent Asian American male owner of a specialty contracting firm stated that he and a Black American contractor bid on a contract with the Zoo but never heard back. He said that they spent hours collecting information for the bid and ultimately decided to lowball it just to get their foot in the door. He commented, “[I think] they already had the company picked out, and wanted to work with someone they knew or had worked with before.” [#18]
- The non-Hispanic white male owner of a construction-related firm reported that his company has been unsuccessful in pursuing public sector work. He explained, “[We] responded to bids from the City of Denver, specifically [Denver] Public Works, during the time the company was [a] certified [SBE]. We never won any of those bids, [and] stopped responding after the [SBE] certification lapsed.” [#25]
- The non-Hispanic white female co-owner of a specialty services firm reported that while the firm has never worked with any public agencies in City and County of Denver, they’ve worked with City of Longmont, City of Berthoud, and a local school district. [#8]

The same business co-owner later added that she never submitted a bid for the work. Instead, she said that the entities reached out to her. She explained, “They contacted me. I have no idea how to contact public entities for contracts. They just said, ‘Hey, we need a new [vendor for her product]. Can you do this job for us and have it ready by the [deadline]?’” She went on to say that she worked as a prime on projects for City of Longmont. [#8]

- The non-Hispanic white male owner of an engineering company reported that he has never worked for and “would never work for the City of Denver.” He said that he had a negative experience working with a city government before starting his own firm. [#26]
- When asked if he has worked with or attempted to work with any public agencies in the Denver area, the Black American veteran male owner of a general contracting company reported that he has not. He added, “I don’t want to work for the government.” [#29]

A number of business owners and representatives discussed positive experiences while working with City and County of Denver or other public agencies. [e.g., #39] For example:

- The non-Hispanic white female owner of a DBE-certified construction firm stated that her firm has “a good partnership” with CDOT. [#27]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm stated, “We absolutely love working with the City and County of Denver. The Department of Public Works ... personnel are excellent to work with. The city implements an honesty and transparency protocol with everybody they’re working with, and that reflects a lot.” [#2]

The same business co-owner continued, “We are more than ecstatic to continue to work with the City and County of Denver. It’s one of the best, if not the best, government entities to work for as a prime and as a sub.” [#2]

- The male representative of a woman-owned specialty services firm said, “Denver supported us and awarded a wonderful contract This has been a wonderful thing for our business and we are thankful. Without Denver looking to find smaller, locally owned businesses, we would never have been able to add 150 additional employees to our roster.” [WT#1]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated that her experience with Denver Parks and Recreation was very positive because of the agency’s involvement. She continued, “With [Denver] Parks and Rec, they had a ... job in [a public park]. They would talk with us every day because the job was so visible to the neighborhood.” [#19]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm indicated that his experiences working with City and County of Denver and other public agencies in the Denver area, including CDOT, have been positive. [#14]
- When asked about the firm’s experience as a supplier working with City of Denver, the non-Hispanic white male representative of a majority-owned goods and services firm said, “[Subcontractors] check their boxes and we get them everything they need. [It’s] not difficult.” [#23b]
- The non-Hispanic white male representative of a majority-owned construction services firm stated that working with City and County of Denver and Denver International Airport has been positive overall. He said that he has not heard of any “nightmares.” [#21a]

One business assistance organization representative reported positively on members’ experiences working with Denver public agencies. The Native American female representative of a business assistance organization said, “[Denver International Airport] and [City and County of Denver] are very responsive. Denver Purchasing has been excellent about sending flyers out about their events, and they stay in contact. Denver Housing Authority has really focused on developing their relationship with us the last couple years.” [#37]

Some business owners and representatives discussed challenges they face when working with or trying to get work with City and County of Denver or other public agencies. For example, untimely payments, paperwork issues and other barriers follow:

- The non-Hispanic white female owner of a DBE-, MWBE, SBE, and ESB-certified professional services firm said, “Our experience working with the [City and County of Denver] has been challenging, particularly over the past few years. My biggest concern is prompt payment, or lack thereof. All of our contracts, unfortunately, are pay when get paid. My firm is typically a second-tier sub. It is commonplace for my firm to wait six months or more for payment from [City and County of Denver]. We were recently paid on work we performed two years ago.” [WT#15]

- A survey respondent said, “For a company just starting out, say the first 24 [to] 36 months, it is impossible for a company to work for a public entity. It's the qualifications and RFQs, because the company doesn't have a proven track record.” [AS#44]
- Regarding challenges that he sometimes faces when trying to work with Denver public agencies, the Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said, “Sometimes with public agencies it's harder to work through the maze to get answers to your questions.” [#39]
- The non-Hispanic white male owner of a goods and services firm reported that the firm's work is almost exclusively in the private sector. He noted that they briefly attempted to do work with public agencies in the Denver area, and commented, “There was more paperwork than we really wanted to do It wasn't [necessarily] a deterrent. It was more [that] we [would] come back to it because there were lower [hanging] fruit.” [#10]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “The municipalities and public agencies that require proposals are the most difficult, so we generally don't do that because we are always high I refuse to lowball. We've come in triple. I think the folks who are successful lowball it, and then come in with lots of change orders.” He later indicated that he had a negative experience working with Denver Public Schools. [#22]
- The Hispanic American male owner of a specialty contracting firm reported problems with communication and timeline limitations. He stated, “The only recommendation I have [for the City of Denver] is that during the term of work, change orders need to be processed in a quicker manner ... [because] we have a timeline. When [they] are not processed quick enough everybody runs late.” [#4]
- Regarding work with City and County of Denver, a survey respondent stated, “It's been a little bit difficult. Just the way they conduct business, they're not small business-friendly. [There is] a lot of bureaucracy, and [they are] not really open to small business.” [AS#51]
- A survey respondent said, “The people in charge only help people they know. We've participated in city committees, but weren't successful in getting contracts. It's impossible to meet requirements to even start the bidding process [due to required] insurance coverage. [AS #16]
- A public meeting participant said, “If you are planning to do work with [City and County of Denver] ... you've got to have at least \$60,000 to \$100,000 in cash, with payments being really slow.” She added, “You are committing suicide for your business, so make sure you have cash. I have contracts here. I'll tell you because I know.” [PT#4]
- The Hispanic American male owner of a DBE-, MBE- and SBE-certified construction firm stated, “We are very disappointed as a [certified] contractor. We finally get a contract with [City and County of Denver], but we never got any requests for pricing. This is a failing effort by the City to provide opportunities to contract directly with small businesses.” [WT#14]

- The Hispanic American female co-owner of an SBE-certified professional services firm said that it is difficult to secure public sector work without MBE or WBE certification. She added that the firm's SBE certification does not set the firm apart because "too many" firms have the certification. [#15a]
- Regarding the firm's work with CDOT, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm commented that their contract had unclear specifications. She explained, "They wouldn't tell you about the specs until you made a mistake. They would talk to you then, not ahead of time. It was just not part of the information they provided." She went on to say, "Some of the information comes from the red book or the green book. Those are guidelines for construction projects. It's always changing." [#19]

The same business owner continued, "I did a large ... project, [but] unfortunately it [had] three different contractors ... three different specs, and three different CDOT inspectors, [all on the] same road. Three different primes won the job and they selected us for all of the road. It was 10 miles and the specs changed with each prime." She commented, "It was bizarre working like that. As temperatures changed and the application rates changed ... it was almost like each was its own little mini project, but our lines connected." [#19]

- The Black American male owner of a DBE- and SBE-certified professional services firm said, "I have been on several projects that are [City and County of Denver] projects. My work is usually with the prime contractor. I have found the City of Denver to be a rather different type of entity to work with. [There's a] lot of stuff to go through. Keeping track of all of the certifications and getting passed around to different people when trying to get information about [work] opportunities [can be a challenge]." [WT#12]

The same business owner continued, "It can become rather cumbersome, and as a result, I do not pursue much City of Denver work." He added, however, "With the new ordinances that were discussed at the last [Construction Empowerment Initiative] meeting, it is something I may reconsider if those become law." [WT#12]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said, "Sometimes ... CDOT runs out of money and cancels a task order. Then you have people [just] standing around." However, he later said, "I think it's easiest to find out about work with CDOT because we know a lot of [their representatives], and we can call them and ... see them right away." [#14]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that she tried to get work with public agencies other than Denver International Airport with no success. She commented, "It is very hard to get a foot in the door with other public entities." [#20]

The same business owner continued by saying she attempted to work with CDOT, Regional Transportation District, and Denver Water in the areas of construction management and labor support. She noted, however, that she does not have the relationships to bid as a subcontractor in those industries. [#20]

- The non-Hispanic white male owner of a specialty services firm said, “The problem we have faced is finding out how to break into the city and other government entities, to sell our product. I’m sure they probably use the same vendors they have always used, and [are] not interested in finding out if there is something more competitive available.” [#30]
- The Black American and veteran male owner of a DBE- and MBE-certified construction firm said, “More needs to be done to include MWBEs in telecommunication procurements at the airport.” [WT#13]

A few trade association and business assistance organization representatives discussed challenges members sometimes face when working with or trying to work with City and County of Denver and other public agencies. For example:

- The non-Hispanic white female representative of a trade association said that many members find it difficult to get work with public agencies in Denver. She said, “I think some of them feel like the opportunities aren’t there Some feel that they keep giving work to the same firms over and over, [and] I know that this isn’t just with [the City and County of] Denver Some project managers are comfortable with a certain firm, and that’s all they want to do business with.” She added that contract administrators find it easy to work with firms they already know, and commented, “They know them, so it’s less risk on their part [and] less that they have to manage. [#38]
- When asked to describe members’ experiences attempting to get work with these public agencies, the Native American female representative of a business assistance organization said, “I think getting that first contract is the big challenge. Once they get the first one, they’re [okay]. If they’ve been working in the private sector, they’re not used to all the rules. I had a member who submitted a bid and put it in an envelope as required. When he turned it in, they took it out of the envelope and stamped it, but didn’t put it back in the envelope, and he was disqualified. So, that was a shock.” She later added, “We have a difficult time getting responses from Denver Water.” [#37]
- Regarding members’ experiences working with City and County of Denver, the Black American female representative of a trade association said, “Unfortunately, a lot of the comments I hear are [that] it’s a mess over there [and] they don’t know what they’re doing There are so many questions [regarding] the organization, the administration of the departments, [et cetera], and it’s been a challenge.” [#6]

Some interviewees and survey respondents discussed challenges specific to small businesses when pursuing work with City and County of Denver or other public agencies. Comments include:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said working within the public-school system is difficult. She said the presence of children and relative safety concerns adds to the challenge, and said, “You have to approach it a different way. And they, admittedly, will tell you this when you come onboard. [They’ll say], ‘Hey, this is not going to be the city and county. It’s not going to be as pleasant as you think it might be.’” [#13]

- Regarding his efforts to get work with public agencies in the Denver area, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “For commodities, you have to put in the time and effort to submit your bid. [However], the volumes are such that the large companies benefit because they get a better price for the product and can make money.” [#36]
- The non-Hispanic white male owner of a construction firm indicated that he has not pursued work with public agencies. He said, “I have heard that you have to jump through all types of hoops to work on public projects. I’d rather stay as an independent contractor.” He continued, “I’ve heard you have to go to pre-bid meetings, try to build a relationship with other companies that are going after the project, [and] they don’t notify you if you got it or not. And [most] importantly, you don’t get paid in a timely basis [So], I’d rather stay as an independent contractor.” [#24]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said there is a negative perception that small businesses cannot compete against larger firms “because they don’t have the infrastructure in place to compete,” or because “they don’t have the experience or qualifications.” He noted that small businesses are more likely to have qualifications with their key people rather than the firm as a whole. [#39]
- The Hispanic American female co-owner of an SBE-certified professional services firm said that small firms are viewed as riskier and potentially unable to finish a project. She said that this perception is present in the public sector as well as the private sector. [#15a]
- When asked about his firm’s experience attempting to work with public agencies in the Denver area, the Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm said, “Denver has its own technology department. That department does all of the data communications for the entire city, [but] there has not been an opportunity to get any of that work. If that ever changes, we are ready to cable install, provide technical support, [and] anything else. Right now [though], we don’t see that happening. However, municipalities are always looking to control and reduce costs, [so] that could be something in the future.” [#32a]
- A survey respondent noted, “Work in the Denver area, as well as the Denver International Airport area, all seem to be controlled by the same general contractor.” [AS#10]

Some trade association and business assistance organization representatives indicated that small businesses face unique challenges when pursuing work with City and County of Denver and other public agencies. Comments include:

- Regarding lack of experience as a barrier to performing public sector work, the Native American female representative of a business assistance organization said, “I have heard that come up. One of the things we try to do is encourage them to start out with a very small contract to get their foot in the door. I’ve also heard that sometimes there is a requirement for extensive experience doing a project like a school, and for a small business that’s a barrier.” [#37]

- The Hispanic American male representative of a trade association said, “[Denver] just put through a new proposal, or maybe an ordinance, spelling out the prompt pay guidelines and reinforcing what we already had in place. But the issue is for a certified firm that may be a third- or fourth-tier [subcontractor]. They do their work [then] they have to submit the paperwork to get paid. If somebody didn’t submit their paperwork on the same package correctly, the whole package is held until the next cycle, until all the paperwork is corrected.” [#11]

The same trade association representative continued, “We do not have a good system ... When work is done and completed ... the approved payment should be made. The payments made to these tier subcontractors who did the work should also be within a certain amount of time. I think it is going to get better. But a small business cannot hold in their accounts receivable 60 [or] 90 days. They cannot hold payroll back 60 or 90 days while waiting for payment from the city.” [#11]

- When asked about challenges that small businesses face when pursuing work with City and County of Denver or other public agencies, the non-Hispanic white female representative of a trade association said that delaying contracts after teams have been formed and contracts have been signed is damaging to small businesses. She added, “What is that small firm supposed to do? They geared up [and] were ready They [then] have to put [staff] on another job.” [#38]

The same trade association representative said that, in these instances, a prime contractor finds another subcontractor that might not be a DBE. She commented, “Sometimes ... I do not believe that public entities understand business at all, and what those firms have to go through.” [#38]

She later said, “I met with a woman last night [who owns] a firm of 17 people. She tries to prime as much as possible. She’s on other people’s teams, but she wants to be a prime The client selection pool [needs to] give those firms an opportunity to really be in charge of their own destiny. I think that’s part of [what] public entities [don’t understand about] business.” [#38]

Some business owners and representatives indicated that there is not enough local firm participation in the public sector and with City and County of Denver specifically. [e.g., WT#1, WT#9, PT#3a] For example:

- The non-Hispanic white male representative of an engineering firm stated, “We have enormous firms in this community that have tremendous capacity that are not 100 percent utilized by the city.” [PT#2a]
- The non-Hispanic white female representative of a WBE-certified professional services firm said, “[In] Denver in particular, you see giant companies begin to come [in and get large projects]. ... [They bring] their consultants and their giant MBEs out of Chicago that meet the ... qualifiers at the airport. [A firm from] Chicago won a \$30 million project management contract” [PT#3b]

- The Black American male owner of a DBE- and SBE-certified professional services firm said that “many construction/engineering/architectural firms” in the region give his firm a “hard time” when he justifies his fees, and often turn to out-of-state talent. He explained, “It’s not that they don’t have the budget or the money, they just don’t want to properly compensate the dynamic local talent” [WT#12]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that increased work along the Front Range has attracted “out-of-state contractors” that are competing with local firms, “especially small businesses.” [#20]

The same business owner later said, “I just lost a big contract opportunity because there was no requirement for local MWBE participation. Because of losing this contract, I will have to lay off 14 employees. The winning bidder told me that because there was no incentive to use a local company, they saw no value in using my company.” [#20]

She said that she believes Denver International Airport is marketing heavily to out-of-state companies with no preference for local companies. She stated, “The City and County of Denver and [DIA] need to have a local requirement on their contracts. I think they should add incentives to contractors that utilize local subcontractors.” [#20]

Some interviewees spoke about their positive experiences with outreach efforts by City and County of Denver and other public agencies. [e.g., #5, #13, #35] For example:

- The Hispanic American male owner of a specialty contracting firm stated that relative to other cities and counties he has worked for, it is easier for him to find out about work opportunities from the City and County of Denver and Denver Public Libraries. He reported that these entities are more communicative than others, specifically via email. [#4]
- The non-Hispanic white male representative of a majority-owned construction services firm said that it’s relatively easy to find out about work opportunities with City and County of Denver. In the private sector, he added, work opportunities are more dependent on relationships with primes pursuing that type of work. [#21a]

The same business representative later said, “If you’re aware of where to go, you can pretty much find what the city is doing. And they always have outreach events. We recently attended one for the National Western Complex.” [#21a]

A trade association representative spoke positively about members’ experiences with public agency outreach. The Hispanic American male representative of a trade association said that members get a lot of their information about upcoming jobs or projects through public agency outreach. He said that there are several general contractors who also do their own outreach and invite their membership to attend presentations. He added, “Many times, the airport will have outreach events and you want to take a look and see who the primes are at any one of those meetings. You want to know the folks that are there because those are the folks who are forming teams and those are the folks that the smaller guys in our membership want to talk to.” [#11]

The same trade association representative later said that discovering work opportunities is easiest for Denver International Airport. He explained that DIA Commerce Hub helps promote and conduct outreach on contracting opportunities available at the airport. [#11]

Some interviewees reported limited outreach from the City and County of Denver and other related challenges regarding outreach efforts. [e.g., #6, #23b, WT#12, PT#3b, PT#4] Examples follow:

- The Asian-Pacific American male owner of a MWBE-certified consulting firm said, “Recently we have invested much more time and energy into pursuing state and federal opportunities related to our business, [though] we have yet to be awarded projects through these avenues It is my hope that the State of Colorado continues to support small and [MWBEs] in the future, particularly those who embrace and adopt corporate citizenship principles beneficial to the community. Thus far, I have also found it a bit difficult to track down potential/applicable state RFPs using the information resources available I would love to have more exposure to information around RFPs that would fit our skillset and capabilities, as well as our status as a minority-owned small business.” [WT#6]
- Regarding the city’s outreach efforts, the non-Hispanic white female owner of a WBE-certified professional services firm said, “The staff at the city is overwhelmed with their tasks. They’re understaffed, and the city’s growing [at] an explosive pace I think they don’t have enough people to deliver world class services from a world class city. And we’re seeing ... maybe not as prompt public notification for these meetings [as there should be].” [PT#3c]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “If I’ve already been to an outreach [event] and provided the necessary information, but then we don’t get invited to participate, my question is, ‘Why?’” He continued, “[If] we’ve done the things that you’ve asked us to do to participate, [why aren’t we] seeing any feedback?” [#9]
- The male representative of a construction services firm said, “As a prospective vendor, I have gone to all of the events [and] met the people I needed to meet. I followed up with an email thanking them for their time, [and] set up meetings with them and had great conversations about us partnering with them for future business. I have stated time and time again we are looking for a long-term relationship [rather than] a one-off business deal. [However], we part ways, shake hands and we say we will get together again. [I] send [a] follow-up email ... asking for another appointment, and call and leave a voicemail to [no] avail. Weeks go [by and] no response via email or phone call.” He commented, “What would you think with no further reply from them?” [WT#4]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that even though he was certified with several agencies, he did not get automatic notices regarding opportunities in his market. [#36]

Some business owners and representatives commented on how late/untimely payments from City and County of Denver or other public entities impact the success of firms. [e.g., WT#3, WT#15, AS#26, PT#3a, PT#3c] For example:

- Regarding her work with public agencies in general in Denver, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, “All municipality work is challenging, and then there is always waiting to be paid. The city payment might take months.” She added, “The primes I work with make sure I’m not waiting too long, and will make payment to the company before they are paid.” [#19]
- A public meeting participant said that “payments [are] really slow” when working with City of Denver. She added that it can take “up to two years to get your money back.” [PT#4]
- When asked to describe the firm’s experience getting paid on work with public agencies, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “It really varies. It depends on the agency. The first payment is generally painful because you have to understand their process. Everyone is different ... they all break things out differently, even within different Denver departments. We have battled over \$140 on \$10,000 worth of work because of rates that have changed, and it’s in their favor.” [#22]
- When asked about the firm’s experience getting paid on public sector work, the non-Hispanic white male representative of a majority-owned goods and services firm commented, “It can be slower than others.” [#23a]
- Regarding the firm’s experience getting paid on public sector work, the non-Hispanic white male representative of a majority-owned goods and services firm stated that getting paid on public sector work can be slow because both prime contractors and subcontractors are paid before suppliers gets paid. [#23b]
- Regarding untimely payment from City and County of Denver, the non-Hispanic white male representative of a majority-owned construction services firm said, “Recently there was a delay on a project, and it filtered all the way down to our subs, and their subs, because those subs were approaching us [asking], ‘How come you're not paying?’” He continued, “The situation bothered me because we have always paid our subs on time. I looked into it and found [that City of Denver] had held up payment.” He added, “They did finally release payment, with interest.” [#21a]

A few trade association and business assistance organization representatives discussed how late/untimely payments from City and County of Denver or other public agencies impact members’ success. [e.g., #33] Comments include:

- Regarding late payments by City and County of Denver, the non-Hispanic white male representative of a trade association said, “That really affects [firms], especially minority [and] woman-owned certified business[es]. They are a small business and they can’t suffer the cash flow of waiting ... 60 or 90 days for payment. They need payment every 30 days. [#40]

- The Black American female representative of a trade association reported that members are often not paid on time when working on City and County of Denver projects. She explained, “One of our members in particular shared [that] it had taken several months for them to get their payment. I want to say [it was] nine months or something.” She added, “Others talk about the different steps internally, like not knowing what the status is because you call into one department and they’re saying that they don’t have it, or they don’t know and it’s kind of a runaround.” [#6]

The same trade association representative went on to say, “If a firm is newer, they’re not clear on what the process is. If they’re more seasoned contractors, they’ve been around the block enough to have learned what the process is or isn’t, and they have just kind of accepted it because that’s the way the city works Some are very hesitant to come forward and say anything because they don’t want any retaliation.” [#6]

- The non-Hispanic white female representative of a trade association said that prompt payment is an issue for members working with City and County of Denver as both prime contractors and subcontractors. [#38]

Learning about prime and subcontract opportunities with City and County of Denver and Other Public Agencies. Firms discussed learning about prime and subcontract opportunities with City and County of Denver and how it compares to other public agencies. Some indicated that it is difficult for them to learn about prime or subcontract opportunities. [e.g., WT#12] Others reported effective ways of learning about potential subcontracting, or that prime contractors reach out to them. For example:

- Regarding learning about work opportunities with the City and County of Denver, a public meeting participant said, “The process for me has been really, really frustrating. It’s been many years that I’ve been trying to work with the City and County of Denver, and I’m ready to serve.” He continued, “I serve my community [and] I do it well. We have a good network of individuals, really good people who are committed and want to do things for our communities. [However], that process to come on board with the City and County of Denver has been ... really cumbersome.” [PT#4]
- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said it takes “two or three phone calls” to get in touch with someone at the city. She added that other municipalities have a much slower response time, so she views her local experience with the city somewhat favorably. She went on to say that her positive relationship with prime contractors has allowed her to get the process pushed through more swiftly. [#13]

The same business owner later said it is more difficult to find work with the state because of the extensive time required to review opportunities through their bid management tool, BidNet. She said, “You gotta pay the subscription price And if you’re a small firm just starting off, you’re paying a subscription just to look at the screen to see the project, and don’t even get to bid.” She went on to say, “[It’s] easier with the City and County of Denver because not only do they email you [about opportunities], they put it on their website.” [#13]

- The non-Hispanic white male owner of a professional services firm stated that he is pleased with how easy the City and County of Denver makes learning about projects. He also reported that he is pleased with other agencies, saying, "We get communications from Denver Public Schools that announce opportunities ... [the] City of Aurora has staff that will call us to make us aware of [projects] The Denver metro area is an unusually good place for an engineer to work, which is based on my experience working [in this field] for over 40 years." [#3]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said finding out about upcoming projects with public agencies was relatively the same across the board. However, she noted that for City and County of Denver, firms also have to check the website. She said that for other public agencies she gets notifications through BidNet, and added, "You have to go in manually to the [City and County of] Denver website for work. Other entities, the majority of them if not all, go through the BidNet network where you pay for a subscription and you get emails [relevant] to your codes." [#2]
- The Black American male co-owner of a veteran-owned specialty contracting firm said it is harder to find out about City and County of Denver opportunities versus those of other public agencies. He explained, "It is a little harder because by the time it's published or you find out, it's already been bid on by [what] I call the insiders. They get notified well before the bid goes out, and the bid is usually tailored to one of those companies." [#7]
- When asked if it is easier or harder to find out about work opportunities with City and County of Denver versus other public agencies, the non-Hispanic white male representative of a majority-owned goods and services firm said that there is not much difference between public agencies when it comes to finding out about work opportunities. [#23a]

Some trade association and business assistance organization representatives compared City and County of Denver's outreach to other public agencies'. Some indicated that members struggle to learn about public sector prime and subcontract opportunities in Denver. [e.g., #38] For example, when asked about prime contract opportunities with public agencies in Denver, the Black American female representative of a trade association said, "With CDOT, you're going to start seeing more priming opportunities because that's something that's on their table, something they've been considering and making room for with their budgets, with the allocation of projects and all of that." [#6]

The same trade association representative continued, "With the City and County of Denver, I've not necessarily seen as much opportunity for priming. There are a few here and there, but I don't know what their program looks like in terms of dedicated focus. Is there [even] an initiative that supports that?" [#6]

She went on to say that the City and County of Denver DGS usually keeps members up-to-date regarding opportunities, and added, "Every week, if not more than once a week, we are getting communications. We are broadcasting those on our website and our publications, so what we get we certainly pass on [to others]." She noted that Regional Transportation District and CDOT also keep her organization in the loop regarding opportunities. [#6]

One business assistance organization representative said that although agencies do a good job of promoting opportunities, the opportunities are rare. The Asian-Pacific American male representative of a business assistance organization said, “There are opportunities, but they are few and far between. Case in point, [Denver Public Schools], the airport expansion, [and] the National Western Complex. Engaging with these projects is challenging for them. I’ve gotten feedback from members that while [Denver Public Schools] says they’re reaching out to diverse communities, quite cynically, it is lip service. The companies in our member family are not seeing it.” [#33]

In regards to learning about work opportunities with public agencies, the same business assistance organization representative stated, “Overall, the agencies all do a good job of getting information out, and it’s also on their websites. One of the areas that should be given more weight is opportunities to provide professional services like marketing and graphic design. These opportunities are equally important to our MWBEs. A \$10,000 or \$20,000 job is very attractive to a small business.” He added, “[Agencies should] slice out different size[d] work.” [#33]

For some, learning about contract opportunities is not a barrier. [e.g., #20] For example:

- When asked if it’s easy or difficult to find out about City and County of Denver work opportunities, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “I think the City and County of Denver has more information available about their projects than pretty much anyone else. I can go out to the [Denver] website, see what is there, see what projects I’ve bid on, and see what projects are pending.” [#5]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, “I am always on BidNet and [iSqFt] researching what would be the best bids to go after.” [#19]
- The non-Hispanic white female co-owner of a specialty services firm reported that she is not aware of any potential barriers to learning about opportunities in the local marketplace. However, she noted, “If there’s a magic list of people that get flyers and broadcast emails, I’m not on it.” [#8]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that his firm primarily does qualifications-based engineering work. Because of this, he added, they submit proposals rather than bids. He went on to say that CDOT work is the easiest to secure because they work often with the agency and know their processes. Therefore, he added, his company’s proposal is very targeted. He noted, “Once you know the process, it’s easy.” [#14]

One business assistance organization representative reported positively on City and County of Denver’s outreach regarding work opportunities. The Native American female representative of a business assistance organization stated, “The City and County of Denver do a great job telling folks that something is coming down the pike.” However, she noted that in the private sector “it’s much harder to get that information.” [#37]

Recommendations for improving state agencies' bidding, contracts, prompt payment, and other processes. A number of business owners and representatives commented on or made suggestions for improving other state agency procedures.

- When asked if she has any recommendations for City and County of Denver to improve its notification or bid processes, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, "The project plans have so many pages, and so much does not apply to us. Just have a section about the cleaning. [And] please, just put what we need in the front. Looking through everything takes a lot of time." [#35]

When asked if she has any recommendations related to improving the administration of contracts or payment methods by City and County of Denver, the same business owner said, "[When] I send an invoice, [it] has to go to different places, then they send us a check, which is another five-day delay. It would be nice to have direct deposit [so] I don't have to ask when the check is coming." [#35]

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said it would be helpful to be notified by email or fax of City and County of Denver bidding opportunities. She added that as of now City and County of Denver only notify of opportunities quarterly, and said it's inconvenient and inefficient that there is not a place for firms to check for work on a regular basis. [#2]

The same business co-owner went on to say that getting paid is easy through City and County of Denver because it's done online while other agencies don't utilize online payments. She also noted that as a prime contractor she has had no issues getting paid across several agencies. When asked if this is the case for subcontract work, she stated, "We are sometimes paid 60 to 90 days after the primes are paid," and commented, "General contractors like to work on their subcontractor's money." She suggested that public agencies follow-up with general contractors that do not comply with prompt payment guidelines. [#2]

- When asked if he has any recommendations for City and County of Denver to improve its notification or bid processes, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, "There is a lot they could do. When you register with them you're supposed to get bid notifications when something comes up in your NAICS code, but you don't. I have to go inquire all the time. I've tried to get into [Regional Transportation District's] automatic system for years, but haven't been successful. Same thing with Denver. And I know they're out there buying smaller quantities of things, but they never tell you about those opportunities. When you're running a business, you don't have time to knock on that door time after time." [#36]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm stated that City and County of Denver should improve their notification and bid processes. She said, "Why can't [firms] go on Rocky Mountain BidNet like everybody else? You have to go on Work4Denver, [but] there seem to me to be tons of projects that never show up [there], such as, [a local public project in my neighborhood]. I live in this

neighborhood and I work in this neighborhood. All of a sudden, this huge project was taking place that I had no idea about. [#12]

The same business owner continued, “So, finding the work is hard. I think tons of work doesn’t ever go through [Work4Denver]. They have on-call services for architects and landscape architects, which is how their small projects are addressed. So, these big firms get these on-call contracts. I realize it would be more work for [City and County of Denver], but some of these smaller projects would really be a great way to bring in new blood rather than using the same old ... white male-owned players over and over again.” She also described the Denver Public Schools bid process as “arduous,” and indicated that it should be streamlined. [#12]

- When asked if he has any suggestions for improving the administration of contracts or payment methods, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “Yes. The federal government has a great system. They have a contract manager and they have a project manager. A lot of municipal and state agencies have a project manager, and you know who that is, [but] then your invoice goes into the accounting department and you don’t know who that person is. It may sit on someone’s desk and they may not even know what the contract is.” [#22]

The same business owner continued, “After it sits on their desk for a week, they go back to the project manager and ask, ‘What is this?’ The project manager has to explain it to them. So [then] they go back and crunch the numbers, and say, ‘It’s \$5 off, have them resubmit it.’ The prompt pay ordinance doesn’t kick in until they approve the invoice. In the federal world you send it to both, so they talk to each other and you know who that contract manager is. And they are usually at the meetings, so they know what is going on with the project. If they had that at Denver, the state, [or Regional Transportation District], it would be so much better.” [#22]

- When asked how City and County of Denver and Denver International Airport bid processes compare to other public agencies’, the non-Hispanic white male representative of a majority-owned construction services firm stated, “There is ... the issue of delivery methods. Some allow design-build or [construction manager/general contractor], [but] others won’t do anything but design, bid, build. The bid process is different for each delivery method.” [#21a]

The same business representative later said, “Getting change orders approved in a timely manner would help. It goes back to the fact that everyone can say, ‘No,’ but no one will say, ‘Yes.’ It’s getting the change orders approved so you can bill for them [that’s important]. We’re coming out of pocket for long periods of time, financing a change order, and can’t get it approved.” [#21a]

- Regarding untimely payment by City and County of Denver, the non-Hispanic white female owner of a DBE-, MWBE, SBE, and ESB-certified professional services firm said, “There is always a reason, a dispute on the prime’s invoice, pending change orders, et cetera. The bottom line is [that] cash flow concerns are resulting in small businesses closing shop or allowing larger firms to purchase them in fire sales. I have advocated for consideration of

DBE subconsultant payment waivers requiring payment a maximum of 60 days from sub invoice acceptance. Prompt payment from the City and our clients is the best way to support small disadvantaged businesses in my opinion.” [WT#15]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified construction services firm said, “If I could make any suggestions to help improve the program, I would recommend ... Denver require that businesses that have to meet goals [also] have some requirements to try new women- or minority-owned businesses [to give] other companies ... a chance to compete.” She added, “Have Denver require more percentage for women versus minority in the construction industry. I believe that is where there is the most disparity.” [WT#5]

- When asked if he has any recommendations for City and County of Denver to improve its notification or bid processes, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that they should post contact information for project managers somewhere on their website. He commented, “You need to know who’s calling the shots.” [#14]

The same business owner later said that better communicating agency personnel changes on projects would be helpful. He said that when a personnel change occurs his company spends a lot of time trying to figure out who the replacement is. [#14]

- When asked if he has any recommendations on how to improve the administration of contracts or payment methods for public agencies within City and County of Denver, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said that he is fairly happy with the current system. He added, “Although, on the private side we normally [get] a deposit for the order that we do. We have never asked a city for a deposit. But if they were willing to do that, we’ll gladly accept it.” [#9]
- Regarding ways to improve contracting processes by City and County of Denver and Denver International Airport, the non-Hispanic white male representative of a majority-owned goods and services firm stated, “Sometimes they need insurance requirements or other documents, and I’ll have to provide those to them so the sub gets paid. I wish they would do that on the front end rather than the back end.” [#23b]
- Regarding timely payments, the Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm indicated that state and local public entities should follow in the federal government’s footsteps. She said the federal government is the best entity at paying in a timely manner. [#13]

The same business owner continued, “The [federal government does] the best of getting your money right now. It used to be the opposite. They were the worst at getting you your cash, but now they are really good at getting electronic payments in fairly quickly.” She concluded, “I think we’re just stuck in the public system of it’s going to take 45 days to 90 days, to 120 days. And once you get to 120, you’re [thinking], ‘Oh, good grief.’” [#13]

- A public meeting participant said, “The [City of Denver’s] payment process [is] so convoluted. I can’t tell you how many times I had to revise a pay application because different people wanted to see things. It’s not a streamlined process, and everybody has their preferences We’ve had to call different people in different departments, and I spend hours and hours and hours on the phone trying to track down something that should be really easy.” [PT#4]
- The Black American male co-owner of a veteran-owned specialty contracting firm said that federal government contracting “seems to be a little fairer,” and explained, “They have more checks and balances because of fraud that has gone on over the years with government contracting. It’s daunting, but once you get there, they are pretty set steps [such as] meet these criteria, the next criteria, and the next criteria It’s pretty straightforward. They have set-asides for minorities, for women, for veterans, things like that. So, it’s a little bit fairer.” [#7]

The same business co-owner later said it would be helpful if City and County of Denver made changes to its procurement processes. He said, “It would be great if they sent out their pre-bid scope of work, what they require, and then follow[ed] up with deadline dates of when the bid is turned in, and also deadline dates of when they will select the bidder and make it all public[ly] accessible. It would be nice to know how they pick their vendors That’d be nice to know because it would allow other people applying for a bid on those jobs to know what they’re lacking and how to prepare themselves for the next [incoming] bid” He went on to say, “I think if they did that, some of the companies that get the bids they receive might not get multiple bids.” [#7]

Some trade association and business assistance organization representatives discussed ways City and County of Denver can improve its bidding procedures and other procurement processes. For example:

- When asked if she has recommendations to improve the administration of contracts or payment methods with Denver public agencies, the Native American female representative of a business assistance organization said, “Perhaps paying by credit card, or other digital payment processes like electronic funds transfer [would be helpful]. That would be so much faster than putting a check in the mail.” [#37]
- When asked if he has any recommendations for the City and County of Denver to improve its notification or bid process, the Asian-Pacific American male representative of a business assistance organization said, “Because so many professional businesses are members of chambers of commerce, I would ask the City and County [of Denver] to leverage those relationships and push more opportunities out through those channels.” [#33]

The same business assistance organization representative added that the Denver small business office does not collect robust data regarding payments to subs, like Regional Transportation District does with its E2 form. He stated, “It would seem to me that these city subs should be on a reportable list, [and] perhaps in an ideal situation someone is monitoring that.” [#33]

- The Hispanic American male representative of a trade association suggested that City and County of Denver implement a program that mimics the notification and bid processes of Denver International Airport's Commerce HUB, which promotes opportunities at the airport. [#11]

The same trade association representative later said, "Most of the DBE programs in the [City and County of Denver] and from CDOT are always ... horizontal work. They are usually large dollar projects, most of which are at the airport. Our certified firms cannot compete in that arena unless there are mandatory subcontractor opportunities." [#11]

- When asked how payment processes by City and County of Denver can be improved, the Black American female representative of a trade association suggested that there be better internal communication. She said, "Public works, DSBO, auditing, and whoever else touches the payout all need to get in the same room and determine what point of entry and point of contact will be had." She went on to comment, "What platform can they use so everybody gets the same information at the same time?" [#6]

A trade association representative suggested that City and County of Denver require prime contractors to use subcontractors they have never partnered with before. The non-Hispanic white female representative of a trade association said that members enjoy a procurement bonus offered by CDOT, and indicated that City and County of Denver might do well in adopting a similar practice. She explained that CDOT offers a procurement bonus when firms try to do work with a subcontractor that they've never worked with before. She said, "They ... go through the process of having all these people submit proposals." However, she noted that "they [still] have their favorites, and that's who they want." [#38]

Regarding payment processes, the same trade association representative said that a system to track payments would be helpful for small firms. She said, "I think [something] like Textura [would be helpful]. I'm confused [as to] why the [City and County of Denver] has allowed Textura to be used for design professionals and [not] public works. Why is that? [It's] a good tracking mechanism." [#38]

She later said, "Design professionals at a state level [and] federal level need to be selected first on qualifications The procurement method is known as qualifications-based selection, [and] we want to see that at a city level and a county level [Instead], they are all about low bid." She added, "Why not ... select who you think is the most qualified through whatever criteria you have, then ... sit down and discuss scope?" [#38]

One business owner suggested that City and County of Denver implement "tiered contracts" like CDOT. The non-Hispanic white female owner of a MWBE-, SBE-, and EBE-certified engineering firm said, "We talk a lot at our company about winning meaningful work. This means not being merely a placeholder subconsultant in order to fulfill the MWBE/DBE requirements ... but being able to win work where we actually get to showcase our abilities and our expertise. One of the best ways we are currently able to win meaningful work is through the CDOT [tiered] contract[s]. This tiered approach by CDOT [is] focused on bringing in and supporting smaller firms that traditionally haven't been successful proposing on CDOT projects." [WT#8]

The same business owner continued, “Being the prime consultant on this contract has allowed us to win a fairly substantial ... intersection upgrade project, and we are hoping for future projects as well. I recommend [that] City and County of Denver do something similar to CDOT. Split some of the continuing services contracts into small tier and large tier contracts. Denver can then target smaller businesses within the small tier contract, thereby providing the opportunity for meaningful work for small businesses within Denver.” [WT#8]

Another business owner said there is an “artificial cap” on the size of contracts awarded to professional services firms. The Hispanic American female owner of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said, “If you’re around ... a five-year contract, if you’re reaching anywhere [from] \$1.5 [or] \$3 million, you’re ... going to see that artificial cap. You’re gonna see what they’re giving in Denver to small business unless you’re in trucking, unless you’re in traffic control, [or] unless you’re in construction. If you’re professional services, you’re going to ... very much see ... a cap that’s given to us.” [PT#3a]

G. Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Denied opportunity to bid;
- Bid shopping and bid manipulation;
- Treatment by prime contractors and customers during performance of the work;
- Unfavorable work environment for minorities or women; and
- Any double standards for minority- or woman-owned firms when performing work.

Denied opportunity to bid. The interview team asked business owners and representatives if they experienced denial of the opportunity to bid.

Many interviewees indicated that they did not experience or have knowledge of denial of opportunities to bid. [e.g., #4, #15a, #36] For example:

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that he has never been denied an opportunity to submit a bid or price quote. However, he noted that in some cases he does not receive the solicitations that other potential firms receive. He explained, “By the time we do find out about it, we’re a week away from when the information is due. Normally, if you work within a project like that you need three weeks or a month to determine what it is that you’re asking for [and] see where you figure into it” [#9]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reported that she has never been denied the opportunity to submit a price quote to a prime. [#5]
- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said she has never been denied the opportunity to bid, but commented, “For [this] industry, you lose about 20 percent [of what] you throw ... against the wall.” [#13]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she has not been denied the opportunity to submit a bid or price quote to a prime contractor. She commented that her problem is winning bids, not being denied the opportunity to bid. [#35]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that he has not experienced any unfair denial of bid opportunities. [#14]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that their firm has never been denied the opportunity to submit a price quote to a customer. [#23a]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that she has never been denied the opportunity to submit a bid or price quote to a prime contractor. [#20]
- When asked if the firm has ever been denied the opportunity to submit a bid or price quote to a prime, the non-Hispanic white male representative of a majority-owned construction services firm stated, “There are times when we're turned down to get on a job because of whatever reason. We may not have the resume to do a specific job, even though I think we do. The owner or the client may not think so, so there are times we get rejected as well.” [#21a]

Most trade association and business assistance organization representatives reported no knowledge of members being denied bid opportunities. For example:

- The Hispanic American male representative of a trade association said that he has not heard of member firms being denied the opportunity to submit a bid or price quote to a prime. [#11]
- When asked if he has ever heard of members being denied the opportunity to submit a bid or price quote to a prime, the Asian-Pacific American male representative of a business assistance organization stated that he has not. [#33]
- When asked if members have ever been denied bid opportunities, the Black American female representative of a trade association reported that, to her knowledge, they have not. [#6]

Other interviewees reported being denied opportunities to bid, or not knowing, but suspecting, denial of opportunity for bid might have occurred. [e.g., #14, #18] For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm was denied the opportunity to submit a bid. He explained, “We were told, by a non-minority prime, that we weren’t part of their group and could not bid. [We were] not part of the primary group of contractors that they use. I don’t know why. Maybe because they’d met us in person and they noticed we didn’t look like everyone else who was in the

room. That's the only thing I could think of. I try not to go there, but that's the only thing I saw that was obviously different." [#7]

The same business co-owner later shared an example of a time when his firm was not invited to the table to bid. He said, "There was a company that we know because we know a lot of the people who do the same work that we do. So, we went to bid on a job in Denver at a school on an asbestos job. We heard about it through an employee of the school, [and] when we [inquired about] bid[ding] ... [we] didn't get a call back. And then [we] found out from another company that's a little bit larger than us and that has its own connections, that they got the bid two weeks prior." [#7]

He continued, "We finally got a call three weeks later that said, 'Oh, the bid just closed,' but we knew the firm had already started work on the job." He went on to say that he told Denver Public Schools that he heard the project had already begun, and they responded that it must have been a mistake and that paperwork may have gotten lost. He added, "Either way, we knew why we didn't get it [because] the other firm told us why they got it. They knew a superintendent, and that's how they got the job." [#7]

- When asked if her firm has ever been denied the opportunity to submit a bid or price quote to a prime, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that primes have told her firm that they do not want to partner. She explained, "They say no all the time, but I think it's different than with contractors who might want to get three drywall quotes. That's not how RFPs in architecture work, typically. They won't get quotes because the quote is not the most important thing. It's about the fancy proposal. The document that they put together, or that ... we put together. A lot of times they already have a landscape architect. They're using the same one that they've always used." [#12]

The same business owner later said that she does believe that some firms are denied opportunities to bid due to discrimination. She explained, "I definitely feel like there are power structures that are white, male-dominated [Some may think], 'What's that girl doing? What does she know?'" [#12]

- When asked if he has ever been denied the opportunity to submit a bid or price quote to a prime, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, "Yes, sometimes the prime has already selected someone else who does what we do." [#22]

One business assistance organization representative indicated that some members are denied bid opportunities. When asked if she has knowledge of members being denied the opportunity to submit a bid or price quote to a prime, the Native American female representative of a business assistance organization stated, "On the public sector side, I've heard from members who say their bid was rejected because they didn't use the right color ink, they didn't put it in a folder, and other little things. When it comes to the primes directly, it's the issues that opportunities are out there, but the small company didn't hear about them. By the time they hear, the opportunities are already filled. That's when I remind them how important

relationship-building is. They constantly have to remind the primes that they're there. [If they're] out of sight, [they're] out of mind." [#37]

Bid shopping and bid manipulation. Business owners and representatives often reported being concerned about bid shopping, bid manipulation, and the unfair denial of contracts and subcontracts through those practices.

Many interviewees indicated that bid shopping and/or bid manipulation exists or they felt that it might be prevalent. [e.g., #21a, #36, WT#5] For example:

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, "Bid shopping is very common and pits small businesses against each other." She went on to say that she is not aware of bid manipulation. [#20]
- Regarding bid shopping and bid manipulation, the Black American male co-owner of a veteran-owned specialty contracting firm said, "In the public sector, certain vendors are contacted well before the bid comes out, and they've told me about it. I played golf with them and they said, 'Oh yeah ... I was told about that two months ago but we just didn't want to do it [because] it's too small,' or, 'We know another company got that bid already, [so] don't waste your time applying.'" [#7]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm stated that he suspects that bid shopping and manipulation occur. He said, "I was at an outreach meeting and one of the things that I was told was that if you want to participate in this, you do a booth and the primes [will be] around and ... stop and talk to anybody. And I noticed that one prime spent basically 95 percent of his time talking to a particular business and that the only way that I could get him to come over and talk to us about what we're doing was actually to grab the guy and stop him as he was walking by ... He gave me 30 seconds whereas he just spent an hour with this other vendor. What does it all mean? I don't know." [#9]
- The male representative of a woman-owned specialty services firm said, "Our general comment is that in the commercial office building janitorial market, large office building managers hire national firms under national bids. Some of these firms win on price by cheating" He explained, "We confirmed that a bidder for one of the projects has legal/union/regulatory action against them in [four] different national markets. Many bid projects on a national price structure are willing to lose money in some markets where wages are higher, as they are able to make up for it in other cities, taking the profit and money out of the local economy." [WT#1]
- When asked about barriers or discrimination regarding bid shopping, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, "They just tell you, 'Your bid is too high. Thank you very much, goodbye.'" [#35]
- When asked about barriers or discrimination related to bid shopping, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, "It happens all the time with us." He added, "It happens more so in private work

Even with the federal government they have to choose based on qualifications, and so they chose several firms to do on-call work and they bid each specific task order. We told them, 'You can't do that. You can't bid us against each other.' They come back with, 'We've already selected on qualifications, but we use best value because of the Brooks Act.' But they always gave it to the lowest bidder." [#22]

- Regarding bid shopping and bid manipulation, the Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said, "I think that a buyer is going to have preset perceptions, and it could make a difference when [choosing a bidder]." He went on to recall a situation where he asked to bid and the buyer proceeded to make a purchase without his bid. He noted, "That happens more so with the government." [#39]

One business assistance organization representative indicated that members may have experienced bid manipulation. When asked if members face any barriers or discrimination related to bid shopping, the Asian-Pacific American male representative of a business assistance organization said that he has heard of members quitting public work because the same companies always seem to get the contracts. He stated, "That's why some members won't play in that space." [#33]

The same business assistance organization representative also said, "Members say they often don't bid because they already know that the City and County [of Denver] will take the low bid, not the best bid." [#33]

Another business assistance organization representative said that members have not acknowledged the presence of bid manipulation. The Native American female representative of a business assistance organization reported that she has not heard from members that bid shopping or bid manipulation is present in the Denver marketplace. [#37]

Several interviewees do not perceive bid manipulation and/or bid shopping as prevalent, or are not bothered by it. For instance:

- The non-Hispanic white female owner of a DBE-certified construction firm indicated that she does not perceive there to be any bid manipulation or bid shopping. [#27]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that he is not aware of any issues surrounding bid shopping or bid manipulation. [#23b]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that she has not experienced discrimination or barriers in regards to bid manipulation. [#12]

A few interviewees discussed whether there are unfair denials of contract awards or unfair termination of contracts in the marketplace. While some said they are unaware of such denials, [e.g., #5, #11, #23b, #35] others reported firsthand experience of unfair treatment. Comments include:

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “There was one instance when we were a sub to an engineering firm that contracts with Denver Public Works. We were on the team because they had to meet goals. We were asked to do the design and the Denver project manager didn’t like the design. Instead of working with us to change the design or alter it, he instructed the engineering company to hire this firm out of [Los Angeles] to do the design. And [so] we were kicked off the team.” [#22]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm stated that unfair denial of contracts sometimes occurs because agencies do not enforce their diversity programs. [#36]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “A specific example of what I believe to be discrimination is that when we had an on-call ... contract with Denver many years ago, we were asked to do [a] short-term project to enable the then vacant [public] building to be used as a temporary event venue.” [WT#2]

The same business owner continued, “After I toured the building, I gave my professional opinion that there were too many life safety issues to overcome that it would require much more time and money than [City and County of Denver] had to spend on the project. Eventually, a larger ... firm that also had an on-call contract was given the commission to upgrade the building.” [WT#2]

- The Black American male co-owner of a veteran-owned specialty contracting firm stated that he believes there to be unfair denials of contract awards and unfair termination of contracts in the marketplace. [#7]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm commented that municipalities sometimes “take the road of least resistance” when it comes to factors public agencies or others use to make contract awards. [#39]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that he has not experienced any unfair denial of contract awards or unfair termination of contracts. [#14]
- The non-Hispanic white male representative of a majority-owned construction services firm stated, “No I don’t see discrimination. I see a business community and a business atmosphere where if you don’t do good work, you’re not going to get the work.” [#21a]
- The Hispanic American female co-owner of an SBE-certified professional services firm said that she has no knowledge of any unfair denials of contract awards or unfair termination of contracts in the marketplace. [#15a]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that she has never experienced any issues with unfair termination of contracts. [#20]

One business assistance organization representative discussed members' experiences with unfair denials of contract awards and unfair termination of contracts. The Asian-Pacific American male representative of a business assistance organization said that he had heard of unfair denial of contract awards among members. Regarding unfair termination of contracts, he said that he has also heard of it, and noted that members feel there is no recourse. He reported that one member was removed from a Denver project because the project manager wanted to work with a company out of Los Angeles. [#33]

Treatment by prime contractors and customers during performance of the work.

A number of business owners and representatives described their experiences with unfair treatment by contractors and customers during performance of work, or with approval of work. [e.g., #2 #22] For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said that women in construction are often questioned about their abilities and knowledge of the work, and commented, "They'll never ask any guy in [the] room [those] questions." She later said that in her experience, younger, college-aged women become discouraged because of this treatment. [#13]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that she has absolutely experienced discrimination and barriers regarding how she is treated during performance of work. She explained, "I can go on a construction site. I now have gray hair. I can go out with my son who's [in his mid-20s] and we'll be talking to somebody in the field about some construction technique, and their eyes will immediately go towards that male even though I've been doing this for 30 years. The presumption is that the guy is going to have something more meaningful to say, which is totally not true. I don't think this is particular to the City of Denver. I think that society in general is resistant to women being authority figures in the world of construction." [#12]
- When asked about any unfair treatment by prime contractors or customers during performance of work, the Black American male co-owner of a veteran-owned specialty contracting firm said, "This happens when I have to figure out which employee I can send to a particular job. If I want to get a good referral from them and get more work, I have to think, 'Are we sending [our white employee] or [our Hispanic employee]?" He continued, "We [maybe] can't send [our Hispanic employee] to [a] job because we might not get any more business." [#7]

The same business co-owner continued, "To get a bid, we send [the other co-owner's] wife because she's Caucasian, to turn in our paperwork." He went on to comment, "We're learning to play the game. It's not worth it, as a small business, to fight it." [#7]

- Regarding any unfair treatment of the firm during performance of work, the non-Hispanic white female co-owner of a specialty services firm stated that she believes her firm has

experienced gender-based discrimination. She explained, “When people see a corporation that’s doing [my line of work], they don’t expect to walk in and see that it’s a woman-owned company and a woman-run company. A couple customers have not stayed here when they realized that.” [#8]

- The non-Hispanic white male representative of a majority-owned construction services firm reported that he is aware of instances where some primes treat subcontractors unfairly. He noted that the firm strives to treat their subs equitably. [#21a]

One business owner commented that some MWBE firms choose to “suffer quietly” on the jobsite to avoid harassment. The Black American male owner of a DBE- and SBE-certified professional services firm said, “I have often had rude comments and remarks made to me while on location Some of the field construction workers are the worst, and the most ignorant. With some firms, if you complain or address the issues head-on, you are viewed as sensitive and they will go out of their way to make your life hell the next time they see you. That’s why many MWBE firms ‘suffer quietly’ so they can continue in business.” [WT#12]

One business assistance organization representative reported on barriers faced by members related to unfair treatment. When asked if members face any barriers or discrimination related to treatment by primes or customers during performance of work, the Asian-Pacific American male representative of a business assistance organization said, “[It’s] not only [among] the minority community, but also women.” He continued to state that minority and women members “probably” also face problems with approval of work. [#33]

Many interviewees reported little or no experiences with unfair treatment by prime contractors and customers during performance of work, or with approval of work. [e.g., #20]
For example:

- The non-Hispanic white female owner of a DBE-certified construction firm stated, “We have never had any issues with primes we’ve worked with. They just want the job done correctly.” [#27]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported that he has not experienced poor treatment by primes or customers during performance of work. [#9]
- When asked about barriers or discrimination regarding treatment by primes or customers during performance of work, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said that she is not treated unfairly or otherwise poorly. [#35]

Regarding approval of the work by primes or customers, the same business owner stated, “So far I haven’t had any problems. After I clean something, I tend to ask them to walk the project with me and approve [of] what I did. People have been very honest.” [#35]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm reported that he has not experienced unfair treatment by prime contractors

or customers. He added that approval of his firm's work by prime contractors and customers has not been an issue either. [#14]

- The non-Hispanic white male representative of a majority-owned goods and services firm reported no knowledge of unfair treatment by prime contractors or customers during performance of work. He added that he is not aware of discrimination in approval of work by primes or customers. [#23b]
- When asked if he has ever experienced any unfair treatment by a prime or customer during performance of work, or with approval of work, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, "Once we get someone for a customer, I don't think there are any problems." [#36]

One business assistance organization representative indicated that members do not experience unfair treatment by prime contractors or customers. The Native American female representative of a business assistance organization reported that members have not complained about unfair treatment by prime contractors or customers, or about issues with approval of work. [#37]

Unfavorable work environment for minorities or women. Business owners and representatives discussed whether there are unfavorable work environments specifically for minorities or women.

A number of businesses reported experiences with unfavorable work environments for minorities or women. For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said, "I had a guy that said to my superintendent, who was white, [during] a lunch break [while] the guys were walking off. He [said], 'Oh, it looks like the Mexican Day Parade.'" She added that questions are often asked about whether or not they are qualified or legal. She went on to say, "I have to say that if you report it, the city is very good ... they're very supportive. That, I'll give across the board in all the agencies." [#13]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, "I would say because we've worked in the construction space for years teaming with contractors to build our projects, architects and engineers are a billion times more sexist than contractors are. Architects and engineers to me are some of the most unbelievably sexist men I've ever met." [#12]

The same business owner also said, "I think in terms of racial harassment, most of the people who build our projects [that face that] are immigrants. I have heard clients say horrible things ... not that often, but occasionally." She added, "Within our office, we are deeply committed to supporting the workforce that's in the field and treating them with absolute respect. That's really important in our company." [#12]

She continued, "In terms of sexism, I've had young females work here who have complained about being ogled out in the field. I'm like, 'Well, then just wear more clothes. Cover

yourself up more. If you're going to go out on a jobsite in short shorts, which I don't care, you can do that if you want to, but people are probably going to look at your legs You need to get over that." [#12]

- The Hispanic American male owner of a specialty contracting firm reported that he has been discriminated against because of his ethnicity. He stated, "I always get a certain look when I sit in a room I always get the feeling that I need to prove myself." To avoid tension in meetings, he commented, "I've even gone to the point where I've taken a Caucasian employee with me to kind of ease that issue." He also noted, "I believe [discrimination] is more of a problem in the private sector than the public sector." [#4]

The same business owner added that discrimination has affected his interactions with other contractors and clients. He said, "I have come upon jobs where ... as soon as [contractors] met me, I felt like I was brushed off. I was taken seriously while they were talking to me on the phone and emailing me, but as soon as we [met], I felt like I was not [taken seriously]. I'll be sitting at my desk in the office and somebody will walk in to talk business and I'm not the first person they walk to, even though I'm at the biggest desk. They'll walk up to somebody else and [assume] that they're the boss or ... the owner" [#4]

He went on to say that he experienced more discrimination when he worked as an employee of other companies. He stated, "It felt like I wasn't allowed to go on certain jobs or be in certain areas of the building. I think it was mainly [to keep] me from being the face of the company They want to show a different color in front, and they don't care what you look like in the back, doing the work" [#4]

- The Black American male co-owner of a veteran-owned specialty contracting firm said, "It sounds bad, but a lot of people don't want certain minority groups on their property ... mainly the Hispanic minority group. We hire a lot of Hispanics. I grew up in [California], so I grew up with a lot of Mexicans And [in] the current, I guess, political environment, if you come to a jobsite and it's five Hispanics, typically you ... get looked down on because they think you have some illegal immigrants working for you, and [that] you're paying them \$2 an hour or something crazy like that." [#7]

The same business co-owner continued, "Rather, if I show up to a jobsite with five white guys, I'm treated completely differently. Now it's seen as a professional environment. I have professional workers and the homeowners, or even the small businesses, feel more comfortable with certain workers. It's a stigma that's coming around. I believe it's related to the last year and a half's political environment. Before, Hispanics were considered hard workers. Now people think they're stealing jobs. So, it's affected us. I literally have to know what job I'm bidding on because you get part of the job and then you get paid on the second half of the job. If I have the wrong employees, I will not get the second half of the job. I just won't get it So, you really have to know who you're bidding with, and I have to play that game, unfortunately, if I want to stay in business." [#7]

When asked if he has experienced any discrimination in the form of offensive comments or behavior, he said, "You'll hear jokes like, 'They said you guys are lazy, but every time I turn

around you guys are bidding on something,' [referring to] Black guys. They're told that Black men are lazy We've heard that one and we sort of laugh it off. You want to say something but you don't, because it's not worth it." He added that this happens in both the public and private sector, and said that it is the inspectors who make the jokes in the public sector. [#7]

- When asked if she has any knowledge of unfavorable work environments for minorities or women, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said that she has experienced offensive comments and behavior because of her gender. She added that she has received mail addressed to a similar male name because the sender assumes that they are writing to a man. [#5]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, "We received our [certifications] and have been pursuing public sector work ever since. This has proved extremely challenging, and despite the successes highlighted on our website and on our SOQ, I feel that gender discrimination is rampant, not only in the City of Denver, but throughout the Front Range of Colorado and most likely throughout the country." [WT#11]
- A public meeting participant said, "Hispanic people seem to be now the focus on doing the lower thing in the community I mean, [it's] true." [PT#4]

One business assistance organization representative commented that unfavorable work environments for minorities and women are "probably underreported." The Asian-Pacific American male representative of a business assistance organization said that he has heard of unfavorable work environments for minorities and women. He added, "The reality is it's probably underreported because companies are afraid of retaliation." [#33]

A trade association representative said that race "absolutely plays a role" when it comes to getting work opportunities. The Black American female representative of a trade association said, "We would like to think it's gone, but race absolutely plays a role in opportunities that are provided One thing about racism [is that] it's not something that you can wear or see, so you're not quite sure what resides behind the eyes of each person you see or encounter." [#6]

The same trade association representative continued, "It's very interesting to see how [or] if a lot of what is really happening is captured, because [of] ... the subtleties through which a lot of these things are taking place There's no doubt that racism still exists. With this current administration, there's been such a resurgence of it. Before, it seemed like we had so much more unity. Unfortunately, a lot of people have had the boldness to come forward with their true self, their true set of beliefs." [#6]

Others reported no experience with unfavorable work environment for minorities or women. [e.g., #11, #14, #22, #23a, #32b, #35] For example:

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm reported that she has not had any personal experiences with barriers related to

discriminatory treatment. She added, “I honestly don’t think there [are barriers] for DBEs, MBEs, and SBEs if you [fit] your company with the best professionals.” [#2]

The same business co-owner went on to say that financing was a challenge when she started her business, though she did not feel discriminated against based on her race or gender. She said she was met with difficulties because she was just starting out as a small business, and added, “When you’re small, you have a lot more debt than they ... probably [want] to see I ... believe that [some banks] have ... safeguards in place. [Banks may think], ‘We see your growing potential, but we don’t feel comfortable with you.’” [#2]

She later stated that she believes race/ethnicity and gender discrimination can create potential barriers. However, she noted that the DBE, MBE, and SBE programs reduce the discriminatory behavior significantly. [#2]

- When asked if he has experienced or is aware of any unfavorable work environments for minorities or women, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “Not blatantly. One of my sales guys had meetings with some large transportation companies. It’s funny to see how the dynamic changes when I’m around. He joked with me after one meeting saying he didn’t want me to attend again.” [#36]
- When asked about potential barriers or discrimination based on race, ethnicity, or gender, the Subcontinent Asian American male owner of a specialty contracting firm stated that he has not experienced any such barriers. He added that he has not heard of any other contractors experiencing related barriers or discrimination either. [#18]
- When asked if race, ethnicity, or gender discrimination affects his business opportunities, the Black American veteran male owner of a general contracting company stated, “I don’t do public work. Almost all of my customers are Black. I haven’t had any problems that have affected my success.” [#29]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm reported no experience with unfavorable work environments for minorities or women. [#9]
- The Hispanic American male owner of an engineering firm reported that, to his knowledge, he has not experienced any race/ethnicity-based discrimination. [#16]
- Regarding unfavorable work environments for minorities or women, the Hispanic American female co-owner of an SBE-certified professional services firm said that the firm has not experienced any. [#15a]
- The non-Hispanic white male owner of a construction services firm stated, “I haven’t had any experiences of discrimination based on race, ethnicity, [or] gender.” However, he went on to comment, “I’m not in a position to discuss that area.” [#31]

- The Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, “There have been no instances experienced of discrimination, by me, or any of my employees.” [#32a]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that she has never experienced any unfavorable work environments for minorities or women. [#20]
- The non-Hispanic white male representative of a majority-owned construction services firm said that he has not heard of or experienced offensive comments, behavior, or racial or sexual harassment of SBE/MBE/WBE or uncertified minority- or women-owned firms in the local marketplace. [#21a]

Any double standards for minority- or woman-owned firms when performing work. Interviewees discussed whether there were double standards for minority- and woman-owned businesses.

A number of business owners and representatives reported double standards based on race, ethnicity, or gender. For example:

- When asked about his experiences working with minority-owned prime contractors, the Black American male co-owner of a veteran-owned specialty contracting firm said, “Minority primes are typically small businesses, and [they] seem to take more care in their work ethic than non-minority primes because they know you sort of get one chance to make a mistake. So, minority primes seem to work better.” [#7]

The same business co-owner later said, “I can’t put my finger on it, but an older Caucasian male will get perceived differently on jobsites than a [young] Black male. It just is what it is. I don’t know if that’s an age thing. [Maybe] they think he’ll be more experienced [just] because of his age.” [#7]

Regarding double standards based on gender, he said, “[On] a lot of jobsites we have a female on our team as a lead on abatement, and ... they constantly question her qualifications solely because she’s a woman. There was no other reason to question it because they don’t question anyone else’s qualifications that they’ve never met, but they question hers. They want to see her project management certificates [and] want to see her logs. They never ask for logs because it’s a waste of time, but they did that to her.” [#7]

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm indicated that double standards do exist for minorities. He explained, “I think it could be a little bit harder if you are a person of color because of preset notions that somebody might have, or beliefs they might have. I think there are always going to be barriers out there, and the fence might be a little bit higher for a person of color sometimes [because] you [have to] prove yourself more.” [#39]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified construction services firm said “being a woman in the construction industry” means “you are not taken seriously and not given opportunities to prove yourself.” [WT#5]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, “Back in the day after I left [my previous] job and wanted to work for a prestigious downtown firm, they offered me a job as a marketing girl. I was like, ‘Well I don’t want to write proposals and be a secretary. I want to learn construction details.’ So, I turned down [the] job. I remember my father was furious with me, but I was like, ‘I’m going to be in a tight skirt and I’m going to get hired for [non-technical skills], not to be a landscape architect.’” [#12]

The same business owner continued, “Some of the young women who work for me stated, ‘We wanted to work for you because we knew we’d get equal exposure on the construction side, whereas if we worked for a male-owned firm as females on the construction side, it would be harder.’” She later added, “If you’re a person of color or a female, you have to be twice as good. We know that. A white male can do something [wrong] and people are like, ‘Oh, that’s fine.’” [#12]

- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “There is a bias for sure with folks regarding a minority-owned business as less qualified. But established customers don’t drop me when they find out the business is minority-owned.” [#36]

The same business owner later added, “I think they show a majority company more leniency when they make a mistake. If a minority makes a mistake, it’s blown way out of proportion. Everybody makes mistakes. They should [just] look at what you did [and] fix it.” [#36]

For a few business owners, double standards did not exist, or were less prevalent than before. [e.g., #5, #21a, #23a] For example:

- When asked about double standards, unfair treatment, and stereotypical attitudes towards minorities and women in the local marketplace, the Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm stated, “I don’t think they’re happening as much as they used to. I think we’ve gotten better. But, I ... remember people put nooses up on a jobsite.” [#13]

The same business owner continued, “I think it’s good to have change. I think it’s also bad to have people in the same spot for 30 or 40 years, with the same attitude 30 years ago as they [have] now.” She said she would like to see more diversity in the city, saying, “I’d like to see more diversity on the city-side in those roles, not in the typical roles of DSBO, but in the actual procurement project managers.” [#13]

- The Hispanic American male owner of a specialty contracting firm reported being discriminated against, particularly in the private sector, but noted, “It’s not as bad as it was

20 years ago. Generations go by and people are changing. I saw it more as a younger adult than I do now." [#4]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that double standard in performance are not an issue for his firm. [#14]
- The Hispanic American female co-owner of an SBE-certified professional services firm said that the firm has not experienced any double standards when performing work. [#15a]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported that she has never experienced any issues with double standards in performance. [#20]

Some business owners discussed whether there is a fair playing field in the Denver marketplace. Comments include:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm indicated that there is not a fair playing field in the local marketplace. However, she noted that certifications “sort of [get] you a semi-level playing field.” [#13]
- The non-Hispanic white female co-owner of a specialty services firm said that she feels male-owned businesses have an advantage. She added, “I know people are more apt to refer to a male-based company. I’ve heard from somebody who used to do [my line of work], and doors opened for him like crazy when people found out what he did.” [#8]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said that while she is relatively new to her industry, she no longer sees her lack of experience and expertise as an issue. She stated, “I recognize I am new to this industry. Construction is still a white man’s world. There have been times when I’ve gone to a pre-con and they have not addressed me. Just one gentleman [maybe], but it doesn’t bother me anymore because I get the work. There is still plenty of work to be had. I’d say 99 percent of the contractors out there are very open.” [#19]
- The Black American male and veteran owner of a DBE-, ACDBE-, WMBE-, SBE-, SBEC-, and SDVOSB-certified specialty services firm said, “As owner of a small ... company in the metro area I find it amazing that [a corporation] currently working at [Denver International Airport] has been there over 20 years. Surely a contract of that size should have enriched the owners well above the established threshold of graduation eligibility.” [WT#9]

The same business owner continued, “The reason that I was given is that no other company can do such a massive job. Well, I believe that a few small companies from this area could. It appears that for some reason some companies are being allowed to monopolize their positions while others sit on the sidelines. This is in direct conflict with the way the rules were written Greed and elitism rule the day.” [WT#9]

One trade association representative stated that minority- and women-owned firms “do not have a level playing field in today's environment.” The Hispanic American male representative of a trade association added that certification gives these firms an opportunity to “get a piece of the pie” on public projects. [#11]

H. Insights Regarding Race-/Ethnicity- or Gender-Based Discrimination

The study team asked interviewees about whether they experienced or were aware of other potential forms of discrimination affecting minorities or women, or minority- and women-owned businesses. This part of Appendix J examines their discussion of:

- Any stereotypical attitudes about minorities or women (or MBE/WBE/DBEs);
- Any evidence of a “good ol’ boy” network or other closed networks;
- Any other allegations of discriminatory treatment; and
- Factors that affect opportunities for minorities or women to enter and advance in the industry.

Any stereotypical attitudes about minorities or women (or MBE/WBE/DBEs).

A number of business owners and representatives reported on stereotypes that negatively affect minority- and women-owned firms. [e.g., #7, WT#5] For example:

- When asked about any stereotypical attitudes on the part of customers or buyers, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm commented that it is just based on “nuance.” She added, “People will say things like, ‘Oh, that girl engineer’ No one would ever say, ‘Oh, that boy engineer,’ [or] ‘Oh, that boy doctor.’” [#5]
- The Black American male owner of a DBE- and SBE-certified professional services firm said, “I can truly say that I have experienced racial discrimination in the Denver, [Colorado] region. I have had many situations where I have done marketing to architectural/engineering/construction firms and have immediately felt the negative racial vibe of being an African American male. With some people I have come across, the mindset is this type of ... work is to be done by a white man only ... not a person of color or a woman.” [WT#12]

The same business owner later said, “I have experienced barriers put in place to block me from gaining access to some of the better projects in this region, [both] private and public. I have had situations where a construction company or an architectural firm appears to be very interested in the quality of [my] work I do only to discover that [it] was done by a talented African American man and not a white man. At that point, everything changes. If I was asked to submit a proposal, suddenly I do not get returned phone calls or answered emails, or the proposal gets strung along for weeks and months.” [WT#12]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm stated that she does believe there is discrimination in regards to stereotypical attitudes on the part of customers and buyers. She said that often people ask her what

flowers to plant, and never ask [what she knows] in regards to concrete or other construction aspects. She added, “I know a lot about flowers. I know way more about flowers than most people, but [also] I know a lot about concrete and pavers, and regulations around building swimming pools. The expectation is that if you’re a girl, you [only] plant the flowers [and] make sure the flowers are really pretty.” [#12]

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said she lost all of her managers within a month of her taking over the company. She said they told her, “We like you. We just don’t think you can make it.” She attributed great clients, general contractors, and the City of Denver to her being able to pick herself back up and move forward. She added that working on a “key project” also helped. [#13]

The same business owner later said had a leadership position on an advisory committee for a construction education provider and said there was resistance to the idea of a women leading the committee. [#13]

- When asked if he is aware of any stereotypical attitudes in the marketplace regarding minorities or women, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm stated that he is convinced they exist, from financing to hiring employees. [#36]
- The Subcontinent Asian American male owner of a specialty contracting firm said that he has experienced stereotypical attitudes from some customers based on his name alone. He said that he changed the name of his company to sound less “foreign” due to this, and added, “There was nothing specifically said [by customers], I just felt that people didn’t know about me because the name was foreign.” He went on to say that he believes there are still “raw feelings” surrounding the 9/11 terrorist attacks that have caused people to view him differently. [#18]
- The non-Hispanic white female co-owner of a specialty services firm said, “When people ask who does my [work] and I say, ‘I do’, I think they are surprised. I tell them, ‘I don’t need a big, burly man to do it. I can do it myself by pushing a button.’” [#8]

The same business co-owner went on to say that stereotypical attitudes do exist when it comes to women-owned businesses. She added, “That’s why there are so many women-owned groups [working with other women]. It’s easier to talk to women about it. It’s almost cliquy trying to hold onto a little part of the market.” [#8]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, “I operate in a man’s world and often face credibility issues, even after many years in business and a great track record.” She added, “This is true for many women small business owners in the construction industry.” [#20]
- Regarding discrimination faced by women in the construction industry, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, “I think there is more speculation. Not because I’m a minority, but more because

I'm a woman It is difficult to work in the construction industry as a woman." She added, "The more I'm out there, the more comfortable other contractors feel. They have learned my quality of work." [#19]

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said that he does believe there are some stereotypical attitudes on the part of customers and buyers regarding small businesses and minority-owned businesses. He said, "I believe we have really good products, and anybody that's worked with us would recommend us for other work. But I also know that there's a stigma out there about small businesses and minority businesses in particular." [#9]

The same business owner continued, "But, we've tried to stay above that. We don't go into places saying, 'You should give us a piece of business because we're a small business or we're a minority-owned business.' We want to be able to compete with everybody else that's competing on the basis of the products that we have, the services that we provide, the pricing that we provide, and what we can bring to the table." [#9]

Some trade association and business assistance organization representatives discussed whether members experience any stereotypical attitudes on the part of customers or buyers.

For example:

- The Hispanic American male representative of a trade association said he has seen discrimination against women- and minority-owned firms in regards to stereotypical attitudes on the part of customers and buyers. He explained, "This happens especially in industries where minority [firms] are [underrepresented]. [Because of that underrepresentation], you hear comments that minorities do not know what they are doing." [#11]
- When asked about members' experiences with stereotypical attitudes on the part of customers and buyers, the Asian-Pacific American male representative of a business assistance organization said that stereotypical attitudes are still a problem, especially for immigrants. He added that small businesses are seen as riskier due to capital and workforce challenges. [#33]

Some interviewees reported no experience with stereotypes that negatively affected minority- or women-owned firms. [e.g., #15a, #21a, #23a, #28, #32a, #32b] For example:

- The non-Hispanic white male owner of a professional services firm reported that he was not aware of any discrimination affecting minority- or women-owned firms in the local marketplace. [#3]
- The non-Hispanic white male owner of a construction-related firm stated that he has not experienced any discrimination based on race, ethnicity, or gender that has interfered with small businesses' success. He added, "I have never heard of any situations that have interfered with the success of minority companies." [#25]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that stereotypical attitudes on the part of customers and buyers is not an issue for his firm. [#14]
- The Hispanic American female co-owner of an SBE-certified professional services firm reported that she has not experienced any stereotypical attitudes by prime contractors or customers in the industry. [#15a]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she has not experienced stereotypical attitudes that negatively affect minority- or women-owned firms. [#35]

Any “good ol’ boy” network or other closed networks. Many business owners and representatives reported the existence of a “good ol’ boy” network or other closed networks. [e.g., WT#11, WT#12, PT#3c] For example:

- The Hispanic American male owner of a specialty contracting firm reported that he has experienced “good ol’ boy” networks. He stated, “I worked for a [different] firm and I saw discrimination within their networks there. That was one of the things that pushed me to [start] my own business. I knew that there was a point where I wasn’t allowed. I believe it was because of the color of my skin, for obvious reasons.” He continued, “Since I’ve been in business on my own I haven’t noticed it as much, mainly because I’m dealing with it on a different level, but it’s still there. The good-old-boy networks are there, and they make it pretty obvious if someone from the outside is trying to get in.” [#4]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “In the private sector it’s the “good ol’ boy” club. We are not approached about opportunities. In the public sector, opportunities are more transparent.” [#22]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm stated that “good ol’ boy” networks do exist. He added, “Even when companies fail to meet goals, they still get contracts. There are no penalties.” [#36]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm stated she believes “100 percent” that the “good ol’ boy” network exists. She explained, “I think that my experience with the City of Denver is that it’s a diverse workforce. I think that the person who runs parks and rec planning is a pretty old school sexist male, but I think it’s the incumbency of the established players, which happen to be white, male-owned, that’s the problem.” [#12]

The same business owner continued, “[City and County of Denver] likes those players because they’re going to get a reliable product. I understand that. No city employee wants to be at work at 11 p.m. because they hired this start-up company and the start-up company did a crappy job. I get that. But it seems like they could diversify a little bit more ... particularly to make the projects small enough so that newer companies can do them. Also, to create more opportunities for minorities and women to get in the game instead of

just to be a subcontractor and do the [less desirable] work on some big project, because that's how the system works now." [#12]

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm reported that he is aware of the "good ol' boy" network and acknowledged its existence in the Denver marketplace. [#39]
- When asked about "good ol' boy" networks or other closed networks, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said that he does believe they exist. He added, "Based on the products we do [and] the services we provide, and where we're priced in the market, we can compete on a level playing field. [However], we [sometimes] don't get invited to the table ... We may not win a project always, but ... we want to [at least] be able to have a conversation. And I'd say there have been many instances where we've never had that conversation." [#9]
- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said, "The private sector is very much if they worked with you before, they'll work with you again. It's really a hard market to get into It's really like a club." [#13]
- Regarding "good ol' boy" networks, the Black American male co-owner of a veteran-owned specialty contracting firm reported that he has witnessed them on jobsites. He said, "There are the 'good ol' boys' that will get together and talk in a corner ... [and] they come back and say, 'We'll give you this piece,' and someone else takes their bigger piece. We may say, 'Wait a minute. We didn't bid on this small piece. We bid on [the big one],' but they'll interrupt and say, 'Well, that's what we have left.' And you look, and it's just you and another minority [with the small piece]." [#7]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, and SBE-certified professional services firm indicated that closed networks exist in the Denver marketplace. She said, "You never are asked [by large prime contractors] to participate, or ... asked to join a team with a number that will bring you on as they may do with other partners. [It's because] they have other partners that they've been in business with a long time" [PT#3a]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified construction services firm said, "It seems as though the most difficult part of penetrating the 'good ol' boy' world is being a woman in the construction industry. You are not taken seriously and not given opportunities to prove yourself. There are a lot of events that promote doing business with women-owned and minority-owned businesses, but it never develops into anything." [WT#5]

The same business owner continued, "My latest experience was with an electrical company that was awarded some of [a] Denver International Airport ... project. Supposedly, they took a smaller part of the trade that we perform and had my company and a variety of others bid the job. We spent a lot of time and money on the proposal, [but] found out through the grapevine that it was just a 'mock' exercise to see who would be a contender I was very offended that it was not an actual bid." [WT#5]

- The Subcontinent Asian American male owner of a specialty contracting firm reported that there is a “good ol’ boy” network in the Denver area. He said that he lost a bid for a Zoo project due to a closed network, and added that it’s common for businesses to work with other businesses that they’ve worked with previously. [#18]
- Regarding her experiences with the “good ol’ boy” network, the non-Hispanic white female co-owner of a specialty services firm said, “In my industry, [the ‘good ol’ boy’ network] is awful, awful I worked with a gentleman on [a] project. He did the process for me because my client wanted something I don’t do. This man did the embroidery and his wife did the graphics and everything else. While I was speaking with him, his wife left and [went into] the embroidery room and wasn’t involved in the speaking He spoke down to me like I was a charlatan, or novice or something.” [#8]

The same business co-owner went on to say that she quit a local chamber of commerce because it was a “testosterone-filled group.” She explained, “When they show up, it’s a drinking party and everybody has to have their martinis or their gin and tonics [to] talk about business. I really did get accepted by the women at the chamber, but most of [them] work for the chamber.” [#8]

- The non-Hispanic white male owner of a construction-related firm stated that he has not experienced any barriers. However, he noted, “Most companies [and] owners like working with companies they have worked with before.” [#25]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that the “good ol’ boy” network exists and that it creates credibility issues for her firm. [#20]

A trade association representative stated that he believes the “good ol’ boy” network does exist. The Hispanic American male representative of a trade association explained, “It is relationship-driven, and I [do not] want to use that term ... because of what ‘good old boy’ network typically means to most of us, [which is] Anglo men. But in the construction world, it could also mean a prime that uses the exact same certified firms every single time. And that is a ‘good old boy’ network [too]. No one can penetrate into that.” [#11]

Some interviewees said they do not encounter closed networks or think they are a thing of the past. For example:

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that the “good ol’ boy” network is not an issue for his firm. [#14]
- The Hispanic American female co-owner of an SBE-certified professional services firm reported that she has not experienced any “good ol’ boy” networks or other closed networks. [#15a]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that he is not aware of a “good ol’ boy” network or other closed networks. [#23a]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she has not experienced the “good ol’ boy” network or any other closed networks. [#35]

Any other allegations of discriminatory treatment. Some interviewees had comments related to topics not discussed above. For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm indicated that his firm sometimes faces discrimination when pursuing public sector bid opportunities. He said, “It’s who you know, and if you know the right person, they can walk you through their front door and get you to sit down with the correct person in order to submit your bid. If you don’t, then the gatekeeper, depending on where you bid, will look at you and say the bid is closed. [They’ll] literally look at you and [have] no other criteria.” [#7]

The same business co-owner continued, “Then, someone can come behind you a week later and still bid on it. And for us, there’s no real recourse [there]. We’re not going to complain because we’re not going to burn a bridge. We’re a small business, and unfortunately, we don’t have the ability to go complain. Because if you complain, they remember [it]. There are no secret complaints.” [#7]

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “This was a while back. It was an instance where I had a dispute with [a] City of Denver architect. We were on a [public sector] project and I didn’t agree with what the ... architect was asking us to do, so I asked for mediation because I didn’t think we were being treated fairly. [A] manager of [Denver] Public Works was the mediator. I felt brow beaten in the meeting because he wasn’t an independent person. So, it never went anywhere and I felt I was wasting my time.” [#22]

- The Black American male owner of a DBE- and SBE-certified professional services firm said, “Some years ago I attended a commercial real estate business networking breakfast and marketing event and was amazed at the extreme lack of cultural diversity There were some women there. I was well-dressed ... as [my] counterparts [were]. I had nice marketing materials and business cards, as [did my] counterparts. When I entered the main dining hall at the big hotel the event was held at, I was greeted with some very rude stares and people ignoring me as I approached them to introduce myself.” [WT#12]

The same business owner continued, “At the end of the event while I leaving, I discovered that some of my high-end professionally printed marketing materials were in the trash with the food remainders [of] people’s plates. This is just a small example of what I have experienced. I have had direct comments made to me like, ‘Is this really your work?’ or ... some racial comment made under the person’s breath as they walk by me.” [WT#12]

Some trade association and business assistance organization representatives had comments regarding additional unfair or discriminatory treatment that members experience. For example:

- The Black American female representative of a trade association said, “Some of our members have verbalized to me the different discriminatory experiences they’ve had, [and] some of them don’t know how to navigate through some of those experiences. Some have been in the game long enough to kind of know how to finesse ... and how to make their way through, [but] in some way, shape, or form, a lot of them have experienced discrimination, overtly.” [#6]
- The Hispanic American male representative of a trade association said he believes a challenge in construction-related industries is that the forms are not bilingual. He explained, “We have a lot of Spanish-speaking firms that are American citizens seeking work, but they have to hire somebody to fill out their paperwork for them. [It] puts them at an unfair disadvantage.” [#11]
- The Asian-Pacific American male representative of a business assistance organization stated, “I believe minorities and women are unfairly held to a higher standard.” [#33]

Many business owners and representatives had comments related to price discrimination and/or discrimination in payments. For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said that she has experienced payment-related issues that she suspects are rooted in discrimination. She explained, “There’s one developer who I’m always waiting on to get paid ... who probably takes advantage of our company a little bit more because he’s like, ‘Yeah, they’re girls’ I think that overall with clients, society makes it feel easier to take advantage of women.” [#12]

The same business owner continued, “I’ve had to be really good to my employees, but it’s difficult with clients who are always trying to nickel and dime us. I just tried to get really tough about that because it shows there’s significant wage disparity in architecture and engineering between men and women. Study after study shows that. We always look at our work and go, ‘If we were a male-owned firm, how much would we have charged for this? Did we undercharge?’ Because we’re women, we are socialized to be nice.” [#12]

- The Black American male owner of a DBE- and SBE-certified professional services firm said that some prime contractors will “blacklist” minority- and women-owned firms that complain about late payment. He explained, “And if you speak up ... [they] will do a ‘whisper campaign’ to their buddies at other construction ... or architectural firms in the region.” [WT#12]
- When asked if he is aware of price discrimination in obtaining financing, bonding, materials and supplies, or other products or services, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that after many years of business, he is still forced to get a more expensive SBA loan rather than a traditional loan. [#36]
- When asked about price discrimination, the non-Hispanic white female co-owner of a specialty services firm reported that she has never had to deal with bonding and that she has experienced no discrimination in financing with her bank. [#8]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that price discrimination is not an issue for his firm. [#14]
- When asked if he has witnessed or experienced any price discrimination in obtaining financing, bonding, materials or supplies, the Black American male co-owner of a veteran-owned specialty contracting firm reported that he has not. [#7]
- The Hispanic American female co-owner of an SBE-certified professional services firm stated that the firm has not encountered any price discrimination or discrimination in payments. [#15a]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that he is not aware of discrimination in timely payments by customers or primes. He went on to comment, “Slow payments are not just a minorities issue.” [#23b]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that price discrimination “encompasses” all small business issues. [#20]
- When asked if he is aware of discrimination in payments being a problem for SBE/MBE/WBE or uncertified minority- or women-owned firms in the local marketplace, the non-Hispanic white male representative of a majority-owned construction services firm stated, “No. It’s not because a firm is one thing or another. Payments are sometimes slow for all of us. Sometimes we wait a long time ... 90 [or] 120 days.” [#21a]

Some trade association and business assistance organization representatives commented on discrimination related to price or payments. For example:

- The Hispanic American male representative of a trade association said that he has heard mention of discrimination in payments from members but does not believe that slow payment relates to the race/ethnicity of business owners: “I do not think that with slow payment, ethnicity has [anything] to do with it. It is just a process.” [#11]
- The Native American female representative of a business assistance organization said that while slow payment on public work is an issue, she does not believe it is due to discrimination. [#37]

Some interviewees commented on whether there is any governmental resistance to use of SBE/MBE/WBE firms. Comments include:

- When asked if he is aware of any government resistance to the use of DBEs, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm stated, “Not outwardly. They all tout their program and say they want to do business with you. Their websites even say they believe in a diverse supplier network ... but it doesn’t happen. Then they bundle contracts, and that’s a form of exclusion.” [#36]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that he is aware of governmental resistance to use of SBE/MBE/WBE

firms. He explained that he was removed from a Denver Public Works project because the project manager wanted to work with a firm out of Los Angeles. [#22]

- When asked if he is aware of governmental resistance to use of SBE/MBE/WBEs being a problem for SBE/MBE/WBE or uncertified minority- or women-owned firms in the local marketplace, either in the private sector or the public sector, the non-Hispanic white male representative of a majority-owned construction services firm stated, “Nothing is farther from the truth. Government has [contract] goals.” [#21a]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that governmental resistance to use of SBE/MWBEs is not an issue when projects have goals. She said that when projects do not have goals it is an issue because primes have no incentive to use certified firms. [#20]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm stated that she believes there is no governmental resistance to the use of SBE/MBE/WBEs. [#12]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that he is not aware of any governmental resistance to use of SBE/MBE/WBEs. [#23a]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she is not aware of any governmental resistance to the use of SBE/MBE/WBE firms. [#35]

Some trade association and business assistance organization representatives also discussed whether there is governmental resistance to the use of DBEs. For example:

- The Hispanic American male representative of a trade association said that some public agencies within City and County of Denver have wanted to get rid of goals because the technical skills required for some projects are too specific and the availability of DBE-certified contractors with the necessary skills is low. Public agencies, he continued, are then faced with not reaching their DBE goals. [#11]

The same trade association representative added, “I think it comes primarily from the ownership of the departments. I remember [Denver] Botanic Gardens not wanting to use any certified firms, [and] I remember [Denver] Public Works fighting on those [too]. I think the resistance is there.” [#11]

- When asked if there is government resistance to use of DBEs, the Asian-Pacific American male representative of a business assistance organization stated, “Not overt resistance, but our minority community is going to be the majority in not too many years Some people are uncomfortable with that.” [#33]

One business owner said he considered changing his last name to be less ethnic-sounding.

The non-Hispanic white male owner of a construction firm said, “I work on private jobs [and] I

haven't experienced any barriers, [though] the only thing that I have thought about was changing my last name because it is [Middle Eastern]. I don't believe I have been denied work, but it's just a feeling [that it may be possible]. Fortunately, once people work with me and know my quality of work, they don't have a problem." [#24]

Factors that affect opportunities for minorities or women to enter and advance in the industry. Some interviewees discussed whether there are factors that affect the ability of minorities and women to enter and advance in the industry. For example:

- The Hispanic American female owner of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said large prime contractors in her industry open small offices "to comply with every single bit of category of mixed codes which they ... could potentially have work tied to" and define the offices as "the office of small business, civil rights, [or] outreach, [et cetera]." [PT#3a]

The same business owner continued, "Whatever the business is, they have that internally and they end up doing that work inside the project. They gather our ... competitive bids because you have to compete." She added, "You have to give up [because you're giving] your unit numbers and your labor hours, and your dollar amounts right when you sit down and meet with them. And those are the numbers that they're gonna go in with." [PT#3a]

- When asked if any race, ethnicity, or gender discrimination affects business opportunities for minorities or women, the non-Hispanic white female owner of a DBE-certified construction firm said, "I have not experienced any discrimination in the area of limited business opportunities." [#27]

- When asked if she is aware of any barriers or discrimination based on race, ethnicity, or gender in the Denver marketplace, the non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, "We have been in business so long in this metro area, [and] we are not aware of any discriminatory obstacles. We have worked with many minorities and have not heard of any of those practices." [#28]

The same business representative continued, "We are all aware that companies like to work with people and companies they know. I suppose there are some that feel it is difficult to get large contracts because they might be a minority. I haven't heard of that situation, but I do know that people like working with people they know, that they have worked with before, and [that] produce quality work." [#28]

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said, "I think the perception of a small business is they're not going to be able to compete with the large businesses ... because they don't have the infrastructure in place to compete, or they don't have the experience or qualifications. They might have the qualifications with their key people, but as a firm they may not. I think also as a person of color, sometimes it's a little bit harder." [#39]

A few trade association representatives discussed whether minority- and women-owned firms face additional barriers not experienced by other firms. For example:

- When asked if members face any barriers or discrimination based on race, ethnicity, or gender, the non-Hispanic white female representative of a trade association said, “We’ve heard of ... some barriers for ... minority- and women-owned businesses, [such as] obtaining financing, bonding requirements, [and] insurance requirements.” She said that obtaining financing and meeting insurance requirements are especially difficult for minority- and women-owned businesses in the Denver marketplace, and commented, “I know a lot of the primes really work well with the small firms because they need them They need them to meet the goals [and] to be a good partner.” [#38]
- The Hispanic American male representative of a trade association said he believes there are additional difficulties and barriers for small businesses as well as minority- and woman-owned firms in the marketplace. He explained, “A lot of this work is relationship-driven. Primes tend to utilize the same firms that they have had relationships with, and it is hard for newer firms to break into that and get more work. I’m a believer that the only way to build capacity is ... to find a way to create opportunities for new startups or folks who have been there for a while and want to enter into the public arena or private sector, or move from residential to commercial. When the larger guys are limiting exposure to new firms, it is very difficult for them to get in.” [#11]
- When asked if small, minority- or women-owned firms face additional barriers not faced by other firms, the Black American female representative of a trade association indicated that additional barriers do exist. She stated, “With the new administration and the challenges of the civil rights programs, it has been ... interesting to see how it has been interpreted by a number of primes, or just different people, period.” She said that it is difficult to “prove there is discrimination,” or “bias,” and commented, “It’s interesting to see how it’s being repackaged.” [#6]

The same trade association representative added that her organization met with a civil rights team at the U.S. DOT in Washington, D.C. to discuss keeping programs in place that benefit minority- and women-owned businesses. She said, “A lot of DOTs will pull out if they have the opportunity to [do so], and that’s why there’s such a strong appreciation [between] us and CDOT.” [#6]

I. Insights Regarding Business Assistance Programs

The study team asked business owners and representatives about their views of potential race- and gender-neutral measures that might help small businesses and minority- and women-owned businesses, obtain work in the Denver contracting industry. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics. The following pages of this Appendix review comments pertaining to:

- Knowledge of programs in general;
- Technical assistance and support services;
- On-the-job training;
- Mentor-protégé relationships;

- Joint venture relationships;
- Financing assistance;
- Bonding assistance;
- Assistance in obtaining business insurance; and
- Assistance in using emerging technology.

Knowledge of programs in general. The study team reported on their awareness of and experiences with business assistance program.

Most interviewees reported having knowledge of or participation in business assistance programs. Some found programs helpful while others indicated they were unimpressed by the programs' helpfulness. For example:

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said she is aware of training programs offered that she finds helpful. She said, "I believe at one point there was ... training regarding estimating contract language ... bonding. It was back when we first started. Just recently, in the past two to three years, I've changed what I need internally and have focused more on financial classes." [#2]

The same business co-owner went on to say, "I honestly think [training programs] are valuable. For me, it has not worked to pursue [more trainings] because of the timing of the workshops. Even though you do need to focus on your business, my main focus is my [family]. Back [when I first started my business], we struggled a bit more because I didn't attend those [trainings]." She added that she finds great value in the information offered via her association memberships. [#2]

- The Hispanic American male owner of a specialty contracting firm reported, "When I first started [my firm] I did see an SBE counselor. They guided me on how to get SBE certified and things of that nature. Then I went to an SBE conference. I think they are very helpful." [#4]
- Regarding business assistance programs, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, "I just attended one recently on NACIS codes. [It focused on] making sure that your codes are right. That was really a good example because we did find a category that we may fit into." [#9]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that before starting his business he attended a six-week course offered by the Denver Metro Chamber of Commerce. He said that the course helped him make the final decision to move forward with starting his own business. [#14]
- The non-Hispanic white male owner of a goods and services firm stated, "We regularly get newsletters that come around from the Boulder and Broomfield Chambers of Commerce. There are frequent workshops, so I am aware of them. I haven't attended any of them, but it seems like there are good resources available." He commented on specific events that he

imagines are helpful, though he does not participate, including a “Boulder Startup Week” event that focuses on networking. He added, “There are all sorts of resources for finding financing or for meeting other members of the community, and just kind of helping to grow the business.” [#10]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reported knowing of several types of business assistance that she does not take advantage of. She said that she is aware of technical assistance, financing assistance, on-the-job training, and small business start-up assistance, though has never utilized any. [#20]
- The non-Hispanic white male representative of a majority-owned construction services firm commented that many start-ups could use assistance in business financing, purchasing, and safety. [#21a]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she completed a six-week program designed for MWBE companies at [a corporate-based university]. She said the program reviewed the essentials of construction management, including how to read an RFP, applying for credit, marketing, safety, sustainability, and managing insurance and bonding. She added that she has attended the Hispanic Contractors of Colorado bidding workshop. [#35]
- Regarding programs and resources that are particularly helpful to MBE/WBE firms, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said that she has participated with Hispanic Contractors of Colorado and other trade associations. [#12]

The same business owner added, “The other resource that I felt is a really good resource is PTAC, which I think is State of Colorado or federal, or combined. That’s an excellent resource. Their counselors are really helpful in helping you understand the public sector game. The lady who helped me there, I’d give her a shout out a million times over.” [#12]

- Regarding the Denver International Airport Commerce Hub and SBO, a public meeting participant said, “The lack of communication was [poor]. I [made] an appointment with a higher official just to ask public knowledge, and I was told, ‘We can’t tell you this, we can’t tell you this, we can’t tell you this.’ So, it seems to me that even though we have organizations to help us, they are not coming forward with the help. And sometimes maybe they are intimidated [to] not to give us the help. So, that was one of the biggest frustrations I’ve had.” [PT#4]

A few trade association and business assistance organization representatives reported on their organizations’ offered programs. Some discussed other programs or services available to members. For example:

- When asked about the business assistance offered to members, the non-Hispanic white female representative of a trade association said, “One of the key things we have is a leadership development program, and it starts at the pre-supervisory level.” She continued,

“We just started ... a management one [this year], and that [covers] a lot of HR and communication skills [for] those that are developing in their career. We’re a business organization, so not all engineers are ... interested in being a business. They work for a business, but they [might] not [be] interested in managing a business. [#38]

The same trade association representative added that the organization also offers management education and legal education. She noted, “Employment law is a big thing. Understanding both sides [is important], and so we have those kinds of programs.” [#38]

- The Hispanic American male representative of a trade association said, “Because we do our general membership meetings on a monthly basis, we get the big guys in. We also give presentations by some of the bigger projects at each one of our dinners, and it allows our membership to have direct access with decision-makers for these big projects. The primes also attend the dinners, which allows our members to develop relationships with those folks that are key in making decisions on who they want to invite to bid on work that they are doing Another arm of our organization is the training opportunities we offer. We have a contractor academy where we offer classes [and] trainings for members and non-members, employees, and owners ... at minimal cost. The classes are taught by industry experts, which makes them more applicable to the day-to-day business of our members.” [#11]
- Regarding potential measures or programs that can benefit members, the Black American female representative of a trade association said that she is a big proponent of business education and training. She said that Regional Transportation District’s orientation regarding contract termination helps subcontractors to understand their responsibilities and expectations. [#6]
- When asked about potential measures or programs she is aware of that seem particularly helpful to small businesses including, minority- and women-owned firms, the Native American female representative of a business assistance organization said, “We encourage our members to get involved with the National Center for American Indian Enterprise Development and the American Indian Procurement Technical Assistance Center, as well as the Small Business Administration and the Colorado Minority Business Office.” [#37]

When asked why these are helpful, the same business assistance organization representative stated that National Center for American Indian Enterprise Development (NCAIED) and American Indian Procurement Technical Assistance Center (PTAC) are culturally attuned to members’ needs, and that the SBA and Colorado Minority Business Office (MBO) focus well on the needs of small businesses in general. [#37]

She later added, “There was a person who came in and did training on workers’ comp. There is also a contact on [a] human rights commission who occasionally comes [to the organization] and speaks to members.” [#37]

- The Asian-Pacific American male representative of a business assistance organization stated that the organization promotes training provided by the Denver Metro Chamber of Commerce, SBA, Small Business Development Centers, and the Minority Supplier

Development Council in the areas of market analysis, business planning, financial planning, marketing and sales, social media, hiring and managing employees, capital formation, accounting systems, and community engagement. [#33]

A few interviewees discussed small business assistance offered by local universities and other educational institutions. [e.g., #33] For example:

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she participated in a bonding course at Turner University. [#35]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that she attended a career fair hosted by Colorado State University. [#12]

Others reported having little or no knowledge of assistance programs in general and/or not participating in any programs. [e.g., #23b, #24, #31, #34] A few indicated that available programs are not helpful. For example:

- When asked if any assistance programs are particularly helpful to small businesses, the Hispanic American male owner of an architectural engineering firm stated that he has not used any programs, not even those offered by the Small Business Administration. He explained that the most helpful things for his firm have been seminars conducted by the professional associations to which they are members. [#16]
- The Subcontinent Asian American male owner of a specialty contracting firm reported that he is unaware of any programs available to small or certified companies. He went on to comment that individuals who want to start a business need to understand that it is a full-time job and that help isn't always available. He added, "I got no help. [I] had to learn it the hard way. A good example [of that] is a bid we submitted for ... the Zoo. It would have been nice to know [why] we [lost]." [#18]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is not aware of any programs that are particularly helpful for small businesses. He added, "It's difficult to get information on how to apply You go to small business events and they're sort of a waste of time." [#7]
- The Black American and veteran male owner of a general contracting company stated, "I don't think there are any resources out there that could help a new business to make sure you're doing things right. It's trial and error. You've got to keep working on it to make the business successful." [#29]
- When asked if he is aware of potential measures or programs that benefit small businesses, the non-Hispanic white male owner of a construction-related firm stated that he is not aware of specific programs. However, he said, "I believe [that] if the city wants to really assist in small business growth, there are some steps to implement." [#25]

The same business owner continued, “There needs to be some way [for] small businesses [to] network with bigger companies, [and] not [with] just a networking [or] outreach event. [The city should also] assist in making sure that they can mentor the small business.” Regarding current mentor-protégé programs, he said, “There needs to be something [with] more than four or five groups. It should be an effort in making sure relationships are formed and kept.” [#25]

- The non-Hispanic white female co-owner of a specialty services firm stated that she is not aware of programs that are particularly helpful to small businesses aside from those through the SBA. She added, “I used a lot of contact information from the Boulder [Small Business Development Center]. My business broker, my business attorney, and my finance guy were all from the SBA.” She went on to say that she called the county for information, though no one reached out to her afterwards. [#8]
- The Hispanic American female co-owner of an SBE-certified professional services firm reported that the firm never needed help from business assistance programs because she and the other owner have a strong business background. [#15a]
- A survey respondent said, “The small business organization is a joke. When we started our business, we went to them and they told us we were too young and did not have enough experience.” [AS#34]

Technical assistance and support services. The study team discussed different types of technical assistance and other business support programs. Some interviewees reported whether technical assistance and support services are helpful.

A number of business owners and representatives reported that technical assistance and support services are helpful. [e.g., #1c, #9, #21a, #25, #28] For example:

- When asked if she is aware of any technical assistance and support services, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “I have attended workshops at Mi Casa Resource Center, completed ... USDOT Bonding Education Program and [a] Turner University [course].” She added, “I learned bookkeeping in college, and a friend taught me estimating.” [#35]
- The male representative of a non-Hispanic white male-owned professional services firm reported that accounting software has been helpful, notably in maintaining payment schedules. He did note that it would be more helpful if the software allowed billing by labor category rather than by person. [#1d]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm stated that helpful training through the City and County of Denver included topics on estimating, contract language, payroll procedures, and bonding. [#2]
- A public meeting participant said, “In 2010 when the economy plummeted, [I] was [in] phase one of the small business entrepreneurial learning process Since then I have gone

through Mi Casa [and have] taken advantage of some incredible resources [such as] business planning, redevelopment, everything.” [PT#4]

- Regarding technical assistance and other support services, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “I think that marketing programs for MBE, WBE, [and] SBE businesses [to better] understand the marketplace would be very helpful.” [#5]
- The Black American veteran male owner of a general contracting company indicated that technical assistance and support services would be helpful. He said, “Having that type of resource, like a business consultant, could be helpful for small businesses that are struggling with all of the work, like bookkeeping, that is necessary for success.” [#29]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm commented on the benefits of technical assistance and support services. She said, “It could be very helpful for businesses to [learn], before they start a business, the back-office elements of bookkeeping, estimating, and knowledge [of how] to respond to a bid.” [#19]
- The non-Hispanic white female owner of a DBE-certified construction firm said, “To have available a business coach that could assist in all areas of small business [would be helpful]. There have been questions I had to find answers to on my own. An example would be when to start offering benefits to employees. A coach could help in identifying the right time. That coach could be especially helpful for brand new companies.” [#27]
- The non-Hispanic white male representative of a majority-owned goods and services firm reported that the National Electrical Contractors Association (NECA) has a helpful apprenticeship. He went on to comment, “It’s the new people coming in who are tech savvy.” [#23a]
- The Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, “I would like to see some type of technical assistance for small businesses, especially start-ups. I have business experience and know where to go to get what I need. However, I believe it’s difficult for small businesses to know where to get the help they need to succeed. Actually, I’m really surprised that Denver doesn’t have a department that not [only] certifies your company, but [also] give[s]... assistance.” [#32a]
- The non-Hispanic white male owner of a goods and services firm stated, “There were a series of workshops not too long ago doing [search engine optimization] which [were] very helpful, [they also discussed] how to refine an online business to stay relevant and stay current with the constantly changing technology” [#10]
- When asked about technical assistance programs, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “There was a program that helped us get into business, but those programs don’t exist anymore. They are focused on big businesses [now].” [#36]

Some trade association and business assistance organization representatives commented on the helpfulness of technical assistance and other support services for members. [e.g., #33]

- The Native American female representative of a business assistance organization said that the National Center for American Indian Enterprise Development (NCAIED) and American Indian Procurement Technical Assistance Center (PTAC) offer many helpful technical assistance and support services. [#37]
- The Hispanic American male representative of a trade association said that technical assistance and support services are extremely helpful for small businesses. He also noted that apprenticeships are helpful. [#11]

A few business owners and representatives do not find technical assistance programs useful, or are unaware of such programs. For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is not aware of any technical assistance programs. [#7]
- The non-Hispanic white male representative of a specialty services firm reported that he is not aware of any technical assistance or support services. [#34]
- When asked about technical assistance and support services, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that he is aware of such assistance, but noted that it's not always helpful. He explained, "Small businesses are savvy once they get to the point of doing public work. I was fairly well established before I moved into public work." [#22]

On-the-job training programs. Interviewees discussed their perceptions of and experiences with on-the-job training programs.

Some interviewees felt that on-the-job training programs would be useful or had participated in such programs. [e.g., #9, #23a, and #21a] Comments include:

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm indicated that on-the-job training programs would be helpful, especially if they focus on jobsite safety. [#9]
- The non-Hispanic white male representative of a majority-owned goods and services firm indicated that on-the-job training programs are helpful. He said that he is familiar with on-the-job training for electrical apprentices conducted by the Independent Electrical Contractors (IEC) and the National Electrical Contractors Association (NECA). [#23a]
- When asked about on-the-job training programs, the non-Hispanic white male representative of a majority-owned construction services firm reported that Construction Industry Training Council (CITC) and Independent Electrical Contractors (IEC) have big efforts to recruit minorities and women for their training programs. [#21a]

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is not aware of any on-the-job training programs. [#7]

Mentor-protégé relationships. Business owners and representatives reported on their experiences with mentor-protégé programs. Many viewed the programs as helpful. [e.g., #7, #6, #9, #22, #25, AS#40] For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm stated that mentor-protégé relationships are very helpful, and said she wishes she had had a mentor. She explained, “I think that’s probably been one of my hardest struggles. There have been little pieces of mentorship from different people, but because I’m probably in the first 10 of women-owned [companies in my field] in Denver there really hasn’t been anyone to go to.” [#12]

The same business owner added, “I think [Office of Economic Development] in Denver has mentorship opportunities. I don’t think we’ve applied for the OED one, but we would love to be mentored by an architecture firm who would take us under their wing and hand us some of their development work. Even though we complain about development work, we would do it. To have a good mentor would be so worth it.” [#12]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm discussed the benefits of a mentor-protégé relationship and how effective on-the-job training could be for small businesses. She stated, “I applied for the city’s mentor-protégé program, but was not accepted because I had not been in business long enough. I believe the benefits of a mentor-protégé program and on-the-job training could save significant time in making sure to conduct your business the most profitable way possible. A formal program or informal program could give the small business owner a place to get assistance. I also looked at and applied for the CDOT program and was unsuccessful, [but] I’ll keep trying.” [#19]
- The female representative of a non-Hispanic white male-owned professional services firm noted that a mentor-protégé program would be helpful. She noted that although their firm does not want to, they often help their subcontractors do accounting and track their time. [#1b]
- The male representative of a non-Hispanic white male-owned professional services firm stated that a more formal mentoring arrangement that credits the mentoring firm would be helpful for his business. He reported that, “If you really look at the specifics of who mentored and started a firm that grew and became a successful firm in their own right, we did. There’s no credit for that.” [#1a]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “It would ... be helpful to have a mentor-protégé program for those in the design field [similar to the program] in the construction field” [#5]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm reported that he has participated as both the mentor and protégé in

mentor-protégé programs, and indicated that such programs are helpful to small businesses. [#39]

- The non-Hispanic white female owner of an SBE-certified professional services firm indicated that more mentor-protégé programs should be available to small business owners in the Denver marketplace. [PT#2c]
- The non-Hispanic white male representative of a majority-owned goods and services firm said that mentor-protégé relationships are very helpful, but hard to find. [#23a]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that she has only had “unofficial” mentor-protégé relationships with the primes she works with frequently. She said that these relationships have been beneficial. [#20]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said that she has an informal mentor-protégé relationship with another construction cleanup company. [#35]
- The non-Hispanic white male representative of a specialty services firm reported that the firm has not participated in any mentor-protégé programs, but indicated that such programs might be helpful to employees. [#34]

Some trade association and business assistance organization representatives reported on the helpfulness of mentor-protégé programs for members. [e.g., #33] One representative noted their organization’s efforts to recruit firms for the SBA’s mentor-protégé program. Comments include:

- When asked about programs or initiatives by his organization that could benefit SBE- and MWBE-certified members, the non-Hispanic white male representative of a trade association said, “We talked about ... a mentorship type of a situation which would be even more beefy. But how could we put that together with the city’s guidance so it worked? [#40]

The same trade association representative continued, “Right now, there’s no incentive in the ordinance other than you get ... a gold star if you do a mentorship. It doesn’t change the percentage And then all the while, you have the, what I’ll call for lack of a better term, the majority subs. [They’re] the non-minority subcontractors who can build these buildings and they’re sitting on the sidelines, and we’re not employing them to mentor up with these because ... nowhere in the system that makes that the path of least resistance.” [#40]

- The Native American female representative of a business assistance organization reported that the organization recruits companies for the Small Business Administration’s mentor-protégé program. She noted that one-member firm is also part of CDOT’s mentor-protégé program. [#37]

- The Hispanic American male representative of a trade association stated, “Mentor-protégé [programs] done well are extremely helpful to emerging businesses.” [#11]

One business owner said private relationships are more valuable than mentor-protégé relationships. The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said she doesn’t believe mentor-protégé programs are as helpful as genuine private relationships. She said it would be more effective to invite a general contractor or project manager to lunch and ask them for advice about the needs of the organization. She went on to reiterate that it is important to build private relationships, and said she is convinced that scheduling time once a quarter with other contractors and tapping into their knowledge is more valuable. [#13]

The same business owner also said a general contractor on a project provided management help to ensure her success after she took over her company. After learning what her firm’s capacity was, the general contractor helped to identify other opportunities that carried her for another couple of years. [#13]

Joint venture relationships. A few interviewees showed interest in joint venture relationships. [e.g., #12] More faced challenges with joint venture relationships, have not participated in them, or find no value in them. For example:

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that during the construction of Denver International Airport he participated in a joint venture with a large engineering firm that he was part owner of. [#14]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that he is familiar with joint ventures between large firms, but not for small businesses specifically. [#23a]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that she has never participated in a joint venture relationship. When asked why, she said that she is not interested due to their legal “risk.” She went on to comment that she is happy to be a subcontractor only. [#20]
- The Hispanic American female co-owner of an SBE-certified professional services firm reported that the firm participated in a joint venture in the past, but did not get any work out of it. [#15a]

One trade association representative said that joint venture relationships would benefit smaller firms. The Hispanic American male representative of a trade association said that joint ventures can help small firms build necessary experience. However, he noted, “The risk needs to be in proportion to [each firm’s] contribution to it and not a fifty-fifty agreement in order [for the joint venture] to be [successful].” [#11]

Financing assistance. The study team asked interviewees about financing assistance and related programs. Most indicated that such programs are helpful. [e.g., #11, #21a, #23a, #39] For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is aware of finance assistance programs. However, he said that he did not receive much information after inquiring about them. [#7]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that he attended a financing assistance course at the Denver Metro Chamber of Commerce that focused on cash flow. [#14]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, “It would [be] helpful for us and I’m sure could be very helpful for some small business or start-up businesses to ... [have] a resource list of companies that provide bookkeeping and financing assistance An area our company still struggles with is certified payroll. Regular and ongoing classes in that area conducted by the city, since it’s a requirement, would be helpful too.” [#28]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm indicated that financing assistance can be helpful. She noted, “There are nonprofit organizations giving loans, [such as] Colorado Enterprise Fund, Accion, [and] mpowered.” [#35]
- The Hispanic American female co-owner of an SBE-certified professional services firm reported that members take advantage of financing assistance from the organization’s banks and credit union members, usually in the form of business loans and establishing business accounts. [#33]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm indicated that financing assistance is helpful, and noted that he currently has an SBA loan. [#36]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that he currently has an SBA loan on his building. He noted that with an SBA guarantee on the loan, the lender offered longer terms for repayment, which causes his monthly payments to be lower. [#22]

A business assistance organization representative discussed members’ options for financing assistance. When asked if she is aware of any helpful financing assistance programs, the Native American female representative of a business assistance organization said, “Obviously [there is] the SBA, but there is always a need for financial training. It would be helpful to have an online database where people could go and find out who is doing different kinds of training.” She added, “The state’s Minority Business Office is another good resource, but they need more support. Perhaps they could collaborate with the City and County [of Denver].” [#37]

Bonding assistance. Business owners and representatives reported on bonding assistance as helpful. [e.g., #13, PT#4] For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that they participated in a bonding assistance program. Regarding

the firm's participation, she said, "It was a construction-oriented bonding program. I think it was put on by the National Highway [Traffic Safety Administration]. They have it every year [and it] was a valuable way for me to learn how to write public sector proposals and go after public work ... It was ... geared more towards contractors than architects, but we've really tried to take advantage of classes and programs put on by various parts of the public sector and ... trade organizations, to learn as much as possible." [#12]

- When asked if she has any knowledge of bonding assistance, the non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, "Years ago, one of the primes I frequently work with helped me with bonding through their bonding company." [#20]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said that she has utilized the USDOT Bonding Education Program, and indicated that it was helpful. [#35]

A few trade association and business assistance organization representatives commented on the helpfulness of bonding assistance for members. For example:

- When asked if she has any knowledge of bonding assistance, the Native American female representative of a business assistance organization said that they send members to the U.S. Department of Transportation Bonding Education Program classes. She added, "We also have a guy who's a retired former CEO of a construction company who comes in and does bonding workshops." [#37]
- When asked about bonding assistance, the Hispanic American male representative of a trade association said, "If the city could come up with a bonding program where [firms] could pay into it, I think [it] would be extremely helpful to a lot of our small firms that cannot get bonding on their own, since it takes three to five years of good financial records to achieve bonding." [#11]

A business assistance organization representative noted that she is unaware of any bonding assistance for members. The Native American female representative of a business assistance organization said that assistance in obtaining business insurance would be helpful to members, though she is not aware of any such assistance currently. [#37]

Assistance in obtaining business insurance. A few business owners and representatives said that assistance obtaining business insurance would be helpful to small businesses. [e.g., #2, AS#16] Others reported no need for insurance-related assistance. [e.g., #15a] For example, the Black American male co-owner of a veteran-owned specialty contracting firm reported that he is not aware of any programs that assist in obtaining business insurance, but indicated that such programs would be helpful. [#7]

Assistance in using emerging technology. Some interviewees said that assistance using emerging technology would be helpful. [e.g., #9, #11, #37] Others indicated that they have no need for emerging technology assistance. [e.g., #15a] Comments include:

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she received computer training at Mi Casa Resource Center and learned LCPtracker at COMTO Colorado. She explained, “They were giving a class about it and it is good to know. When [a client] moved to their new office, I got the ... contract because the prime use[d] LCPtracker I got the contract because I knew how to use it.” [#35]
- The non-Hispanic white male representative of a majority-owned construction services firm said, “Our company is trying to keep up with emerging technology, so we have a lot of lunch and learns where vendors come in and make presentations. The [City and County of Denver] could probably partner with Red Rocks Community College or other educational institutions to provide assistance in using emerging technology.” [#21a]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is not aware of any programs that assist in using emerging technology. [#7]
- The non-Hispanic white male representative of a specialty services firm indicated that further assistance in using emerging technology may be helpful. He said, “Keeping up with new technologies is a challenge, but we have people at the company who are staying on top of that It gives us a competitive advantage.” [#34]

J. Insights Regarding Contracting Processes

Insights discussed include the following topics:

- Contract compliance and enforcement;
- Solicitations and procurements;
- Information on public agency contracting procedures and bidding opportunities;
- Perceptions of electronic bidding, registration, and online directory of potential subcontractors;
- Pre-bid conferences where subcontractors can meet prime contractors;
- Distribution of lists of plan holders or other lists of possible prime bidders to potential subcontractors.
- Other agency outreach such as vendor fairs and events;
- Streamlining or simplification of bidding procedures;
- Breaking up large contracts into smaller pieces (unbundling);
- Price or evaluation preferences for small businesses;
- Small business set-asides;
- Mandatory subcontracting minimums;
- Small business subcontracting goals; and
- Formal complaint and grievance procedures.

Contract compliance and enforcement. A few business owners and representatives discussed compliance and enforcement of City and County of Denver contracts. For example:

- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said she once signed a blank letter of intent for a general contractor that later refused to utilize her firm on a project. She said the general contractor told her, “Oh no, we made a mistake. We only showed you as a sub if we needed you to meet our goal.” [#2]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm stated that there should be better enforcement regarding prime contractors’ efforts to meet MWBE requirements. She said, “If you’re going to have a program that requires compliance, someone is going to have to monitor it to make sure the big primes are meeting the compliance. That means you need boots on the ground to actually do the work. There needs to be some sort of serious repercussions for not meeting the requirements.” [#5]

Solicitations and procurements. Some interviewees reported on their experiences with solicitation and procurement processes.

Comments related to solicitations and procurements are broad. For example:

- Regarding solicitations and procurements, the Black American male co-owner of a veteran-owned specialty contracting firm said, “It’s a ‘good ol’ boys’ club.” He explained, “They talk to each other about upcoming bids, upcoming contracts, and upcoming work That’s why I wish that there was a better place for the city to host something. [The city should] say, ‘Hey, here are the qualifications. Bid,’ and that’s it. But by the time it does get to their bid process, the vendors usually already selected.” [#7]
- A public meeting participant said, “I feel a lot of times that the solicitations and the programs that we have established ... feel like it’s a welfare system. And the reason why I say that is because the amounts of the contract or the values of the contract keep you here. You’re never going to go and be a big [business] here, so it prohibits you from growing. It just keeps you at this level.” She added, “The big issue ... is [getting] minority companies [to grow]. I think that’s a huge problem because you can never get an opportunity to grow.” [PT#4]

The same public meeting participant continued, “I know that we have the set-aside program on ... but there’s not very many contracts in there. And ... [with] the defined selection pool for the professional services this year, they kept the dollar value at the same dollar value as it was last time. I think it was an \$11 million contract But all the primes, because of the growth of the airport and all the activities happening, their contractors quadrupled. One project management contract went from \$25 million to like \$45 million [or] \$90 million. So, their contract values increase, but the defined selection pool contracts remained the same. So that’s what I mean by that welfare system. We’re just going to do what we have to do to meet the minimum requirement [without letting] people grow and become economically ... big.” [PT#4]

- Regarding solicitations, the non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated, “I get a lot of solicitations from prime contractors, but there is no follow-up.” [#20]
- Regarding City and County of Denver’s notification and bid processes, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “They will post stuff on Rocky Mountain BidNet, [but] what I don’t always see are the bid results. They’ll ask you to apply through that, but when the bid tabs come out they’re not posted. [If they are], I never see them. You can go back in and try and find that project, but a lot of times the tabulations or the award information isn’t there. I know they post them on their websites, but it’s another step in the process, and as a small business you don’t always have the time to look for that stuff in two or three different places.” [#9]

The same business owner continued, “Another thing I’ve discovered is that the purchasing person who works with [our] category usually does not go to the certification list and say, ‘Here are the businesses that are certified in this category. Let’s send them a solicitation for this project,’ which would be helpful. You’re certified with the city already, so why not use the directory or list that the city maintains already to solicit responses for projects? In one instance, I went to talk to the City of Denver purchasing agent and I explained that we are certified and did not get a solicitation for a project. She told me to go to another department for that, so I asked her how she chose to send people the solicitation She said it was dependent on whose card she had in her desk drawer.” [#9]

One business owner suggested that City and County of Denver be more transparent regarding solicitation and procurement. The Black American male co-owner of a veteran-owned specialty contracting firm suggested that City and County of Denver be more transparent in its solicitation and procurement processes. He said that by the time bids are open to the public, “the vendors [are] usually already selected.” [#7]

Information on public agency contracting procedures and bidding opportunities.

Some interviewees reported on how well information is disseminated regarding public agency contracting procedures and bidding opportunities. For example:

- When asked if he had any direct experience or was aware of any information on public agency contracting procedures and bidding opportunities that might benefit all small businesses, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that he gets assistance regarding federal work from the Procurement Technical Assistance Center (PTAC). [#22]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that he does not receive electronic notices about opportunities even though he holds several certifications. [#36]

A trade association representative commented on his organization’s gathering of information regarding contract opportunities for members. The Hispanic American male representative of a trade association said that receiving information on public agency contracting procedures and bidding opportunities is very helpful. He said the organization tries to gather this information for

members, and explained that many small business owners do not understand all the public requirements needed to submit a successful bid. [#11]

Perceptions of electronic bidding, registration, and online directory of potential subcontractors. Most business owners and representatives said that online services are helpful, or “okay.” [e.g., #28, #37] For example:

- Regarding online registration with public agencies as a potential bidder, the non-Hispanic white male representative of a majority-owned construction services firm said, “The City of Denver is really good about that. The school districts are all good about that [too]. If you want to get on their list, you can do that.” [#21a]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm indicated that online registration as a potential bidder is helpful. He said, “We are online with a lot of agencies. The Procurement Technical Assistance Center (PTAC) will even do searches for companies.” [#22]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm indicated that electronic bidding and online registration as a potential subcontractor is helpful. She said that she is registered with Regional Transportation District, City and County of Denver, and with Connect2DOT for CDOT. [#35]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that most agencies now have information on public agency contracting procedures and bidding opportunities on their website. He noted that this saves his firm a lot of time. [#14]

The same business owner later said that he is registered with all public agencies in Denver to receive bidding information electronically. [#14]

- The non-Hispanic white male representative of a majority-owned goods and services firm reported that the firm maintains its own subcontractor directory. [#23a]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that she taught herself how to register online with public agencies and that she receives information regularly. [#20]

A few interviewees had negative experiences with registration and online directories. For example:

- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “Everyone says to go on-line and register your business, but I don’t think the major companies go there to find you.” [#36]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported awareness of an electronic directory of potential subcontractors. He said, “We got a list that showed us how to go onto the government website and find subs, [but] then you have to

contact them on your own and see if they would like to partner with you. There's no [actual] program. There's just a list and a phone number to call." [#7]

Pre-bid conferences where subcontractors can meet prime contractors. Business owners and representatives discussed the helpfulness of pre-bid conferences.

Some saw the advantages of pre-bid conferences. [e.g., #25] A few reported on room for improvement. Comments include:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm suggested there be a system in place to help primes and subcontractors identify each other at pre-bid conferences so that they can easily communicate regarding working together. She went on to say, "Think about how much easier it would be if every prime had to wear a pink name tag and every subcontractor had to wear a blue name tag That [way] when I walk in, I know instantly who my targets are [Because] currently ... I don't know who these people are as we go through these pre-bid meetings. I've been to hundreds of pre-bid meetings, or pre-proposal meetings, and I don't know who to go up and talk to" [#5]
- When asked about pre-bid conferences, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that he attends "all" of them, and noted that they are very beneficial because they allow him to meet other teams pursuing projects. He commented, "We got a [public sector] contract because I attended events and spoke with all the teams pursuing the project." [#22]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she does attend pre-bid conferences and noted that her first public project was awarded by attending one. [#35]
- The non-Hispanic white male representative of a majority-owned construction services firm stated, "Pre-bid conferences, where subcontractors can meet prime contractors, are held often and our company attends many of them. There is good information at these meetings and that they are also networking opportunities." [#21a]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that he has gone to a few pre-bid conferences to learn about major projects. However, he said that if there is no line item in a construction budget for his products that help primes meet goals, they are not interested in using his firm. [#36]

Some business assistance organization representatives commented on the helpfulness of pre-bid conferences. Comments include:

- The Native American female representative of a business assistance organization indicated that pre-bid conferences are helpful, and commented, "We send out flyers we receive from public entities. At our expo we also offer matchmaking." [#37]

- The Asian-Pacific American male representative of a business assistance organization stated that pre-bid conferences are a key way for members to learn about public sector opportunities. [#33]

Some interviewees indicated that pre-bid conferences are not helpful, not available, or they choose not to attend them. For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is not aware of any pre-bid conferences. However, he indicated that such conferences would be helpful if available to his firm. [#7]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that pre-bid conferences are often just “lip service.” He explained, “They’re doing it so they can get the public entity off their back.” He went on to say that the value of these events is learning who is already on the team and what their needs are going to be. [#14]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated, “I used to attend pre-bid conferences regularly, and sometimes still do, but they’re not very useful for what I do since I’m very specialized.” [#20]

Distribution of lists of plan holders or other lists of possible prime bidders to potential subcontractors. Business owners and representatives discussed the helpfulness of plan holders’ lists. Most found them helpful. [e.g., #21a] For example:

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that she does not use plan holders lists because they are not useful. She explained, “They would be more useful if the City and County of Denver and [Denver International Airport] had a goal to utilize local companies, because [then] out-of-town firms coming into the Denver market would have incentive to know my company.” [#20]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she does use online plan holders lists to find prime bidders. [#35]

Other agency outreach such as vendor fairs and events. Many business owners and representatives discussed the helpfulness of outreach events such as vendor fairs.

Many interviewees reported that they support agency outreach such as training seminars, conferences, networking events, and vendor fairs and attend them regularly. [e.g., #21a] For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said because of the “small knit community” when seeking subcontractors for public sector jobs, recruiting is often through word of mouth. She said she attends outreach events to network and find out the status of various businesses, and added that clients sometimes have recommendations based on past projects. [#13]

- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm indicated that his firm has attended outreach events organized by City and County of Denver and CDOT to learn about upcoming contracting opportunities. [#14]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm indicated that agency outreach is helpful. She stated that she attends all agency outreach events that she can. [#35]

Some trade association and business assistance organization representatives discussed the helpfulness of agency outreach for members. [e.g., #40] For example:

- The Native American female representative of a business assistance organization indicated that agency outreach benefits members, and commented, “We send out all of the agency outreach information, and we also invite them to our expo to talk to our members.” [#37]
- The non-Hispanic white female representative of a trade association said that the best way for subcontractors to market themselves to primes is to attend networking events. [#38]
- The Asian-Pacific American male representative of a business assistance organization stated that the organization promotes agency outreach and Minority Supplier Development Council events. He said they also partner with the other minority chambers to do job fairs and other events. [#33]

Others indicated that they faced challenges in attending outreach events, do not support their usefulness, or are unaware of their existence. For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that he is not aware of any vendor fairs or similar events. [#7]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that she has attended vendor fairs, but considers them “for show” because she believes the primes already know who they are going to use. She said that she no longer attends vendor fairs for this reason. [#20]
- The non-Hispanic white male representative of a majority-owned goods and services firm said that he is not aware of any agency outreach such as vendor fairs or events. [#23b]
- The non-Hispanic white male representative of a specialty services firm said that he is not aware of agency outreach such as vendor fairs. [#34]

Streamlining or simplification of bidding procedures. Some interviewees indicated that streamlining or simplification of bidding procedures would be helpful. [e.g., #37] Others suggested that shortening the time it takes to bid would be an improvement for small businesses trying to manage their time efficiently. For example:

- When asked about simplifying bidding procedures, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “It’s my understanding that they’ve been doing that in terms of breaking the contracts up. I guess

the one thing that I would say based on where we normally fit within the schedule is that our stuff is always the last part that's going to go into a project." [#9]

The same business owner continued, "If it is going to take two or three years before our part is needed, it's really difficult to anticipate what the market's going to do three years from now. As an example, when the President announced that he would be adding the market for steel, all my manufacturers started saying, 'Well, we're going to take a 5 percent increase,' or, 'We're monitoring the situation.' So, if I have to bid a contract where my part is two years or even six months down the road, I have no earthly idea what that will cost and I'm not sure that anybody else does either." [#9]

- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said that streamlining bidding procedures would be helpful in maneuvering agency contracting. [#28]
- When asked if bidding procedures should be streamlined, the non-Hispanic white male representative of a majority-owned construction services firm indicated that they should. He said, "Sometimes some of the bidding procedures and some of the bid forms, and all of that, are so cumbersome. You spend a lot of time doing that instead of doing the bid." [#21a]
- When asked if streamlining or simplifying bidding procedures would be helpful, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, "That would be great. It just seems like there are a lot of forms to be filled out, even in the RFQ stage, that could be waived until contract negotiation." [#22]

Breaking up large contracts into smaller pieces (unbundling). The size of contracts and unbundling of contracts were topics of interest to many interviewees.

Most business owners and representatives indicated that breaking up large contracts into smaller components would be helpful. [e.g., #12, #13, #20, #25, #33, WT#9, WT#11] A few mentioned that it allows for smaller firms to perform as prime contractors rather than subcontractors. Comments include:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm indicated that she supports the unbundling of large contracts. [#5]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, "When our firm started, we took full advantage of the projects set aside for SBE-certified firms. [However], I haven't seen a pool of projects recently for those firms." [#28]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated, "The only way small businesses are going to grow is to break-up some of the very large projects and make those small business set-asides. That would be helpful because they would only be competing with another small business." [#19]

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said it would be helpful if City and County of Denver broke up large contracts into smaller pieces, because it would allow him the opportunity to bid as a prime contractor rather than a sub. [#22]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm indicated that he supports the unbundling of public sector contracts. He said that in his industry “public agencies bundle everything together because they say that gets them the best value for the taxpayer.” He commented, “It makes it impossible for a small business to compete.” [#36]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm indicated that unbundling large contracts would benefit her firm. She said, “Because my company is very small, finding a project in the public sector that is small enough for me is difficult.” [#35]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified construction services firm said, “Denver [should] require that businesses that have to meet goals ... break down the work into smaller job sizes for smaller certified businesses to have an opportunity and ability to bid. [For example] \$50,000 to \$200,000 size jobs.” [WT#5]

Some trade association and business assistance organization representatives agreed that unbundling large contracts would benefit members. [e.g., #6] For example:

- The Native American female representative of a business assistance organization indicated that unbundling large contracts would benefit members. She said, “There was one particular instance where [a public agency] wanted a company to serve a large number of clients at a certain level, and it was too much for a small company to take on. So, they dropped out. They make the packages too big for a small business.” [#37]
- The Hispanic American male representative of a trade association stated, “The breaking down of contracts to smaller dollar sizes is extremely helpful to our businesses in gaining experience.” [#11]

One interviewee discussed his firm’s efforts to unbundle contracts as a prime contractor.

Regarding unbundling contracts, the non-Hispanic white male representative of a majority-owned construction services firm said, “We take the project goal and we break it down. And we take the budgets, and see what makes sense, but then we have to fit it in to the whole scheme and keep the subcontractor within their ability. So, we do a lot of that downstream.” [#21a]

Price or evaluation preferences for small businesses. Some interviewees had comments on price or evaluation preferences. For example:

- The non-Hispanic white male representative of a majority-owned goods and services firm said that he is not aware of any programs or initiatives pertaining to price or evaluation preferences for small businesses. [#23a]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that she is not aware of price or evaluation preferences, but noted that she would like to see points awarded to bids that include local small businesses. [#20]

A business assistance organization representative noted that her organization shares information on price/evaluation preferences with members. When asked if members are knowledgeable of price or evaluation preferences, the Native American female representative of a business assistance organization said that they cover the topic at their expo. [#37]

Small business set-asides. The study team discussed the concept of small business set-asides, a program that limits the bidding of certain contracts to firms qualifying as small businesses, with business owners and representatives.

Some business owners and representatives supported small business set-asides. [e.g., #5, #22, WT#11] For example:

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated, “[I’m] not sure about goals on projects, but I have heard it’s not going well. However, set-asides could clear up the issues of goals setting. An example would be if a project has a 15 percent goal and you make that portion a set-aside. It could be an opportunity for small businesses to compete with each other.” [#19]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm stated that she “is for” small business set-asides. She explained, “You don’t want to concentrate power in the hands of a few rich, old, white men. Through generations there’ll always be new start-ups, and those new companies need to get a chance. That is particularly true in a situation of women and people of color, because they have less access to financing. That’s proven over and over again. So, if you are trying to start a company as a person of color or as a female, you have to start out with small contracts because you can’t get that business loan for a million dollars.” [#12]

Trade association and business assistance organization representatives generally agreed that small business set-asides benefit member firms. For example:

- The non-Hispanic white female representative of a trade association indicated that small business set-asides would be helpful for members. She said, “I try to encourage [the City and County of Denver] to have an opportunity for small firms to be primes That adds value to the firm.” [#38]
- The Hispanic American male representative of a trade association indicated that he supports small business set-asides. He said, “The [City and County of Denver] put the EBE program in its ordinance four or five years ago, and no projects have been issued under that program. They were supposed to be small dollars, and only small guys that were certified EBEs could bid on it so [they] only bid ... against [their] own competition for these projects. They would be issued. You’d get the opportunity to work for [City and County of Denver and] learn the paperwork on a small-scale project. I can’t imagine that not being

truly successful and beneficial to the small businesses, but we do not know because there never were any issued.” [#11]

- The Native American female representative of a business assistance organization indicated that small business set-asides benefit certified members. [#37]

Others expressed concerns regarding small business set-asides, did not support them, or were not familiar with them. For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, “Although Denver provides set-asides for DBE/WBE/MBE/SBE contractors and consultants, the deck is still stacked against us The contracting officers who write the RFPs stack them heavily in favor of incumbents. The language they use to do this is ‘past performance’ for the exact project type This may be relevant for very specific project types, [like] playgrounds, but for most landscape applications this is way less so. The landscape around a judicial building isn’t substantially different than ... private sector office buildings. By specifying past performance in a super specific project type as highly important to be a successful competitor, the same ‘good ol’ boys’ get the work.” [WT#11]
- When asked about the helpfulness of small business set asides, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said that he has gotten on-call contracts through Denver’s small business set-aside program. However, he described the projects in that pool as “small,” and noted that his firm is capable of doing larger projects. He went on to say that the larger projects always go to big firms. [#22]
- When asked if he solicits SBE/MBE/WBE subcontractors for bids or quotes, the non-Hispanic white male owner of an engineering company stated, “I don’t believe in those set-aside programs. I will only work with people I know, and they aren’t in that certified program.” [#26]
- The non-Hispanic white male representative of a majority-owned goods and services firm said that he is not aware of any programs or initiatives pertaining to small business set asides. [#23a]

Mandatory subcontracting minimums. Some interviewees supported a minimum level of subcontracting on projects, indicating it would be helpful to their firm. [e.g., WT#11] For example:

- When asked about mandatory subcontracting minimums, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “They are needed.” [#22]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm indicated that mandatory subcontracting minimums benefit his firm by ensuring that large companies do not get all of the work. [#14]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified professional services firm indicated that mandatory subcontracting minimums would benefit her firm and other small, disadvantaged businesses. She said, “Prime consultants in the professional services of design don’t understand there is a problem with diversity or inclusivity. Many personally view themselves as politically progressive and non-discriminatory. [However], it doesn’t occur to them to include SBE/MWBE/DBE firms on project teams, unless compelled.” [WT#3]

The same business owner continued, “I have worked with several design firms that complement my firm’s work and endorse us to other firms. However, unless a project has a specific goal assigned to it, those same design firms will not include SBE/MWBE/DBE firms in their proposals. Their goal is to simply meet the participation goal, but not exceed it. Many large prime consultants view every dollar allocated to SBE/MWBE/DBE firms as a loss of revenue for them. They do not view it as a benefit or enriching their team or work product. Some prime consulting firms barely conceal their frustration over perceived losses of revenue because they have to work with SBE/MWBE/DBE firms.” [WT#3]

She went on to say, “There are discrepancies between what senior management at large design firms say and their practices. At senior levels, most all design firms claim to appreciate working with diverse teams. [But] in practice, project managers are rewarded for maximizing revenues in the short-term. Therefore, sharing scope and fee with SBE/MWBE/DBE firms conflicts with the metric by which they are evaluated. It doesn’t matter if an SBE [or] MWBE/DBE firm is superior in every way [because] it is not in the project manager’s best interest to work with a certified firm.” [WT#3]

One trade association representative stated that small business subcontracting minimums are “absolutely necessary.” When asked about mandatory subcontracting minimums, the Hispanic American male representative of a trade association said, “That is what goal-setting does, and I think it is absolutely necessary. [However], the caveat to that is there are some scopes of work where we have no certified firms.” [#11]

A few interviewees were unfamiliar with mandatory subcontracting minimums, or downplayed their helpfulness. Comments include:

- The non-Hispanic white male representative of a majority-owned goods and services firm said that he is not aware of any programs or initiatives pertaining to mandatory subcontracting minimums. [#23a]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said that mandatory subcontracting minimums are not ideal, though they are “better than nothing.” [#12]

Small business subcontracting goals. Interviewees discussed the concept of setting contract goals for small business participation in public contracts.

Several business owners and representatives voiced approval for small business subcontracting goals. Some expressed that goals should be set or expanded. [e.g., #22] For example:

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said that, as a subcontractor, her firm has “benefited from small business subcontracting goals.” [#20]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that small business subcontracting goals for DBE/MWBE firms are critical for his business because they ensure that the large companies do not get all of the work. [#14]
- Regarding small business contracting goals, a public meeting participant stated, “Every contract should have a goal.” [PT#4]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said, “So the struggles in being a minority woman owned business is that in reality because ... of these programs, the prime isn’t interested in you unless there is a goal. Then when you have a relationship with them, they want to utilize you for work, but you’re capped. You know you’re going to be capped. On top of all of that, you have to have the financial capabilities to hold your own.” [PT#3a]
- Regarding how small business subcontracting goals are set, the non-Hispanic white female owner of a WBE-certified professional services firm said, “The goals committee at DPS does set both construction and professional [services goals]. And you hear ... from the big contractors as well [that] these disciplines are at capacity, and everybody just takes [them] at their word when there’s no mechanism in place to actually track that.” She added, “I would think in this day and age ... that there should be tools out there so that they can tell who’s at capacity.” [PT#3c]

The same business representative continued, “And to me ... it’s insulting to have somebody [tell] me ... everybody’s at capacity. When I [want to] grow my firm, don’t you tell me that I’m at capacity That’s not a decision that you can make for me, because if I get a big contract and a project that I really [want to] work on, I’m going to go hire somebody, and that’s how I grow my firm.” [PT#3c]

Some trade association representatives indicated that small business subcontracting goals benefit membership. For example:

- Regarding small business subcontracting goals, the Hispanic American male representative of a trade association said, “It allows a wider group of small business folks to participate and compete. That is really truly a level playing field for small businesses. When it is the requirement, there’s a cap of what size you can be.” [#11]
- The Black American female representative of a trade association said, “If there’s no [DBE] goal, there will probably be no outreach event [or] preconstruction meetings, and no way

for the firms to find out about opportunities early enough to get engaged and build rapport. So, if you're not already in the know, [then] you don't know." [#6]

The same trade association representative said that some members use the same DBE subs for both public and private sector projects. She added, "There are four that come to mind right away. They've established a name for themselves on these public projects, [so] a lot of the teams that have engaged them pulled them into their private projects too." [#6]

Some interviewees indicated that small business subcontracting goals put their firms at a disadvantage. Some said that goals are sometimes abused or used for the wrong reasons. [e.g., #11] For example:

- The male representative of a non-Hispanic white male-owned professional services firm described his frustration with contractors who, when trying to meet unrealistic goals, simply pass these goals on to subcontractors who may not have the appropriate experience or expertise. He went on to describe the process in San Francisco, where the city identifies what parts of the projects can be done by small, minority- or woman-owned businesses and specifically contracts those parts to those firms. He notes that the City of San Francisco does not leave the job of achieving subcontracting goals to prime and subcontractors. [#1a]
- The female representative of a non-Hispanic white male-owned professional services reported a "super huge disconnect" between the Denver Office of Small Business Opportunity (DSBO) Goals Committee and the actual workforce available. She stated that there is there is a higher number of minority- and women-owned firms on the committee than they are representing in the workforce. This makes her feel like "the MWBE community has basically banded together to try and get the highest goal possible on any project that comes out of City and County of Denver, regardless of the size and how it will benefit the project." She added that there are no rules restricting goal committee members from bidding on a project they set goals for. [#1c]
- A survey respondent commented, "I think they're putting extreme pressures on DBE[s] by increasing the quotas in already constrained markets. They're taking on more work than they can handle." [AS#19]
- A survey respondent stated, "Being outbid is frustrating. Being a smaller company, opportunity should be based on merit, not on the basis of our diversity/owner." [AS#2]
- A survey respondent indicated that contract goals put their firm at a disadvantage, saying, "Not being women-owned/minority is a disadvantage." [AS#22]

Formal complaint and grievance procedures. Some interviewees discussed formal complaint and grievance procedures.

Some business owners did not find complaint procedures helpful, had no experience with the procedures, or feared retribution. For example:

- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said it would be helpful if City and County of Denver “were more willing to meet and really discuss [issues].” [#39]
- When asked for her thoughts on formal complaint and grievance procedures, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, “I think you have to be really careful with programs like that because you can get blacklisted. I think it’s good, but I think that with whistleblowers, it’s just tough.” [#12]
- On the topic of formal complaint and grievance procedures, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm explained that he made a complaint on a Denver Public Works project that was not resolved because it was not addressed by an impartial individual. [#22]

K. Insights Regarding Minority- and Woman-owned Business Programs

Interviewees, participants in public hearings, and other individuals made a number of comments about race- and gender-based measures that public agencies use, including MBE/WBE and DBE contract goals and comments regarding:

- Federal DBE Program at City and County of Denver, and other race- and gender-based programs; and
- Any issues regarding City and County of Denver or other public agency monitoring and enforcement of its programs.

Federal DBE Program in City and County of Denver, and other race- and gender-based programs. Business owners and representatives provided insights on City and County of Denver’s implementation of the Federal DBE Program and other race- and gender-based programs. For example:

- A public meeting participant indicated that her experience with the SBA 8(a) program has been positive. She said, “If you’re 8(a) certified, you can get paid in seven days. And if they have a dispute, they have only seven days to take care of that dispute.” [PT#4]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm reported that the firm just received its SBA 8(a) certification. He noted that he considers the program effective, and said, “They at least have a mechanism in place to even the playing field. I don’t know why the airport and [Regional Transportation District] aren’t forced to use this program when they get federal dollars for their transportation projects.” [#36]
- When asked about the Federal DBE Program, MWBE, and SBE programs and their implementation by City and County of Denver, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, “All these programs are the same. I can’t recognize any differences. I didn’t even know I wasn’t certified with the federal government until someone said it wasn’t the same.” She

continued, “For small businesses that are trying to grow their business, these programs are a challenge to understand because they all have different requirements.” [#19]

- When asked about City and County of Denver’s implementation of the Federal DBE Program, the non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, “I’m a certified DBE and I know that program kicks in when the federal government puts money into a local project. [However], reciprocal certification of companies coming to Colorado from other states should be more difficult.” [#20]

A few trade association and business assistance organization representatives commented on topics related to the Federal DBE Program and its implementation by City and County of Denver. For example:

- When asked if she has any recommendations to improve the Federal DBE Program, the Black American female representative of a trade association said that national and local best practices should be reviewed. She added, “They should see whether or not folks are attending national compliance conferences or other programs that could assist in the development of a robust program. We are right in the middle of billions of dollars’ worth of projects right now, and there’s a lot that needs to be done.” [#6]

When asked about members that have experienced the City and County of Denver’s implementation of the Federal DBE Program, the same trade association representative said that members involved in the program speak highly of a Denver Division of Small Business Opportunity (DSBO) representative. She went on to say, “She’s done a really good job in terms of connecting with the community and being the face of the department, and making sure that she’s inserted herself in the community for us to know that they’re here, they’re listening. She’s made some changes on her level where she could, so I do want to make sure that’s acknowledged She’s provided community representation for the office.” [#6]

- When asked if members have any experience with the Federal DBE Program and its implementation by City and County of Denver, and if she has any recommendations for improvement, the Native American female representative of a business assistance organization said, “We have members that have participated in that through [Denver International Airport] and the City and County [of Denver].” She added, “Anything that could be done to streamline the whole DBE program would be beneficial.” [#37]

When asked if she has any comments or recommendations about any other current or potential race/ethnicity/gender-based programs, the same business assistance organization representative said, “They have been really good about coming to us, and we need to make sure that continues when people at agencies change. From the top down, they need to make a commitment to have a presence in the community. People are more comfortable approaching them when they’re on our turf.” [#37]

- When asked if he has any comments or recommendations about any current or potential race/ethnicity/gender-based programs, the Asian-Pacific American male representative of a business assistance organization said, “What I would say is that the [City and County of

Denver] has an opportunity to be a leader and be innovative. I hope they follow through.”
[#33]

Any issues regarding City and County of Denver or other public agency monitoring and enforcement of its programs. Some interviewees had comments regarding the implementation of the Federal DBE Program or other race- and gender-based programs, including reporting by prime contractors or abuse of “good faith efforts” processes, “fronts” and “pass-throughs.”

Businesses reported their insights, both positive and negative, regarding monitoring and enforcement of race- and gender-based programs. For example:

- The male representative of a non-Hispanic white male-owned professional services firm said he is frustrated with the minority- and gender-based requirements. He noted that the percentages of projects that are required to be filled by minority- or woman-owned subs do not match up with the number of minority- or woman-owned subs who have either an interest in the project or the skills and experience necessary to complete the project. He said this discrepancy makes it difficult to contract out work to minority- or woman-owned businesses as there are not enough willing and able firms with those certifications. [#1a]

The same business representative stated that being chosen as a subcontractor in public sector work is challenging, expressing that his firm is chosen second to minority- and women-owned firms who meet a technical requirement. [#1a]

- The female representative of a non-Hispanic white male-owned professional services firm indicated that her firm is frustrated because they cannot “[check] the boxes” like a minority- or woman-owned firm, which she feels impedes their opportunity to submit a bid or price quote to a prime. She said, “Prime firms first go to any firms that meet those requirements, and then if they feel like none of them are capable, then they will come to us.” [#1b]
- The Hispanic American female representative of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said, “I’ve been everywhere in this [country] ... doing business development. [In] the last three years [in Denver] I have ... experienced primes not calling a DBE firm back. I have never ever in all my last 20 years experienced that [previously].” [PT#3b]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm reported that there should be better compliance and enforcement of race- and gender-based programs on part of City and County of Denver. [#36]

A trade association representative said there needs to be better compliance monitoring. The Black American female representative of a trade association reported that there is a need for better public agency training on compliance monitoring, especially for some Denver Division of Small Business Opportunity (DSBO) staff. [#6]

Many business owners and representatives commented on false reporting of MBE/WBE/DBE participation, “fronts,” negative issues with or falsifying “good faith efforts.” Some reported negative perceptions or knowledge of “good faith efforts.” For example:

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said, “I understand its efforts to try to make sure that people aren’t lying, [but] I think a lot of people within the program are lying. It’s 51 percent owned by the woman, but it’s really the husband behind the scenes doing it. I feel there are a lot of fake WBEs out there, but we’re a real WBE. There’s no man here telling me what to do.” [#12]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm stated that public agencies should be very stringent with who they let into the certification program. He commented that he is suspicious of a couple of woman-owned companies that he believes could be “fronts.” [#36]
- The male representative of a non-Hispanic white male-owned professional services firm stated, “There’s a small collection of firms that have decided that they are not going to grow beyond a certain point so that [they] can remain MBEs, WBEs or SBEs. I think this discourages other firms from saying, ‘I’m willing to step out and start my own firms and work,’ because they’re competing with this firm that has been a small business or a minority business for 20 years. And in some cases, that firm is, and the makeup of the firm has changed from its initial years, and the people who originally founded it may or may not even be there anymore. But, the fact is there was a conscious decision to stay below the cap to not graduate out of the program.” [#1a]

The same male representative recommended a “sunset rule” and re-application requirement for DBE certification. This process would include a time limit set on DBE certification, and after the certification expires there would be a designated waiting period before the firm could re-apply. He reports that this structure would result in a smaller pool of subcontractors and would better incentivize small business growth. [#1a]

- Regarding negative issues with “good faith efforts” processes, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “I know for a fact that there were several project managers that did not want to work with [SBA] 8(a) companies. Then there is [Denver Public Schools]. And by the way, we don’t work with DPS anymore. I know a guy who used to have his own contracting firm, and now he works for [a national contractor] where he’s a project manager, so he’s in a position to hire subconsultants. He got into a situation on a DPS project where he was having trouble meeting the goal, and he told DPS [about it]. The DPS project manager said not to worry about it as they would take care of it.” He also said, “There is [an] instance where we were kicked off of a team because the Denver Public Works project manager wanted to work with an architectural firm out of [Los Angeles]. They obviously didn’t meet their goal, so somebody did something.” [#22]

The same business owner later added, “A contractor had an on-call [contract] at [Denver International Airport]. They were new to DIA and had an overall goal on their project. They

got different directives from different project managers regarding how to manage bids for that contract, so they use the goals to their advantage.” [#22]

When asked if he was aware of SBE/MBE/WBE fronts or fraud being a problem for minority- or woman-owned firms in the local marketplace, the same business owner stated, “Yes. There is an MWBE whose personality makes him very difficult to work with. I think he is a front. Others are aware of it [too], but turn a blind eye.” [#22]

- A survey respondent said, “Denver seems to use some favored contractors on some of their projects. One particular contractor is shown as a small, woman-owned business, but I believe it is no longer a small business as it relates to their dollar volume of work.” [AS#12]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm said that he has been asked to partner with big-box stores on projects, but declined because he felt they would use his company as a “pass-through.” He went on to say that he can be competitive on his own. [#39]
- The Black American male co-owner of a veteran-owned specialty contracting firm said that he believes there to be false reporting of SBE and MBE/WBE participation. He stated, “I know for a fact that it’s happening.” He said that he knows of a former City of Denver employee who tried to “expose it,” but was fired for doing so. He explained that, according to this former city employee, big companies sometimes acquire minority firms and “say they are minority [now], or say that they’re [now] this or that.” He continued, “So, he exposed that in Denver. It was in the newspaper, actually He said it was rampant in Denver. It’s been that way for years.” [#7]
- The Black American male owner of a DBE- and SBE-certified professional services firm said, “Some of these firms have you go through the proposal exercise knowing full well they never had any intention of providing you with the opportunity at all. I refer to these as ‘almost opportunities.’ Some of these big firms only want to go through the motions and check the minority box. I have had several situations of this, only to later find out that another photographer ... was given the project and submitted a proposal much higher than mine [with] quality of work ... at the same level as mine or less. I have also been given the opportunity to “hurry up” and submit a detailed proposal for a “potential” project, only to discover that [the] firm requesting the proposal is secretly shopping my proposal because they don’t understand how to properly put together a complete scope of work.” [WT#12]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated, “The good faith effort process is a sham. I get a lot of solicitations from prime contractors, but there is no follow-up. An example is jet bridge contracts. There are only three manufacturers, and these projects are very expensive. There is often a 15 percent DBE goal, but there are no MWBE companies that are big enough. So, they say they have tried to find MWBEs knowing full well that it is impossible.” [#20]

Regarding “fronts” or fraud, the same business owner said, “This does occur. A certified woman recently got a \$10 million construction management contract and subbed out \$8 million in HVAC to a large majority contractor.” [#20]

- When asked about false reporting of “good faith efforts,” the non-Hispanic white male representative of a majority-owned construction services firm indicated that it does occur. He said, “I’ve heard and probably seen it, but we have never participated, nor would we do it.” [#21a]

Trade association and business assistance organization representatives generally agreed that “fronts” and fraud do exist in the Denver marketplace. Comments include:

- The Hispanic American male representative of a trade association said he does believe that DBE “fronts” and fraud exist. He said, “There are firms that get certified that should never have been certified because they lied.” He indicated that he has firsthand experience of firms attempting to do this. [#11]

When asked if he is aware of any false reporting of DBE participation or falsifying of “good faith efforts,” the same trade association representative said, “I question pass-throughs and the utilization of certified firms [for that purpose]. For example, when someone says, ‘I’m going to use you for ordering my supplies’ [They’re really saying], ‘I’ll use your name ... [and] I’m accepting delivery. I’m accepting all the risk for all of the products, and you really aren’t taking any risk other than letting me count you on my participation level for the full dollar amount.’” [#11]

- The Asian-Pacific American male representative of a business assistance organization said that he hears about DBE “fronts” and fraud from the general public, though not from the organization’s members. [#33]

Others reported no knowledge of “fronts,” or false reporting of “good faith efforts.” For example:

- The non-Hispanic white male representative of a majority-owned goods and services firm stated that he is not aware of SBE/MBE/WBE “fronts” or false reporting of “good faith efforts.” [#23a]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she is not aware of any “fronts,” or false reporting of “good faith efforts.” [#35]

One business assistance organization representative indicated that members do not experience “fronts,” or other fraud. The Asian-Pacific American male representative of a business assistance organization reported that he has not heard members discuss “fronts,” or false reporting of “good faith efforts.” [#33]

L. Insights Regarding Certification

Business owners and representatives discussed the process for DBE, MBE, WBE, and SBE certification and other certifications, including comments related to:

- Knowledge of certification opportunities;

- Ease or difficulty of becoming certified;
- Advantages and disadvantages of certification; and
- Experience regarding the certification process and any recommendations for improvement.

Knowledge of certification opportunities. Some interviewees reported awareness, or that learning about certification was relatively easy. A number of their comments follow:

- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated that she did research about the available certifications before she started her company. She added that she completed the applications as soon as she could for local and state certifications, and commented, “I’m looking to find out about the federal small business certifications.” [#19]
- Regarding his firm’s certifications, the Asian-Pacific American male owner of a DBE-, MWBE-, SBE-, and EBE-certified construction firm commented, “I looked into certification as soon as I started my business. When I was eligible, I [pursued certification].” [#32a]
- When asked why she decided to certify the firm, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “I heard the City was going to do a lot of construction and contractors would need certified companies, so that’s why I got certified.” [#35]
- The female representative from a non-Hispanic white male-owned professional services firm indicated that she is aware of small business certification with Denver, but added, “We’re a small business federally, but we have no City and County of Denver designation.” [#1b]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, “The company became SBE-certified when it was made available in the City of Denver. That was about 11 years ago. Our company knew the importance and the possible benefits of certification. Working on Denver ... projects could bring in a lot of business. We are majority-owned, so we were not eligible for any of the other certifications.” [#28]
- The non-Hispanic white male owner of a professional services firm stated that his firm previously held an SBE certification but, although they still qualify, he has not updated the certification and it is no longer current. [#3]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm noted that her firm also holds EBE, ESB, EDWOSB, and WOSB certifications. [#5]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm noted that her firm recently became an Emerging Small Business (ESB) through CDOT. [#2]

- The non-Hispanic white female owner of a DBE-certified construction firm stated that she has been certified as a DBE for many years. She explained, “My daughter had that certification when she had her business. Much of the work she performed was for CDOT. My husband and I felt it would be in the best interest to continue with that certification. The company does a lot of work for CDOT, and it’s a requirement for that work.” [#27]
- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm is not currently certified, though they are pursuing SBA 8(a) certification. He added that they are aware of other certification options and will pursue more in the near future. [#7]
- When asked if the firm holds any state or local agency certification, the non-Hispanic white male owner of a construction-related firm reported that they do not currently hold any certifications. However, he noted that they used to be SBE-certified and chose not to renew as they did not see any benefit. [#25]
- When asked if the firm holds any state or local agency certification, the non-Hispanic white male owner of an engineering company reported that he does not. He added, “I don’t believe in those programs. I believe someone that has the skills should stand on their skills [and] not [depend] on some government program that gives them work.” [#26]
- The non-Hispanic white male owner of a construction services firm stated that he is not interested in certifications. He explained, “I have heard about those certifications and have looked into applying, [but] I don’t think it would be the best move for my company. We are very small and that allows me to be more in control. I don’t think I would be successful because ... our capacity to perform is too limited for those jobs.” [#31]
- The Hispanic American female co-owner of an SBE-certified professional services firm said that she tried to obtain WBE certification but was denied because she is not a licensed architect. She noted that even though she is not a licensed architect, she has the business background to run the company. [#15a]
- The non-Hispanic white male representative of a majority-owned goods and services firm stated that the firm is aware of certification and the MWBE program, but said the process of certification is irrelevant to them because they are not eligible and it does not impact how they do business with subcontractors. [#23b]
- The non-Hispanic white male owner of a goods and services firm indicated that he is interested in SBE certification but has not pursued it due to time constraints. [#10]
- The Hispanic American male owner of an architectural engineering firm reported that he has never pursued certification because he stayed busy without it. [#16]

Most trade association and business assistance organization representatives indicated that members are aware of and often participate in certification programs. For example:

- The Hispanic American male representative of a trade association said that he believes 90 percent of the organization’s minority and woman-owned businesses are certified with the state or a local agency as a DBE. [#11]
- The Black American female representative of a trade association reported that most of their members are DBE-certified. She added, “They are usually on their way to getting certified [if they’re not already], but for the most part our members have DBE- [or] MWBE-certified businesses already.” [#6]
- The Asian-Pacific American male representative of a business assistance organization stated that certified members are probably certified with all agencies, along with the Minority Supplier Development Council. Regarding why members certify, he said, “Some businesses see the opportunity to provide their services to [Regional Transportation District], the airport, or [large corporations], but certification isn’t a guarantee that you’ll get anything. Culturally, Asians are more reticent to promote themselves, [and] some members believe that certification is targeted towards a certain type of minority, so [for them], the value is just not there.” [#33]
- The non-Hispanic white female representative of a trade association indicated that most members pursuing certification do so if they anticipate working for CDOT. She said that members not seeking DBE, MBE, or WBE certification do so because “they’re not interested in doing work for CDOT, and vice-versa.” [#38]

Regarding net worth limits to stay certified with some public entities, the same trade association representative said, “If [small businesses] find it’s too difficult to do business, they have to weigh [whether] it is worth putting in effort [to certify] because [the agency is] going to restrict how much money they can make.” She added, “I know ... some of the public entities put a cap on how much raises you can get within your company.” [#38]

- When asked if members are certified with a state or a local agency as a DBE, the Native American female representative of a business assistance organization said, “We do have quite a few DBEs. When they join [us], we immediately put them in touch with the American Indian Procurement Technical Assistance Center, which only works with American Indians. We set up an introduction, [then] they will start the certification process.” [#37]

The same business assistance organization representative continued, “We do that to ensure they are at the table for opportunities. When they get certified ... whether DBE, MWBE, SBE ... they start interacting with the agencies and learn about the support they offer. The goal is to let them know they’re not out there alone, and if they’re certified we can also track how many have been successful in getting opportunities.” [#37]

One trade association representative discussed his organization’s efforts to recruit more minority- and women-owned firms. The non-Hispanic white male representative of a trade association said that only 19 of their 565 members have certification. He said that his organization started a diversity committee in early 2018 in an effort to recruit more minority- and women-owned firms. [#40]

The same trade association representative later commented, “There are minority or women owned firms that are not certified and they’re just knocking it out of the park and doing good work [without it]. Honestly, working for a public agency is not for everybody.” [#40]

A few interviewees reported having no knowledge or not enough knowledge of certification programs. [e.g., #23b, #31] For example:

- The Black American veteran male owner of a general contracting company reported that he is not aware of any certifications available to his firm. He added, “I haven’t looked into it, [but] I heard it was a pain and [that] you don’t get any work anyway. I have decided this is the best way I could keep my business going. I don’t believe there are advantages to that program.” [#29]
- The non-Hispanic white female co-owner of a specialty services firm reported that the firm holds no certifications at this time, though they are interested in learning more about certification opportunities. [#8]
- Regarding certification opportunities, a public meeting participant said, “I still believe that there is a big gap in contacting the small business[es] that just moved here. [They] don’t understand where to go for certification. [They may know] this other company and they’ve started doing some work with them ... but they’re having a hard time [growing].” [PT#4]
- When asked if he is aware of certification opportunities, the non-Hispanic white male owner of a specialty services firm said, “The firm has no certifications, [but] I have looked into that possibility My research indicated that those certifications were for construction companies [and] we don’t do construction. We provide a product.” [#30]

The same business owner later said, “I have heard about the certification programs available to small and minority companies, [but] I’ve never considered that certification for my company. I have not heard of any assistance programs, like a mentor-protégé program, that would be available for my type of business because I am not certified. Therefore, I don’t believe my ... company would be eligible for business assistance.” [#30]

- The non-Hispanic white male representative of a specialty services firm reported that the firm has no experience with any certification programs. However, he noted that the firm is interested in pursuing certification if they are eligible. [#34]

Ease or difficulty of becoming certified. A number of interviewees commented on how easy or difficult it was to become certified.

Many interviewees reported difficulties with the DBE, MBE/WBE, and SBE certification and/or renewal process. Some business owners and representatives indicated that the certification process was difficult, time consuming or problematic. [e.g., #35] For example:

- The Subcontinent Asian American male owner of a specialty contracting firm reported that his firm has no small business certifications. He commented that the certification process

seems to require too much effort, and noted that he does not personally know of any firm that has profited from certification. [#18]

- When asked if his firm is certified with a state or local agency, the non-Hispanic white male owner of a construction firm said, “I looked into getting certified because a few other contractors had mentioned it. I looked into it and the amount of paperwork that had to be completed was too much, so I never have attempted the certification.” [#24]
- When asked if certification was easy or difficult to achieve, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “It wasn’t difficult because there weren’t any hard questions. It’s not like I had a test to study for. It was just a lot of personal information, and now that CDOT’s been hacked and ... the City and County of Denver was hacked last year, [I’m concerned].” [#5]

The same interviewee went on to say that she’s “very concerned” about the amount of information that is on file for her firm due to the certification process. She stated, “Now not only is my personal information out there, [like] my Social Security number [and] all of my income ... [but] my husband’s information ... and my children’s Social [Security numbers] are out there [too], and I’m very concerned about that. I really feel like [public agencies] put us in an exceptionally vulnerable position. It’s very concerning. I don’t know who gets that information [or] how tightly controlled that information is, and now I know it’s been hacked at least twice. I feel like my livelihood could be swept off the map in a heartbeat. It’s very, very concerning to me.” [#5]

- Regarding the certification process, a public meeting participant said, “I had to go back [and] borrow money to pay for it. And in the meantime, my application expired. [But] within a day I resubmitted everything, because I was prepared So, I am very resilient.” [PT#4]
- The non-Hispanic white male owner of a construction-related firm said, “[We] had the SBE certification with the city for one year and it was a pain in the butt It was a very long process to get certified, [and there were] questions I didn’t think were necessary. An example would be the proof of monies used to start your business. Why is that important? I never got any work with the certification.” [#25]

The same business owner continued, “It was hard to find out about the SBE projects I thought [there] would be a database of projects for that certification, but there is not. After one year ... I received notification that I needed to renew, [and] I decided it wasn’t worth the effort. I was disappointed that there were no benefits to the certification because it was such a long process. In fact, none of my colleagues that claim to be certified have gotten benefit from the program.” [#25]

Some trade association and business assistance organization representatives described the certification process as a barrier. [e.g., #11] Comments include:

- When asked if there are any disadvantages to certification, the Asian-Pacific American male representative of a business assistance organization stated, “Not so much [with] the

certification itself, [but] perhaps the disadvantage is in the process. Navigating the documents, website, [and] bureaucracy is especially hard for start-ups.” He noted that the process is especially difficult for immigrants due to language challenges, and therefore they avoid it. [#33]

- When asked about the ease or difficulty of the certification process, the Black American female representative of a trade association said that there is a lot of paperwork, which can be very labor-intensive for applicants not used to such documentation. She added, “In all fairness, the information they ask for includes basic business documents that one should already have in place. And if the business owner does not have that in place, it would be helpful to get it organized anyway. The process prepares you for what you’re going to encounter, what other primes are going to ask for, what the DOTs are going to ask for, and contractual requirements.” [#6]
- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said she had to hire an employee responsible for completing certification applications and maintaining certification status. She commented, “She literally does them all, and she does a great job.” [#13]

Of the certification process, the same business owner went on to say, “You cannot feel offended, or be annoyed [by the personal information required] [It’s the] price you have to pay to get a foot in the door.” She affirmed that the certifications have helped her business “immensely,” and that more recognition is achieved with them. She stated that her goal is to have more private opportunities, and finds the firm is getting closer to that goal as a result of their certifications. [#13]

- The Asian-Pacific American female representative of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, “I completed the application for certification. It was lengthy and it took some time to gather all of the information needed to submit, but I guess it was worthwhile Though we haven’t gotten any work directly with the city, because of the certification, [yet].” [#32b]
- The Hispanic American male owner of a specialty contracting firm expressed his desire to become certified as an MBE. He stated, “I have not completed all the paperwork, but it would be really nice to be able to find somebody that can help me and guide me through that process. Unfortunately, I leaned on the partner I took on, [...] my accountant, to help out with the MBE stuff, but his political stance kept him from pursuing that. So, I made the determination last year to terminate our relationship This year, I’m on my own again” [#4]
- The non-Hispanic white female owner of a DBE-certified construction firm said, “I looked into the city certifications recently, but decided against it because the application was so lengthy. We get plenty of work with the one we have.” [#27]
- The non-Hispanic white female representative of a majority-owned SBE-certified professional services firm said, “I can only speak to the SBE certification, [but] it wasn’t a hard process, just lengthy. When it’s time to renew, the staff that works on that renewal,

the accounting department, dreads it because of the paperwork involved However, it is worth it in the long-term.” [#28]

- When asked if the certification process is difficult, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “The first time it is difficult because of the paperwork. Renewing is easy, I can do that on-line by just scanning things.” [#35]

One business assistance organization representative commented that the “rigor” of the certification process makes it “more legitimate.” When asked her opinion on DBE certifications, the Native American female representative of a business assistance organization said, “It’s hard to acquire, but we tell people they need to respect the fact that it is a rigorous process, because it makes the program more legitimate. If it’s too easy, anyone would jump in there. So, the fact that it is cumbersome should be looked at in a positive way. It makes sure the right people are in place for opportunities.” [#37]

A few interviewees said that the certification process was easy, or they reported that they received assistance with the process. [e.g., #15a] For example:

- When asked about the ease or difficulty of the certification process, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated that the certification process is “good,” and not easy or hard. She added, “I haven’t been able to identify a disadvantage of certification. The analyst that was assigned to my application was incredible, very calming. He asked relevant questions [and] explained everything, and the why behind everything, which I appreciate[d].” [#19]
- When asked if the certification process is easy or difficult, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “I think it’s relatively easy. However, ... because of the product area that we’re in, it’s not as easily defined.” He went on to say that the industry in which he works is very specific and can be difficult to categorize. [#9]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said it was helpful to ask questions of the DBE certifier, and now she encourages other friends that are minority business owners to ask questions “right off the bat.” She added, “There’s just so much out there, and I don’t think I ever took advantage of that portion of [certification benefits] that’s available at no cost, or minimal cost. [Certification] is an excellent tool for us to have.” [#2]

The same business co-owner went on to say the certification process was easy for her firm because when she applied it was a less involved process. However, she noted that a firm of her current size applying for certification today would undergo much more scrutiny. [#2]

- When asked if acquiring and maintaining certification is easy or difficult, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that he cannot think of any major issues with the certification process or with certification renewals. He went on to comment, “It’s not a big deal.” [#14]

- When asked if the certification process is easy or difficult, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “I don’t think it’s overly cumbersome. I just have to renew.” When asked if he has any suggestions to improve the process, he stated, “No, I don’t think so. The staff is always very helpful.” [#22]

Advantages and disadvantages of certification. Interviews included broad discussion of whether and how DBE, MBE/WBE, and SBE certification or other certification programs helped subcontractors obtain work from prime contractors.

Many of the owners and representatives of certified firms indicated that certification is advantageous. For example:

- When asked if there are benefits to being certified, the Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm stated that there are. He said, “It allows you to work through the maze of a corporation ... municipality, or government and locate the contacts. Sometimes you are given opportunities to compete [otherwise].” He added that he knows of no disadvantages to certification. [#39]
- When asked about her certifications, the Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said, “Certifications [are] good in the sense that it gets my foot in the door versus the big guys, it sorts of gets you a semi-level playing field.” She went on to say, “Your talent kind of gets you where you need to be.” [#13]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm stated that he became certified because it provides his firm with more work opportunities. When asked about other benefits to certification, he said “The advantage is they have access to projects that you probably would have a tough time getting [otherwise], especially when it comes to infrastructure, taxpayer-supported projects.” [#14]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated that she “believes the certification makes a difference for the jobs [they] go after, like CDOT and other government opportunities.” [#19]
- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm stated, “We’re certified because there is more opportunity. We’re also able to team with larger firms for large projects.” [#22]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm stated that she attained the firm’s certifications early on because they are key to securing public work. [#20]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said that he believes the benefits of certification include opening up new doors for businesses, especially with other organizations that do work with the city. He explained, “For the people that do have city contracts and [who] were once in the same position [as my firm], you would hope that they might be a little more open about inviting

you in to see if you can partner or team together on a city project ... and support [each other]." [#9]

- When asked about the certification process, the Asian-Pacific American female representative of a DBE-, MWBE-, SBE-, and EBE-certified construction firm stated, "I believe it adds credibility to your company when you have those certifications." [#32b]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm reported that she has not experienced any disadvantages of certification. She said, "Certifications have given [my firm] more visibility with larger businesses and has helped to provide training resources at minimal costs." She added that the certifications have also given the firm an advantage in the market, specifically by allowing their proposals to stand out. She went on to say, "[Certification] gives you the capability of getting [a role] within a large multimillion-dollar project." [#2]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, "For nine years I never saw a contract that had a WBE [requirement], with one exception, and that was the Colorado Springs Airport. We did a [project there]. I would say up to this point, for 99 percent of my business ... certifications [have been] useless. However, that has changed." [#5]

The same business owner went on to say that her firm's certifications have become very helpful in recent years because public sector contracts require MWBE participation. She noted that this causes her company to be sought after as a subcontractor, and said, "This last year I have won four proposals. I was on winning teams of four proposals because I was a WBE. Two [were] with [Denver] and two [were] with CDOT." [#5]

- The Hispanic American male owner of a specialty contracting firm reported that prime contractors sometimes express interest in hiring his firm as a subcontractor, though they lose interest after realizing he is not MBE certified. [#4]

Many trade association and business assistance organization representatives discussed the advantages of DBE/MBE/WBE/SBE certification. Comments include:

- When asked if there are benefits to certification, the Hispanic American male representative of a trade association stated, "Because we do not have a level playing field in today's environment, certification grants our folks an opportunity to get a piece of the pie of public dollars on public projects." [#11]

The same trade association representative later said, "I have heard some companies do not like the labeling that comes with it, but I do not see any disadvantages The way I look at it is if you are seeking private work, your work speaks for itself whether you are certified or not. And if you are seeking public work, certification allows you the opportunity to make sure that more folks are getting a part in some of that work." [#11]

- When asked if there are any benefits to certification, the non-Hispanic white male representative of a trade association said, "The firms that are certified certainly say that it

has helped them. If you are certified and you have good experience in construction, your phone is ringing. They are saying it is a positive experience because they get serious consideration from general contractors The [certified] specialty contractors delivering work [are] getting a lot of serious consideration" [#40]

The same trade association representative continued, "[Certification] is a good way to make sure that they get attractive projects that are out there, [but] they still need to know how to do the business. They still need to be able to [manage] cash flow [and] the payroll. They still need to be able to do all those things, but it certainly has been a foot in the door to get them going. Now, if they're not good at construction, then it won't last very long." [#40]

- The Black American female representative of a trade association said that certification is advantageous because it allows businesses to participate in spaces they otherwise would not have been able to participate in. She added that some of the resources include availability from transportation-related agencies as well as other local trade associations, which all provide connectivity resources and partnerships for members to get "plugged in." [#6]
- When asked if there are any benefits to certification, the non-Hispanic white female representative of a trade association said, "I think it does have the potential to get people to see these firms [and] recognize they're there There's a pool of people that those primes can go to and say, "The city or [other agency has] looked at them, [so] therefore they may be a viable company.'" [#38]
- The Native American female representative of a business assistance organization said that certification allows firms to "[interface] with the agencies and [take] advantage of their resources." She added, "Also, [there's] the advantage of the DBE goals when pursuing a project." [#37]

Some expressed mixed feelings, indicated that there are limited advantages, or even disadvantages, to certification. Others reported on stereotyping of certified businesses or the "stigma" associated with certification. For example:

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, "I perhaps have a different point of view than most in that I believe that there may be a stigma attached to a business that's certified I think perhaps there's a feeling out there that you're being given something. But, my experience both on the federal side and on this side is that you [give] probably more [effort] as a certified business because the business doesn't come to you. You [may] have the knowledge and expertise, but you'll also have to be able to market and have the right product and be in the right place for things to happen for you." [#9]
- The Black American male owner of a DBE- and SBE-certified professional services firm said, "I have had situations where I have been asked to lower my fee to get a project, only to find out others were able to increase their fees or proposal. The justification is that you are

a small DBE/MWBE firm and that you may not have the same quality as a ‘regular’ firm, when in fact your product is superior to the ‘regular’ firm.” [WT#12]

- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said that he hoped certification would create business opportunities for his firm, though it hasn’t been as helpful as he hoped; he has only received one public sector contract. He commented that public agencies are unwilling to create opportunities small enough for certified firms to competitively bid. [#36]

The same business owner continued, “I really have mixed feelings about [certification]. You go through all the hoops to get certified, and then not much happens. As a Black male, why do I have to go through the back door while everyone else goes through the front door to get business? They don’t give you any real assistance, just technical assistance like we don’t know what we’re doing. You go through all of that, and you still have to compete dollar for dollar. We need these programs because the economy needs diversity.” [#36]

He added, “You can’t just leave people behind. There should be a way to help us get to the right level, but it doesn’t seem to be there. The only time certification worked for me was when I had the contract with [Regional Transportation District]. And then [when] you’re successful [you] go over the size standard. It’s a crazy process that they send us through.” In sum, he said, “The disadvantage is that you have to go through the whole process and disclose everything in order to get into the program, and it may or may not help you.” [#36]

- When asked about the benefits of certification, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “It’s been about 10 percent effective. I’ve only had one project that used my certification.” [#35]
- A survey respondent indicated that their certification has yet to benefit the firm, saying, “I have been in [the] MWBE [program] and have virtually no contracts.” [AS#15]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that certification has never led to new work for the firm. She explained, “I think it’s just a waste of time and money ... filling out all those forms, preparing all those financial statements. We’ve gotten put on project teams a couple times because they want fill that slot, but we’ve never gotten any work out of it.” [#12]
- When asked if there are any disadvantages to certification, the Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that one disadvantage is that you have to constantly renew certifications. He also said, “[Certification] kind of devalues the company, because if you want to sell it to say somebody internally who’s coming up through the ranks, if they’re not minority then they lose those contracts And that’s a big negative.” [#14]
- The non-Hispanic white male co-owner of an SBE-certified professional services firm indicated that the firm’s SBE certification is not as helpful as they had hoped. He said that Denver Public Schools is “very big” on SBE utilization, though they most often use

engineering firms. He went on to say that they have not been successful at obtaining work with Denver Public Schools. [#15b]

- Regarding disadvantages to certification, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm said, “There are only disadvantages when a prime makes a sweeping judgment that a firm only holds a certification because they can’t get work [otherwise].” [#5]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified construction services firm reported that she received her certifications last year. However, she said, “I have not been awarded any work from the City and County of Denver to this point. I have spent a lot of time and money trying to learn the system of doing business with government agencies, [but] thus far have not succeeded.” [WT#5]
- When asked if there are any disadvantages to certification, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm reported that there are. He explained, “In the architecture [and] engineering world, there is still discrimination against minority firms. There were certain agencies that were very friendly in [SBA] 8(a) and DBE programs, but there were other agencies that felt like it was a mandate that they had to do, and they felt minority [architecture and engineering] firms were less capable of doing the work. The issue I have with [the] Denver certification process is that it’s designed as a small business program, [and] the current ordinance size limit is half of the SBA size standard.” [#22]

Some trade association and business assistance organization representatives discussed whether there are disadvantages to certification. Most indicated that there are. [e.g., #40]
For example:

- The non-Hispanic white female representative of a trade association said that one disadvantage of certification is that certified firms often feel that they do not have to market anymore. She added that if a DBE does not know the timeline on a large project, they should at least know that it is coming and who the primary primes will be, and commented, “I think [DBEs] wait too late for some of those [conversations with primes] to happen.” [#38]
- When asked if there are any disadvantages to certification, the Black American female representative of a trade association said, “Personally, for my own business I grappled with becoming a DBE because I did not want to label myself as disadvantaged in any way, shape, or form. But in learning more, I came to understand more of the advantages, and that’s what helped to sway my decision.” [#6]

The same trade association representative added, “There can be disadvantages if you’re entering into certification with the idea that you’re going to be coddled. At some point, you’ve got to take the training wheels off. It can be tough when you’re not in the DBE space because the private sector does not allow for as much participation, or as much meaningful participation [as] in the [public] world They ought to be looking at building their network outside of the public space so that when they do get to the point of graduation, it’s

a more seamless transition ... [If] they don't have that in their strategic plan or in their transitional plan, it makes for a tough transition." [#6]

One trade association representative indicated that certification can stunt a firm's growth. The non-Hispanic white male representative of a trade association said that he believes the process of getting certified can "slow people down." He explained, "It's a government process, so some people say, 'If I'm getting enough work over here in the private sector, why would I want to go to city hall and get on the website and figure out how to ... go through the application process?' [#40]

The same trade association representative continued, "Then ... there are size limits. If you want to be a certain size to be certified, you have to stay under a certain amount of assets or revenue level. So, if my goal is to get here, why would I go do something that says I have to stay [below limits]?" [#40]

Experience regarding the certification process and any recommendations for improvement. Interviewees made recommendations for a number of improvements to the certification process. A few indicated that the process is fine as it is. For example:

- When asked how the certification process can be improved, the Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said that the certification process has already improved due to the online facilitation of forms. [#2]
- When asked about the certification process, the Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm reported that the requested documentation is necessary, and that he has no problems with the information required or amount of time it takes to complete the application. He commented, "If you want to get certified, you work through the process." [#39]

When asked if he has any recommendations on how to improve the certification process, the same business owner said, "It would be nice if there were more people involved in the infrastructure to assist with processing certification applications. Whether it is a municipality or state, or corporation, sometimes they don't have an adequate number of employees to answer questions and work through the applications." [#39]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm indicated that the certification process should be streamlined. She said that the process takes too long, and noted that she missed out on opportunities due to certification delays. [#35]
- When asked if the certification process is easy or difficult, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm described the process as time-consuming, but noted it would feel "worth it" if it produced work. [#12]
- Regarding ways to improve the certification process, the Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm stated, "I am in the renewal period. Everyone has been amazing to send me extension letters automatically, but

we have been extended for a while. So, it's been a long process and nothing has changed. I am the same structure, exact same financials, so ... I thought it would be a little faster. [#19]

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said she appreciates the online aspect of the certification process and the ability to upload documents. She said, "I think it's great that it's mostly online now, and we can upload stuff. That is so much better than before when it was just all paper. That was awful. So, the more you can do electronically, the better off we are." [#13]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm said, "[My] recommendation would be to provide assistance to make sure small businesses understand how the process works. The assistance depends on the level of understanding that small business has about doing work with public entities." [#19]
- When asked if he has any recommendations on how to improve the certification process, the Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, "I think the process is pretty straightforward. I think in terms of becoming certified, the process is probably the way it needs to be. I can't think of anything that would be done differently." [#9]
- The Hispanic American female co-owner of an SBE-certified professional services firm said that City and County of Denver should add architectural projects to the SBE selection pool. She also said that the city should recognize her company as a WBE because she has majority ownership, runs the financial risk, and has the management background to run the business. She explained that all she lacks is an architectural license. [#15a]
- The non-Hispanic white male co-owner of an SBE-certified professional services firm said that City and County of Denver should modify the SBE designation to be more exclusive to small businesses. He said, "The way it stands right now, I think if you bill \$4 million or less you're an SBE, and that's pretty much 80 percent of the architects in Denver." [#15b]
- The Asian-Pacific American female representative of a DBE-, MWBE-, SBE-, and EBE-certified construction firm said, "I am the one at the company that completes the certification renewals. I believe there has to be some way to shorten that application. The information we submit is really the same that we submitted the year before, and the year before that. For small companies, it is very time-consuming." [#32b]
- The non-Hispanic white male owner of a goods and services firm suggested that the SBE program be better promoted to create more awareness of it and how to certify. [#10]
- The non-Hispanic white male representative of a specialty services firm reported that City and County of Denver should do a better job of getting the word out about certification opportunities. [#34]
- When asked about his experience with the DBE, MWBE, and SBE programs, and if he has any comments or recommendations to improve them, the Black American male owner of a

DBE-, MWBE-, and SBE-certified construction supply firm said, “It’s a lot of effort, but you get no direct benefit. I’ve certified with [City and County of Denver] since I first started the business [almost 20 years ago]. Every year you have to submit your financial and affidavits, but I don’t get anything.” [#36]

The same business owner continued, “I wanted to get into the ACDBE program at the airport because of my retail experience. At one time that program was pretty successful, but right now all the big concessionaires are controlling the airport. So now, I’m just managing what I have.” [#36]

Many trade association and business assistance organization representatives indicated that there is room for improvement in the certification process. A few suggested means of improvement. Comments include:

- Regarding ways to improve the DBE certification process, the Hispanic American male representative of a trade association said that City and County of Denver should offer workshops to assist small businesses throughout the certification process. He commented, “Why does a small business have to pay a consultant to help them learn how to get certified when a lot of it can be done through the city providing workshops to help firms do that?” [#11]

The same trade association representative later said, “Having tutorial workshops would be extremely beneficial to our businesses. Once you are on a job, what [is] require[d]? What’s the paperwork? How is it filled out? Information on prevailing wage [and] all of those things can be so helpful and would cut a lot of the angst that goes on between the businesses and the owners in those arenas” [#11]

- When asked if she has any recommendations to improve the certification process, the Black American female representative of a trade association said it would be helpful to give firms better notice on what to expect from the process. She explained, “Allowing small businesses to [better] know what their roles and responsibilities are, what their rights are as a DBE, and giving them ... education as far as the ordinance, or the CFR ... would be a great addition to the process.” [#6]
- Regarding ways to improve the certification process, the Native American female representative of a business assistance organization said, “I would not classify it as easy or difficult. [It’s] just cumbersome. [I suggest to] speed up the process, make it quicker because it takes too much time for a small business owner who is wearing many hats [It can] take 90 days to hear back from them to find out if you were successful.” [#37]

The same business assistance organization representative continued, “Do more online, that would certainly help. At the [organization] I am the only staff person, and I don’t work full-time. So, we had to automate many of our processes and that has allowed us to do more. I’ve heard that [City and County of Denver] cut back on staff involved with certification, and that’s why it takes so long. Automation could really help with certification. Those who do get certified always say they’re glad they did it.” [#37]

- The non-Hispanic white female representative of a trade association said that the certification process should require less paperwork. She commented, “Is the information [asked] for truly important?” She went on to say, “Sometimes it’s an [incredible] amount of information, and then you kind of ... wonder [if] somebody is really looking through every single page [of the thick packet]. You know, that’s probably not the case. So [in the end], they’re submitting a lot more information than they really might need [to].” [#38]
- When asked if he has any recommendations to improve the certification process, the Asian-Pacific American male representative of a business assistance organization stated, “I appreciate that the process is in place because it verifies that companies are truly minority- or woman-owned. Perhaps [it can be] streamline[d]. A lot of Asian businesses are cash-base[d] and don’t keep books like they should. I think I would argue that certification folks should make some accommodation regarding the documentation they require.” He went on to comment, “DBE certification can be very onerous and does not guarantee work.” [#33]

M. Other Insights and Recommendations Regarding City Contracting and Programs

Business owners and representatives provided other suggestions for City and County of Denver and other public agencies to improve their small business or DBE, MBE/WBE, and SBE programs, or any other insights or recommendations. For example:

- The non-Hispanic white male representative of a majority-owned construction services firm said that his company has had a great deal of experience with SBE/MBE/WBE programs. When asked if he has any suggestions on how to improve the programs, he said, “I would review the program, evaluate the companies that have graduated, and what helped them graduate The whole premise of this program is to get people to become businesses that don't need to be on a goal list, right?” He continued, “Then evaluate that, and try to use that for the other companies. Use them as examples.” [#21a]
- The Hispanic American male co-owner of a DBE-, MWBE-, and SBE-certified engineering services firm said that it would be helpful if public agencies ensured that primes are sincere in their outreach efforts. He explained, “Tell us what you need, what you want in the bid or proposal. It’s frustrating to go to an event, be told that they’re looking for folks to do a certain scope, then run into a competitor at the event who tells you they already have a contract for that scope.” [#14]
- When asked if he had any comments or recommendations regarding his experience with SBE/MBE/WBE or any other state program, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said he would like to see Denver go back to the full SBA size standards for architects because so much more work is subcontracted out to engineers, leaving a very small percentage for architects. [#22]

The same business owner went on to say, “[Denver Public Schools] recently went through the MWBE process, but I think they’re where Denver was in the 90s. Project managers are resisting it tooth and nail. They like working with their preferred firms and are not going to look at an MWBE. Their culture needs to change.” [#22]

He concluded, “[City and County of Denver] needs to talk to other municipalities about the success of the MWBE program, [like] Aurora, Lakewood, Arvada, [because] none of them have programs. They just say disadvantaged businesses are encouraged to apply, but that’s it.” [#22]

- The Hispanic American female owner of a DBE-, MBE-, WBE-, and SBE-certified professional services firm said, “We have gone so far backwards And it’s not [because] the small business office isn’t attempting to do a job. It’s that ... they are attempting to do a job, but it’s not coming together. It’s not connecting” [PT#3a]
- The Black American male owner of a DBE- and SBE-certified professional services firm said, “With all of the growth and City of Denver projects that will begin construction in 2018 and beyond, it will be imperative for this region to look for ways to create true opportunities for all of the firms in this region, regardless of gender or race If the new [Construction Empowerment Initiative ordinances] become law, it will definitely help.” [WT#12]

The same business owner added, “However, if many of the major primes in this region continue their current business practices, it is going to be very difficult for many of these projects to meet their small business goals, let alone exceed them. I feel the MWBE program should stay in place because it gives minority- and women-owned firms access to opportunity they otherwise would not have access to.” [WT#12]

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm recommended that MBE/WBE firms try to not get ahead of themselves. She said, “You’re not gonna get that million-dollar contract if all you’ve done is \$10,000. But what you can do is get ten \$25,000 contracts, and it could be on the same project if things are split apart.” She said she would like to see the city unbundle large contracts to help them achieve that goal, and mentioned that larger subs do not often care to perform certain work that could be offered to an MBE or WBE. [#13]
- The Hispanic American female co-owner of a DBE-, MWBE-, and SBE-certified construction firm said minority and disadvantaged firms should “not use [their] status as a disadvantage,” and added, “There are so many people who can help. It’s just a matter of asking and getting your foot out there where you want to do work. If you want to do work with the City and County of Denver, go to the city buildings and ask questions” [#2]
- When asked if she has any comments or recommendations about any other current or potential race/ethnicity/gender-based programs, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “Mi Casa Resource Center is helping the Spanish-speaking community. When I was taking classes, I noticed there are a lot more women trying to start businesses, but [City and County of Denver] is not giving them the opportunity to bid. Documentation is a big issue [too], [because] some of them don’t have Social Security numbers. They work and pay taxes, so they should have opportunities.” [#35]

The same business owner went on to comment, “I have a relationship with an MWBE company that sells cleaning supplies. We want to learn how we can partner and bid on projects together because we did that on [a public sector project], and it was good for both of us. Who can help us with that?” [#35]

- The Hispanic American male owner of a specialty contracting firm implied a lack of knowledge about the program and the certification process. He also noted that he does not know how the minority-business requirements are enforced. For public sector projects with goals, he commented, “I think the public sector is utilizing the least [number of SBE/WBE/MBE firms] they can get away with And it may not even be policed.” [#4]
- When asked if she has any other insights or recommendations, the non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm reiterated that large public contracts should be unbundled. She said, “My biggest complaint about how the City of Denver does business is that they have all this work and rather than go through and say, ‘We can break this up into smaller pieces that more firms can handle,’ they [instead] put the whole turkey out and then they want somebody who can swallow a turkey whole. Small businesses can only do a good job on the portion of the project that they can do until they get bigger. My biggest complaint about public projects is they don’t break them up into small enough pieces.” [#5]
- Regarding how MWBE firms are perceived value-wise, the non-Hispanic white female owner of an SBE-certified professional services firm said, “[If] the MWBE [owner] is retiring, the value of their firm goes out the door with them unless [they] can be replaced by another minority or women owner.” [PT#2c]

The same business owner continued, “By being a prime, you increase your value of ... expertise. So ... the amount that you're going to lose if you sell to someone who's not an MWBE is not as great if you can demonstrate you're a prime.” She added, “That’s been my hang up [and] that’s why I’m stressing so much with the city. We need to provide more opportunities for small business owners to have value in their firm. Not only for the existing owner, but when they’re ready to retire and move on.” [PT#2c]

The same business owner went on to say, “Now granted, making a jump from a subconsultant to a prime is huge, and there needs to be some guidance and mentors But, we need to have those opportunities, and the city has not responded in that way this time around at all.” [PT#2c]

- The Black American male co-owner of a veteran-owned specialty contracting firm stated that he would like to see more transparency in the city and state agencies of Denver. He said, “We want to know who, what, when, where, and how Just [be] transparent. That way, it gives you the ability to see what you need [and] what you’re lacking. A lot of minorities don’t want a handout. They just want to know ... what [they] need to do to get there.” [#7]
- The Hispanic American female owner of a DBE-, MBE-, WBE-, SBE-, and EBE-certified general contracting firm suggested that a public entity, perhaps City and County of Denver,

“develop a database of available equipment.” She explained, “If a company has a \$1 million water blaster and is not using it, and there is a small company that could use the equipment, that company could go to the database and contact the owner of that equipment and contract with them to use it. [Or], maybe it would be an opportunity to sub with the company to do some of the work with the machine.” [#19]

- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “My recommendation would be to look at when the product is going to get used in the project, and allow for adjustments based on the current market conditions I’m guessing if I would have to bid a project where my part comes into play two to three years before they need it ... I’m going to price it way up to try and take care of what I’m hearing may happen in the market, which may make me non-competitive against those people that don’t do that.” [#9]
- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm said, “Monitoring the good faith efforts is really important as [abuse] is often used to eliminate small businesses. And certification should be kept stringent as there are companies who game the system by hiding assets.” [#20]

The same business owner also said that she has heard rumors that City and County of Denver and Denver International Airport might “split” the MWBE program into separate MBE and WBE certifications. She said that it should remain MWBE. [#20]

- When asked for any other insights or recommendations, the non-Hispanic white male owner of a goods and services firm said it would be helpful if businesses knew which mailing list to be on. He explained, “It would be helpful if everything were in a well-curated list of what is current and what’s where. If it’s fragmented into a bunch of different sites, then it’s always hard to navigate. It would be helpful if those resources were all in one centralized location, like a hub where we go to for all the most current info.” [#10]

The same business owner also said that he would be more likely to take part in business assistance programs and workshops if they were offered more often. He explained, “I know they have some that are once a quarter, some that are once a year, and if you miss it, you gotta catch the next one. Also, sometimes the classes fill up. Caps on the program can also limit it sometimes.” Regarding the dissemination of information regarding business assistance programs and events, he said, “Twitter is useful in today’s society If you’re pushing by email, then you may as well push by social media.” [#10]

- The Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “Professional service engineering firms have prospered, grown, and graduated from Denver’s MWBE program. WBE architectural firms have also prospered and graduated. Not so much for MBE architectural firms.” [WT#2]
- The Native American male owner of a DBE-, SDB-, SDVOSB-, and HUBZone-certified goods and services firm commented, “I think as a group ... if a Black person were to walk up to corporate America and knock on the door and nobody answered, I think they are a little more aggressive as an ethnic group to find a way to get in. Hispanics and Asians are the

same way, whereas [if] an Indian or Native American walks up and knocks on the door and nobody answers, they'll turn around and walk away I think it starts back to when you isolate an ethnic group on a reservation like the government did, and you're used to the welfare and placed on an island where they will take care of you, you don't have that push and are not used to competing as other ethnic groups are used to competing" [#39]

A trade association representative commented on the importance of work opportunities for minority companies, especially Black American-owned firms. The Black American female representative of a trade association said, "It's very critical right now for the owner agencies, municipalities, et cetera, to really take a look at their programs and projects to ensure that, along with the increase in opportunities or contracts and projects, there's also an increase in opportunities for minorities." [#6]

The same trade association representative later said, "I was at a meeting recently with another minority group. They asked me to come and speak before some folks at the airport, and in the meeting, they presented some findings. One finding, which was pretty astonishing to me, was that there was less than 1 percent African American participation out of the airport So yes, there's a huge disparity, and there's also a huge need for these programs for capacity-building and supportive services, et cetera." [#6]

Another trade association representative suggested that City and County of Denver offer a "minority business recruiter" to assist minority companies with securing quality labor. The non-Hispanic white male representative of a trade association reiterated that there is a lack of qualified workers in the construction industry, and said, "We've said to ... the [City and County of Denver], 'If you'd invest along with us, we could help the minority firms get a lot more employees.' We haven't heard back on that, and I just think that helping those firms be effective in finding more employees that are partially trained is going to be super important no matter what's done." [#40]

The same trade association representative added, "We put in a proposal to the city to potentially get a minority business recruiter that would specifically start recruiting for these minority firms to help them beef up their companies as well. We would discount our training, but also there would be some money in there for these firms to be able to take a 201-level training [course]." [#40]

Some interviewees discussed what should be done to enhance the availability or participation of small and disadvantaged businesses in City and County of Denver's contracting. For example:

- The Black American female owner of a DBE-, MBE-, WBE-, and SBE-certified construction services firm said that during the next round of big jobs, the consideration should be given to the firms that have the capacity to perform work. She added that she would like to see more outreach to the MBE/WBE community to determine if they can meet the requirements. [#13]
- When asked if he has any other recommendations for City and County of Denver or other state agencies in the Denver area, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, "Some of the goals on these projects are so

small, and they say they're small because there are no qualified businesses out there. So, they continue to shrink goals on the projects because of that. And [therefore] they are shrinking small businesses out of existence." [#36]

The same business owner also said, "You have to enforce compliance. You need to expand goals and give more companies an opportunity to get work. It takes time and money to get certified, and not being given an opportunity is criminal." [#36]

- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, "Getting my first opportunity was ... slow. I've been certified for six years and have one project." She reiterated, "[City and County of Denver] need[s] to break-up contracts. Right now, the primes just look for one big company to do everything. If they would break-up the contracts, more companies could get work." [#35]

The same business owner went on to say, "[There should be] more training of certified business[es]. We go in blind. We don't know everything the big contractors will require, [and] we don't know what to ask. Some of the training should also be in Spanish." [#35]

- When asked what else, if anything, should be done to enhance the availability and participation of all small businesses in the Denver marketplace, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, "There does need to be a culture change at the agencies, [but] I don't know how to do that ... There was a planning project at the airport. The planner for [a Denver agency] was asked about the previous goal for an on-call planning project, and she said she didn't think it had a goal. Well, the reason it didn't have a goal was because planning wasn't part of the last disparity study ... it was just design and construction. So, because there was no goal before, she thought the goal should be low. I was shocked at that statement. I think the people who make these decisions don't know what the MWBE program is about. They have a negative preconception. I know there are MWBEs out there that can do what the agencies want to do." [#22]
- The non-Hispanic white male owner of a professional services firm said, "I think that it would be nice to have some program or some recognition for firms that have minorities or women employees I think it would help more minorities ultimately develop their own firms." He noted that most business founders have experience in their field before starting their own business, and said he thought this type of program would make it easier for minorities and women to gain expertise in a field. [#3]

The same firm owner also recommended a mentoring program connecting students and firms. He said, "I think that it would be nice if entities such as the City of Denver could team up with [local universities] to encourage minorities to get into the education they need for the career they'd like to enter." He noted that there is lingering sexism and racism in schools and thought a program connecting students with these firms would help to "counteract some of the obvious archaic attitudes that exist." [#3]

- The Hispanic American male owner of a specialty contracting firm reported, "I think the requirements for public work to utilize entities with SBE/MBE/WBE certifications is a big

factor [in increasing program participation]. If there's not a requirement, then [participation] will go away ... nobody's going to take that extra step and do that extra paperwork if there's no requirement." [#4]

- The non-Hispanic white female owner of a DBE-, MWBE-, and SBE-certified construction-related firm reiterated, "The City and County of Denver and [Denver International Airport] need to have a local requirement on their contracts. I think they should add incentives to contractors that utilize local subcontractors." [#20]
- Regarding ways to enhance the availability and participation of small businesses in the Denver marketplace, the non-Hispanic white female co-owner of a specialty services firm said, "It would be helpful if the information was just more readily available. [For example], the SBA could have said, 'Hey, by the way, you're a woman-owned company. Here's a list. See if you can get on this list' When I talk to women who own companies, they tell me to chat with other women-owned businesses because it will help me get business." [#8]

The same business co-owner continued, "And I would like that, but I would also like to get public sector business with contracts that are repetitive and [that] I can rely on [for] constant income. I knew about going to SBA because of my business knowledge, but no one told me I should get on a list and be certified. I want to serve everybody, not just the people that are in my gender or in my race. I want to be able to serve everybody and have the opportunity to bid for work." [#8]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified engineering firm indicated that disadvantaged business programs should receive more funding. She went on to comment, "[City and County of Denver should] take MWBE [and] SBE participation seriously. Put your money where your mouth is. It's an important program. I think it's almost as important as school lunch programs If we can just help everybody become the best that individual can be by education, by programs like this MWBE [program], we are all going to live in a better world." [#5]

The same business owner went on to say, "I think the City and County [of Denver] could do more to advertise the need for small business participation and the need for women-owned businesses and education. We need more women in small businesses to start, to be aware of what they can do, and to be aware of the services that are available to them. That has to come through. I had no idea [of] all the services that were available to me." [#5]

- When asked what should be done to enhance the availability and participation of small businesses in the Denver marketplace, the Black American male co-owner of a veteran-owned specialty contracting firm reported that there should be additional, central locations where pre-bids can be submitted. He also said that prequalifications should be clearly defined so that contractors know what qualifications they need to pursue if they want to bid. He went on to say, "They could [also] keep up ... a list of awarded bids and who they were awarded to, sort of like how the federal government does it." [#7]
- When asked if he has any suggestions on how to enhance the availability and participation of small businesses in City and County of Denver's contracting, the non-Hispanic white

male owner of a construction-related firm stated, “A true liaison that could guide businesses to opportunities would be very helpful.” [#25]

Regarding his negative experience with SBE certification, the same business owner also said, “I believe there should be an effort for those certified businesses to get projects, or at least [for them to be] taught how to submit bids that could lead to winning a project.” [#25]

- The Black American veteran male owner of a general contracting company said, “If the city really wants to help small businesses grow, they need to put together a department that [specializes in] answer[ing] small business questions.” [#29]
- When asked what should be done to enhance the availability and participation of small businesses, including SBE/MBE/WBEs, in the Denver marketplace, the Hispanic American female co-owner of an SBE-certified professional services firm said that a newsletter about available contracting opportunities would be helpful. [#15a]
- Regarding what should be done to enhance the availability and participation of small businesses in the Denver marketplace, the non-Hispanic white male owner of a goods and services firm suggested that small businesses have access to “hacker spaces.” He explained, “Hacker spaces are essentially community workshops and you pay a monthly subscription fee It’s a bunch of pooled tools [available], so that might be laser cutters and 3D printers where the old blood and the new blood get together and kind of mingle and make things.” [#10]

The same business owner continued, “It’s just a good community space for whatever sort of projects you want to work on. Up in Longmont, for instance, they have the TinkerMill. It’s one of the best-funded in Colorado. It’s one of the biggest [too] They have all kinds of facilities there, including a ham radio tower up on the roof of the building. Longmont’s been very accommodating for them, but they have all of the engineers from IBM and from, you know, Lockheed Martin and Boeing who go in there to work on their carbon fiber bicycles that they built themselves, or ... their wind kayaks that they’ve been fiber-glassing themselves. Then you have people coming into the same space who have never touched a tool of any kind in their life. They [might say], ‘I want to learn how to solder. I want to learn how to make stained glass.’ And so, it’s just this great fusion of new ideas and old ideas combined with all the technology that ... the community has been able to put together.” [#10]

He went on to say, “Hacker spaces are kind of the upcoming and trendy thing. It’s a great place because you have a lot of would-be entrepreneurs jumping into the scene there and getting their start. And that’s where you can really, really make a difference. It could be [a resource to distribute] a flier of local workshops coming up for the City of Denver [on] how to file your paperwork [or] how to do accounting Even basic stuff would help those people tremendously.” [#10]

- Regarding ways to improve the availability and participation of small and disadvantaged businesses in the Denver marketplace, the non-Hispanic white male representative of a majority-owned construction services firm stated, “There are a lot of contractors that use

Subguard, where they take out the bond rather than the subcontractor. And the reason that they do it is because they can act faster on their bond than they can on the subcontractor's bond. So, they consider it a better process for them, because they could fire you quicker than if you have your own bond." [#21a]

The same business representative continued, "If the [City and County of Denver] moved forward with something like that, it might help the minority community be able to do bigger, broader work. [However], it still doesn't keep them or keep us from being careful about bringing somebody on board, even though they can post a bond. That doesn't mean that they can do the work. So, it's more important to make sure they can do the work, because if they can't, it's only going to hurt them and us." [#21a]

Some trade association and business assistance organization representatives discussed ways to enhance the availability or participation of small and disadvantaged businesses in Denver contracting. For example:

- When asked what, if anything, should be done to enhance the availability and participation of all small businesses in the Denver marketplace, the Native American female representative of a business assistance organization said, "Make the process quicker to get through. Anything that's automated online [would help] so [small businesses] can access it evenings and weekends ... on off-hours. They need to check around the country and find best practices in New York, Chicago, et cetera." [#37]
- When asked if he has any suggestions on how to enhance the availability and participation of small businesses in the Denver marketplace, the Hispanic American male representative of a trade association said, "My strongest recommendation for [City and County of Denver] is a uniform outreach effort across [all public agencies]. This would help a lot of our certified businesses because doing work with [Denver] Zoo is a lot different than doing [Denver] Public Works, or Denver Wastewater Management because of the different outreach efforts [This] creates a hindrance as far as small businesses that are trying to grow and not just constantly doing work with one entity the whole time." [#11]

The same trade association representative continued, "The [Emerging Business Enterprise] program seriously needs to be looked at and put in place, and the departments and owners [should be] held accountable to do it ... [and] held accountable for not doing it. It is sad when [City and County of Denver] puts a report out and there's zero participation [by EBEs] on it." [#11]

A few interviewees shared comments related to outreach efforts and procurement notifications from the City and County of Denver. For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm suggested that City and County of Denver and other state agencies establish a central web location for pre-bid and training information. He explained, "It would be great to log on and see upcoming small business events. [We need] a central location where you can log on, look, read, understand, and maybe apply online, and then attend [an] event to get the training." [#7]

The same business co-owner continued, “Right now, you really have to go search. You go to this website and it gives you the link to another website. Then you have to go to a different website or go down to the city [and] fill out [a] form and someone will contact you later. [Or], you call [a] number and you have to leave a voicemail and someone will call you back. And if you don’t answer your phone right then and there, that’s it. [You] start back over again.” [#7]

- The non-Hispanic white female co-owner of a specialty services firm suggested that City and County of Denver and other public agencies better notify small businesses of upcoming job and contract opportunities. She explained, “If there’s a list that says in order to receive a bid, you have to have this kind of certification, that would be helpful. When your [public sector] contract is [ending] in two months and you need to get a new contract, [a notification] would be helpful.” [#8]
- The Black American male co-owner of a DBE-, MBE-, WBE-, SBE-, and ESB-certified goods and services firm said, “I would like to see them integrate within the purchasing and procurement area with the small business and economic development people so that they are using the resources that they have when they’re soliciting for projects.” [#9]

The same business owner explained, “They’ve asked us to fill out all this information to get certified, but then they don’t use the information. That seems like a lot of missed opportunities. My experience in working with federal agencies is that they use that stuff. They use those lists and will say, ‘We’ve got 15 people, so we’ll send it out to 10 people this time and the next time we’ll take those 10 off or five off and send out to that next group, and keep rotating through.’” [#9]

- When asked what can be done to improve the participation of small businesses in the local marketplace, the non-Hispanic white male owner of a specialty services firm said, “I believe if the city wants to help small businesses, they need to reach out to other businesses, beyond their preferred vendor list, for products and supplies. I don’t believe the agencies within the city government do all they can to reach out to other small businesses outside of their current vendor list. I believe my company could be very competitive in price for many ... jobs.” [#30]

A few public meeting participants shared comments regarding the disparity study. For example:

- A male public meeting participant stated that other business owners are skeptical of the disparity study. He said, “A lot of people that I know, they don’t respond because they don’t trust the process They don’t have any confidence in the system.” He added that he hopes the disparity study’s findings will hold companies accountable to meeting DBE participation goals. [PT#1a]
- The non-Hispanic white female owner of a WBE-certified professional services firm said, “I really hope as a product of this process that we become ... collective, [and] we become creative and visionary so that other cities look to us and say, ‘You know what? Denver tried this and this was successful, and now Denver sets the bar.’” She added, “And let’s ... set the

bar for what is good and right and what promotes small business, and let San Francisco and Los Angeles and Washington look to us.” [PT#3c]

- A public meeting participant said, “When the state did one of [their disparity studies], they had a governor’s disparity resolution oversight committee. And unless the mayor engages with [the disparity] committee, it’s going to go nowhere. I sat on that committee for the governor and he appointed the individuals on it, and they had power because they talked to him directly to make real changes. And one of the real changes was that if the employees weren’t incentivized to meet those goals, it isn’t going to happen.” [PT#4]

Some trade association and business assistance organization representatives shared comments regarding the disparity study. Comments include:

- Regarding a past disparity study, the Black American female representative of a trade association said, “One of the things that concerns me ... is the fact that we have an ordinance, and we’ve had some action items from the last disparity study, [but] there’s been no compliance or reporting mechanism attached to them to ensure that they’re taking place. So, we’re on the same trajectory ... as a result.” [#6]

The same trade association representative continued, “For the items that may have been recommended in the last disparity study, there really has to be some strong follow-up, because as they say, if you’re not part of the solution you are part of the problem. So, even if the City and County [of Denver] were not doing egregious things, the lack of follow-up and implementation of process improvements can certainly be hurting more than helping.” [#6]

- When asked if she has any other recommendations for City and County of Denver or other public agencies, the Native American female representative of a business assistance organization said, “I think Denver has done a great job of allocating resources to their diversity program. It’s not just lip service like I’ve seen in other parts of the country, where they say they care about diversity but don’t put any resources behind it. The disparity study alone is a testament to their commitment. And last week they brought department heads to talk to the [organization]. That was really great.” [#37]

Access to capital and obtaining financing. Some business owners and representatives reported challenges securing financing, and commented on how it impacts their ability to secure work. [e.g., #23b] For example:

- When asked about barriers or discrimination in obtaining financing, the Hispanic American female co-owner of an SBE-certified professional services firm said, “Early on, we tried to get an SBA loan. It was horrible, so we finally went conventional, and still do.” [#15a]
- The non-Hispanic white male representative of a majority-owned construction services firm stated that obtaining financing is a problem for a lot of contractors, not just MWBEs. [#21a]
- The Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm said, “When we got into the business it wasn’t cheap, but [we were] guaranteed the

loan, so [that] was pretty easy. Since then, it has been very difficult when you're trying to finance things that aren't real estate. Even though I've been in business a long time, you would think I'd be ready for a regular banking loan, but they insist I go through the SBA. And of course, that's expensive. I feel I'm ready for prime time, but the regular bankers tie your hands with expensive financing." [#36]

- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm said that she has "absolutely" faced barriers with financing. She explained, "I went through a period where I was going to try to buy a building. I was looking for financing, [and] I think I would have gotten better options if I were male. I think I was looked down upon. People weren't blatantly rude to me and turning me away, but I felt there was just a little bit of weird redlining going on." [#12]

A few trade association and business assistance organization representatives discussed access to capital as a barrier for members. [e.g., #38] Comments include:

- The Hispanic American male representative of a trade association said that members experience barriers in obtaining financing, specifically with access to capital. He explained, "[Some members] just do not have the same [opportunity] to be able to access capital in the construction industry. Some of that I think is just inherited, [and] some of it is just truly the banks or financial institution feeling that they are at greater risk based on the member's ethnicity. Some of that is [also] the firm just ... not yet [having] a financial track record." [#11]
- When asked if she is aware of obtaining financing as being a barrier for members, the Native American female representative of a business assistance organization said, "Access to capital is always a topic, especially for small businesses. We refer them to the SBA, the Native American Bank, and other resources for small businesses." [#37]

Other firms stated that access to capital has not been a barrier. [e.g., #5, #35] For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that access to capital and obtaining financing is not a barrier for his firm. [#7]
- The non-Hispanic white female co-owner of a specialty services firm reported that she is not aware of any potential barriers to obtaining financing for her firm or other firms in the local marketplace. [#8]
- The Hispanic American male owner of an engineering firm stated that he has never had problems obtaining financing. [#16]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that she has not experienced discrimination in regards to obtaining financing, bonding, materials and supplies, or other products or services. [#12]

- When asked if he has faced any barriers or discrimination in obtaining financing, the Asian-Pacific American male owner of a DBE-, MWBE-, and SBE-certified professional services firm said, “It’s not a problem for my firm, [and] I’ve been in business many years.” [#22]

Bonding requirements and obtaining bonds. Some business owners and representatives reported challenges with securing bonds. For example, the non-Hispanic white male representative of a majority-owned construction services firm said, “I don’t want to call it discrimination. I know that there are limitations, especially under bonding. It’s a fact that [certified firms] can’t get a bond, which limits us and our ability to hire that sub. It’s not because the city requires us to bond it, it’s because our policies require that we bond people so that they can’t hurt us. So, our financial people also dictate what we’re allowed to do.” [#21a]

Some trade association and business assistance organization representatives described bonding requirements and obtaining bonds as barriers for member firms. [e.g., #38]

Comments include:

- When asked if she is aware of bonding requirements or obtaining bonds as barriers to members’ success, the Native American female representative of a business assistance organization stated, “It is an issue, but I don’t think it’s because of discrimination. They just don’t have the education.” She went on to say, “We have a member who does bonding workshops with the U.S. Department of Transportation, and they are very good.” [#37]
- The Hispanic American male representative of a trade association reported that some members have mentioned that bonding requirements and obtaining bonds are a barrier. [#11]

For some business owners, bonding requirements and obtaining bonds is not a barrier.

[e.g., #16, #23b] For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm has no issues meeting bonding requirements or obtaining bonds. [#7]
- When asked about barriers or discrimination regarding bonding requirements and obtaining bonds, the Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm said, “For many years I didn’t need a bond, but when I talked to [a large prime] about a project, they said I needed a bond. So, I attended the USDOT Bonding Education [Program] and that’s where I met [someone to] help me get a bond.” However, she added, “I didn’t need it because [the large prime] didn’t give me the contract, but now I know who to go to if I need a bond.” [#35]

Insurance requirements and obtaining insurance. A number of businesses reported on their difficulties securing insurance. Comments include:

- The non-Hispanic white male representative of a majority-owned construction services firm said that obtaining workers’ comp insurance is sometimes a challenge for small contractors if they don’t have the right safety processes in place. [#21a]

- When asked about barriers or discrimination regarding insurance requirements and obtaining insurance, the Black American male owner of a DBE-, MWBE-, and SBE-certified construction supply firm stated, “It’s expensive, but that’s more a function of the industry than discrimination.” [#36]

The same business owner later said, “If you’re going to do business at [Denver International Airport], they want you to have a \$10 million insurance policy, and that’s expensive. You need a sizeable contract to cover the cost.” [#36]

- Regarding barriers or difficulties in the local marketplace for the firm, a survey respondent commented, “Insurance premiums are high.” [AS#29]

One business assistance organization representative reported that insurance requirements can be a barrier for members. When asked if she is aware of insurance requirements or obtaining insurance as barriers for members, the Native American female representative of a business assistance organization stated, “This is an issue. The premiums are too high, so it’s not worth going after the work. [For example] the \$10 million umbrella at [Denver International Airport].” [#37]

For some, insurance requirements and obtaining insurance is not a barrier. [e.g., #23b, #36]
For example:

- The Black American male co-owner of a veteran-owned specialty contracting firm reported that his firm has no issues with insurance requirements or obtaining insurance. [#7]
- The non-Hispanic white female co-owner of a specialty services firm reported that she is not aware of any potential barriers to obtaining insurance for her firm or other firms in the local marketplace. [#8]
- The Hispanic American female owner of a DBE-, MWBE-, and SBE-certified construction services firm reported that she has no problems obtaining the insurance she needs. [#35]
- The non-Hispanic white female owner of a DBE-, WBE-, and SBE-certified professional services firm reported that insurance requirements and obtaining insurance have never been barriers for her firm. She went on to say that she has a good relationship with her insurance agent. [#12]

A trade association representative indicated that members do not face insurance-related barriers. The Hispanic American male representative of a trade association reported that he has not heard of insurance requirements and obtaining insurance as barriers for members. [#11]

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- and woman-owned for construction; professional services; and goods and services prime contracts and subcontracts that the City and County of Denver (the City) awards. Appendix E expands on the information presented in Chapter 5 to describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

A. Availability Data

BBC contracted with Customer Research International (CRI) to conduct telephone surveys with thousands of business establishments throughout the *relevant geographic market area* for City contracting, which BBC identified as Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson Counties in Colorado. Business establishments that CRI surveyed were businesses with locations in the relevant geographic market area that the study team identified as doing work in fields closely related to the types of contracts and procurements that the City awarded between July 1, 2011 and June 30, 2016 (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.¹

As part of the telephone survey effort, the study team attempted to contact 7,320 local business establishments that perform work that is relevant to City contracting. That total included 3,578 construction establishments, 2,346 professional services establishments, and 1,396 goods and services establishments. The study team was able to successfully contact 2,635 of those business establishments (1,168 business establishments did not have valid phone listings). Of business establishments that the study team contacted successfully, 897 establishments completed availability surveys.

¹ In many cases, BBC purchased information about multiple locations of a single business and called all of those locations. BBC's method for consolidating information for different establishments that were associated with the same business is described later in Appendix E.

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business that is operating in the relevant geographic market area. Instead, it was to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of minority- and woman-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; and goods and services work. Instead, BBC determined the types of work that were most relevant to City contracting by assessing 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 services that were most related to the contract and procurement dollars that 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 relevant geographic market area. As an example, the survey instrument that the study team used with construction establishments is presented at the end of Appendix E. The study team modified the construction survey instrument slightly for use with establishments working in other industries in order to reflect terms more commonly used in those industries (e.g., the study team substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying professional services establishments).²

Survey structure. The availability survey included 15 sections, and CRI attempted to cover all sections with each business establishment that the study team successfully contacted and that was willing to complete a survey.

1. Identification of purpose. The surveys began by identifying the City as the survey sponsor and describing the purpose of the study. (e.g., “The City is conducting a survey to develop a list of companies interested in providing construction-related services to the City and County of Denver.”)

² BBC also developed a fax and e-mail version 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			
Bridge construction		Electrical equipment and supplies (continued)	
16229901	Bridge construction	50630104	Transformers, electric
16220000	Bridge, tunnel, and elevated highway construction	50840701	Controlling instruments and accessories
		50630000	Electrical apparatus and equipment
Building construction		Electrical work	
15420000	Nonresidential construction, nec	17319903	General electrical contractor
15410000	Industrial buildings and warehouses	76290200	Electrical equipment repair services
76992500	Miscellaneous building item repair services		
15419909	Renovation, remodeling and repairs: industrial buildings	Elevators and conveyors	
15420101	Commercial and office building, new construction	76992501	Elevators: inspection, service, and repair
15420103	Commercial and office buildings, renovation and repair	17969901	Elevator installation and conversion
15420400	Specialized public building contractors	35340100	Elevators and equipment
15420100	Commercial and office building contractors		
Carpet and floors		Environmental cleaning	
17520000	Floor laying and floor work, nec	17990801	Asbestos removal and encapsulation
		17990800	Decontamination services
Concrete and related products		73499901	Chemical cleaning services
14420102	Construction sand mining	49590302	Environmental cleanup services
32720303	Concrete products, precast, nec		
14230000	Crushed and broken granite	Fencing, guardrails and signs	
29510201	Asphalt and asphaltic paving mixtures (not from refineries)	16110100	Highway signs and guardrails
50320000	Brick, stone, and related material		
32720000	Concrete products, nec	Heavy construction	
50320101	Asphalt mixture	16110000	Highway and street construction
50320503	Concrete building products	16290000	Heavy construction, nec
14420000	Construction sand and gravel		
29510000	Asphalt paving mixtures and blocks	Heavy construction equipment	
Electrical equipment and supplies		73530000	Heavy construction equipment rental
36340110	Heating units, for electric appliances	50820303	Cranes, construction
50630103	Power transmission equipment, electric	50820102	Road construction and maintenance machinery
76290201	Electrical equipment repair, high voltage	73539901	Cranes and aerial lift equipment, rental or leasing
50840703	Measuring and testing equipment, electrical	35310000	Construction machinery
50630205	Electrical construction materials	73539902	Earth moving equipment, rental or leasing

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Highway and street construction		Lawn, garden, and irrigation supplies (continued)	
49590100	Road, airport, and parking lot maintenance service	50830308	Irrigation equipment
16110206	Sidewalk construction	35240200	Lawn and garden mowers and accessories
17710202	Sidewalk contractor	50830203	Lawn machinery and equipment
16110202	Concrete construction: roads, highways, sidewalks, etc.	Masonry, drywall and stonework	
16110204	Highway and street paving contractor	17419903	Concrete block masonry laying
17710201	Curb construction	17420101	Drywall
16119901	General contractor, highway and street construction	17420201	Acoustical and ceiling work
16110201	Airport runway construction	17420104	Plastering, plain or ornamental
16110200	Surfacing and paving	Other construction materials	
17710200	Curb and sidewalk contractors	28510105	Paints, asphalt or bituminous
17719902	Concrete repair	Other construction services	
16110205	Resurfacing contractor	34490000	Miscellaneous metalwork
17410102	Retaining wall construction	16230200	Communication line and transmission tower construction
Industrial equipment and machinery		Painting	
35190000	Internal combustion engines, nec	17210303	Pavement marking contractor
50849914	Recycling machinery and equipment	17210100	Residential painting
50840700	Instruments and control equipment	17210200	Commercial painting
50849905	Hydraulic systems equipment and supplies	Parking services	
35699914	Robots, assembly line: industrial and commercial	75210200	Indoor parking services
Landscape architecture		75210100	Outdoor parking services
07810000	Landscape counseling and planning	75210202	Parking garage
Landscape services		75210101	Parking lots
07829903	Landscape contractors	Plumbing and HVAC	
07829902	Highway lawn and garden maintenance services	17110000	Plumbing, heating, air-conditioning
Lawn, garden, and irrigation supplies		35850000	Refrigeration and heating equipment
35230500	Turf and grounds equipment	35850300	Heating equipment, complete
50870501	Sprinkler systems	35850200	Refrigeration equipment, complete
50830201	Garden machinery and equipment, nec		
35240000	Lawn and garden equipment		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Plumbing and HVAC (continued)		Water, sewer, and utility lines (continued)	
17110301	Fire sprinkler system installation	16239906	Underground utilities contractor
17110401	Mechanical contractor	16239903	Pipe laying construction
		16230300	Water and sewer line construction
Roofing		16290505	Waste water and sewage treatment plant construction
17610000	Roofing, siding, and sheetmetal work	16230000	Water, sewer, and utility lines
Street cleaning		Windows and doors	
49590101	Snowplowing	52110201	Doors, storm: wood or metal
		34420402	Garage doors, overhead: metal
Structural metals		50310300	Doors and windows
34490101	Bars, concrete reinforcing: fabricated steel	52110200	Door and window products
		52110203	Garage doors, sale and installation
Traffic flagging and safety		17930000	Glass and glazing work
73899921	Flagging service (traffic control)		
Trucking, hauling and storage		Wrecking, demolition, excavation, drilling	
42139904	Heavy hauling, nec	17950000	Wrecking and demolition work
42129905	Dump truck haulage	17959902	Demolition, buildings and other structures
42129912	Steel hauling, local	73530102	Oil well drilling equipment, rental or leasing
42120000	Local trucking, without storage	16110203	Grading
		16290401	Land leveling
		17999906	Core drilling and cutting
Water, sewer, and utility lines		17949901	Excavation and grading, building construction
16239904	Pipeline construction, nsk	16290400	Land preparation construction
16290500	Industrial plant construction		
Professional Services			
Advertising, marketing and public relations		Business services and consulting	
73119901	Advertising consultant	87420107	Quality assurance consultant
		87480302	Telecommunications consultant
Architectural and design services		87210200	Accounting services, except auditing
87120000	Architectural services		
73891801	Design, commercial and industrial	Construction management	
87120101	Architectural engineering	87420402	Construction project management consultant
87120100	Architectural engineering	87419902	Construction management

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional Services (continued)			
Engineering		Human resources and job training services	
87110402	Civil engineering	73630101	Employee leasing service
87110404	Structural engineering	73630000	Help supply services
87119909	Professional engineer	73630100	Labor resource services
87110400	Construction and civil engineering		
87110000	Engineering services		
Environmental services and transportation planning		Medical testing, laboratories, and pharmaceutical services	
87480204	Traffic consultant	80710100	Testing laboratories
87480200	Urban planning and consulting services		
87420410	Transportation consultant		
Finance and accounting		Surveying and mapmaking	
73229901	Adjustment bureau, except insurance	87130000	Surveying services
87420401	Banking and finance consultant		
87489903	Employee programs administration		
Goods			
Automobiles		Food	
50120208	Trucks, commercial	51410000	Groceries, general line
50120200	Commercial vehicles		
55119901	Automobiles, new and used		
Cleaning and janitorial supplies		Furniture	
51690400	Specialty cleaning and sanitation preparations	57129904	Office furniture
39910302	Brushes, household or industrial	50210100	Office and public building furniture
35890200	Commercial cleaning equipment	50210106	Office furniture, nec
50870304	Janitors' supplies	25310000	Public building and related furniture
Communications equipment		Office equipment and supplies	
38120000	Search and navigation equipment	26770000	Envelopes
59990602	Communication equipment	51120000	Stationery and office supplies
50650409	Video equipment, electronic	25990203	Carts, restaurant equipment
36630000	Radio and t.v. communications equipment	59991402	Photocopy machines
48130101	Data telephone communications	26210600	Stationary, envelope and tablet papers

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods (continued)			
Other goods		Uniforms (continued)	
76992000	Customizing services	23260100	Work uniforms
Petroleum and petroleum products		56990103	Work clothing
59840000	Liquefied petroleum gas dealers	56990100	Uniforms and work clothing
29110000	Petroleum refining	Vehicle parts and supplies	
51719901	Petroleum bulk stations	37130100	Truck bodies and parts
51720000	Petroleum products, nec	50149901	Automobile tires and tubes
Uniforms		50140000	Tires and tubes
56990102	Uniforms	50130119	Truck parts and accessories
23110300	Men's and boys' uniforms	50630100	Transformers and transmission equipment
Services		37140000	Motor vehicle parts and accessories
Cleaning and janitorial services		Security systems	
73490104	Janitorial service, contract basis	17310400	Safety and security specialization
Communication services		73829901	Burglar alarm maintenance and monitoring
76220100	Communication equipment repair	36990502	Security control equipment and systems
Computer and IT services		17310403	Fire detection and burglar alarm systems specialization
73790203	Online services technology consultants	17310402	Closed circuit television installation
73790201	Computer hardware requirements analysis	17310401	Access control systems specialization
Other services		73829904	Confinement surveillance systems maintenance and monitoring
79229902	Concert management service	Towing services	
Printing and copying		75490301	Towing service, automotive
35790107	Mailing machines	Vehicle repair shops	
27310203	Pamphlets: publishing and printing	75380104	Truck engine repair, except industrial
27590000	Commercial printing, nec	75390102	Automotive springs, rebuilding and repair
Security guard services		75320402	Body shop, trucks
73810100	Guard services		

Source: BBC Research & Consulting.

2. Verification of correct business name. The surveyor verified that he or she had reached the correct business. If the business name was not correct, surveyors asked if the respondent knew how to contact the correct business. CRI then followed up with the correct business based on the new contact information (see areas “X” and “Y” of the availability survey instrument at the end of Appendix E).

3. Verification of work related to relevant projects. The surveyor asked construction businesses whether the organization does work or provides materials related to construction, maintenance, or design (Question A1). Surveyors continued the survey with businesses that responded “yes” to that question.

4. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

5. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B’s work specialization codes were incorrect, businesses 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.

6. 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).

7. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past government and private sector contracts. CRI asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).³

8. Interest in future work. The surveyor asked about businesses’ interest in future work with the City and the Denver International Airport. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B3 through B6).⁴

9. Geographic area. The surveyor asked whether businesses perform work or serve customers throughout Denver. (Question C1).

10. Year established. The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

11. Largest contracts. The study team asked businesses to identify the value of the largest prime contracts and subcontracts on which they had bid or had been awarded during the past five years. (Question D2).⁵

³ Goods and services providers were asked questions about subcontract work.

⁴ Goods and services providers were asked questions about subcontract work.

⁵ Goods and services providers were asked questions about subcontract work.

12. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 and E2). If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of the business's ownership (Question E3). The study team confirmed that information through several other data sources including:

- City vendor data;
- City certification data;
- City review; and
- Information from D&B and other sources.

13. Business revenue. The surveyor asked several questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also asked about their revenues and number of employees across all locations (Questions F1 through F3).

14. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

15. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

D. Survey Execution

CRI conducted all surveys in 2017 and 2018. To minimize non-response, CRI made up to five attempts during different times of the day and on different days of the week to reach each business establishment. CRI attempted to survey an available company representative such as the owner, manager, or other officer who could provide accurate and detailed responses to survey questions.

Establishments that the study team successfully contacted. Figure E-2 presents the disposition of the 7,320 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 2,644 establishments that the study team was able to successfully contact.

Non-working or wrong phone numbers. Some of the business listings that the study team purchased from D&B and that CRI attempted to contact were:

- Duplicate phone numbers (77 listings);
- Non-working phone numbers (920 listings); or
- Wrong numbers for the desired businesses (162 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

Figure E-2.
Disposition of attempts to survey business establishments

Note:
Availability analysis results are based on a representative, unbiased, and statistically-valid subset of the relevant business population.

Source:
2017-18 availability surveys.

	Number of businesses
Beginning list	7,320
Less duplicate phone numbers	77
Less non-working phone numbers	920
Less wrong number/business	171
Unique business listings with working phone numbers	6,152
Less no answer	3,130
Less could not reach responsible staff member	333
Less language barrier	54
Establishments successfully contacted	2,635

Working phone numbers. As shown in Figure E-2, there were 6,161 business establishments with working phone numbers that CRI attempted to contact. CRI was unsuccessful in contacting many of those businesses for various reasons:

- CRI could not reach anyone after five attempts at different times of the day and on different days of the week for 3,130 establishments.
- CRI could not reach a responsible staff member after five attempts at different times of the day on different days of the week for 333 establishments.
- CRI could not conduct the availability survey due to language barriers for 54 establishments.

After taking those unsuccessful attempts into account, CRI was able to successfully contact 2,644 business establishments.

Establishments included in the availability database. Figure E-3 presents the disposition of the 2,644 business establishments that CRI successfully contacted and how that number resulted in the 597 businesses that the study team included in the availability database and that the study team considered potentially available for City work.

Establishments not interested in discussing availability for City work. Of the 2,644 business establishments that the study team successfully contacted, 1,637 establishments were not interested in discussing their availability for City work. In addition, the study team sent fax or e-mail availability surveys upon request but did not receive completed surveys from 101 establishments. In total, 906 successfully-contacted business establishments completed availability surveys.

Establishments available for City work. The study team only deemed a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that 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 38 establishments that indicated that their businesses were not involved in relevant contracting work.
- BBC excluded 12 establishments that indicated that their organizations were not for-profit businesses.
- BBC excluded 23 establishments that indicated that their businesses were involved in relevant work but reported that their main lines of business were outside of the study scope.
- BBC excluded 203 establishments that reported not being interested in either prime contracting or subcontracting opportunities with the City.
- BBC excluded 14 business establishment that reported being established in 2017 or later. That business establishment would not have been available for contract elements that the City awarded during the study period.
- Nineteen establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions, BBC compiled a database of 597 businesses that were considered potentially available for City work.

**Figure E-3.
Disposition of
successfully
contacted business
establishments**

Note:

Availability analysis results are based on a representative, unbiased, and statistically-valid subset of the relevant business population.

Source:

2017-18 availability surveys.

	Number of Establishments
Establishments successfully contacted	2,635
Less establishments not interested in discussing availability for work	1,637
Less unreturned fax/email surveys	101
Establishments that completed interviews about firm characteristics	897
Less no relevant work	38
Less not a for-profit business	12
Less line of work outside scope	23
Less no interest in future work	194
Less established after study period	14
Less multiple establishments	19
Establishments potentially available for City work	597

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. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then the study team considered

the business as available for both prime contracts and subcontracts within the relevant subindustry.

- Except when there were large discrepancies among individual responses regarding establishment dates, BBC used the earliest founding date that establishments of the same business provided. In cases of large discrepancies, BBC followed up with the business establishments to obtain accurate establishment date information.
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the business' relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC determined the number of employees for businesses by calculating the mode or the mean of responses from its establishments.
- BBC considered the largest revenue total that any establishments of the same business reported as the business's revenue cap (for purposes of determining status as a potential Disadvantaged Business Enterprise).
- BBC coded businesses as minority- or woman-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 minority- and woman-owned businesses for City work were accurate and appropriate.

Not providing a count of all businesses available for City work. 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.

Not basing the availability analysis on certification directories, prequalification lists, or bidders lists. 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 minority- and woman-owned 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.

Selection of specific subindustries. Defining *subindustries* based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. For example, 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;
- Work specializations; and
- Language barriers.

Research sponsorship. Surveyors introduced themselves by identifying the City as the survey sponsor, because businesses may be less likely to answer somewhat sensitive business questions if the surveyor was unable to identify the sponsor. In past survey efforts—particularly those related to availability analyses—BBC has found that identifying the sponsor substantially increases response rates.

Work specializations. Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate the availability of minority- and woman-owned businesses would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone. However, work specialization as a potential source of non-response bias in the BBC availability analysis is minimized, because the availability analysis examines businesses within particular work fields before calculating overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

Language barriers. The study team made the decision to only include businesses able to complete the availability survey in English in the availability analysis. Businesses unable to complete the survey due to language barriers represented less than one percent of contacted businesses.

Response reliability. Business owners and managers were asked questions that may be difficult to answer including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures. BBC explored the reliability of survey responses in a number of ways.

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 business owners. The study team compared survey responses concerning business ownership with such information.

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.

City review. The City reviewed contract and vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.

Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Customer Research International. We are calling on behalf of the City and County of Denver. This is not a sales call. The City is conducting a survey to develop a list of companies interested in providing construction-related services to the City and County of Denver. The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE AGENCY]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

- 1=RIGHT COMPANY – **SKIP TO A1**
- 2=NOT RIGHT COMPANY
- 99=REFUSE TO GIVE INFORMATION – **TERMINATE**

Y1. What is the name of this firm?

- 1=VERBATIM

Y2. Can you give me any information about [new firm name]?

- 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 – **SKIP TO Y4**
- 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. Can you give me the name of the owner or manager of [new firm name]?

[ENTER UPDATED NAME]

1=VERBATIM

Y5. Can I have a telephone number for him/her?

[ENTER UPDATED PHONE]

1=VERBATIM

Y6. Do you work for this new company?

1=YES

2=NO – TERMINATE

A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance, or design. Is that correct?

[NOTE TO INTERVIEWER – INCLUDES ANY WORK RELATED TO CONSTRUCTION, MAINTENANCE OR DESIGN SUCH AS BUILDING FACILITIES, PAVING AND CONCRETE, TUNNELS, BRIDGES AND ROADS AND OTHER CONSTRUCTION-RELATED PROJECTS. IT ALSO INCLUDES TRUCKING AND HAULING]

[NOTE TO INTERVIEWER – INCLUDES HAVING DONE WORK, TRYING TO SELL THIS WORK, OR PROVIDING MATERIALS]

1=Yes

2=No – TERMINATE

A2. Let me confirm that [firm name/new firm name] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other – **TERMINATE**

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 any part of a contract as either a prime contractor or subcontractor?

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 the City and County of Denver as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B4. Is your company *interested* in working with the City and County of Denver as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B5. Is your company *interested* in working with the Denver International Airport as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B6. Is your company *interested* in working with Denver International Airport as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1. Now I'm interested in the geographic areas in which your company serves customers. Is your company able to do work or serve customers throughout the City of Denver, including in the area around the Denver International Airport?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. About what year was your firm established?

1=NUMERIC (1600-2015)

9998 = (DON'T KNOW)

9999 = (REFUSED)

D2. What was the largest 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

2=More than \$100,000 to \$250,000

3=More than \$250,000 to \$500,000

4=More than \$500,000 to \$1 million

5=More than \$1 million to \$2 million

6=More than \$2 million to \$5 million

7=More than \$5 million to \$10 million

8=More than \$10 million to \$20 million

9=More than \$20 million to \$50 million

10=More than \$50 million to \$100 million

11= More than \$100 million to \$200 million

12=\$200 million or greater

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)/(NO PRIME BIDS)

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

2=More than \$100,000 to \$250,000

3=More than \$250,000 to \$500,000

4=More than \$500,000 to \$1 million

5=More than \$1 million to \$2 million

6=More than \$2 million to \$5 million

7=More than \$5 million to \$10 million

8=More than \$10 million to \$20 million

9=More than \$20 million to \$50 million

10=More than \$50 million to \$100 million

11= More than \$100 million to \$200 million

12=\$200 million or greater

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)/(NO SUB BIDS)

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. 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)

F1. Dun & Bradstreet lists the average annual gross revenue of your company, just considering your location, to be [*dollar amount*]. Is that an accurate estimate for your company's average annual gross revenue over the last three years?

1=Yes – **SKIP TO F3**

2=No

98=(DON'T KNOW) – **SKIP TO F3**

99=(REFUSED) – **SKIP TO F3**

F2. Roughly, what was the average annual gross revenue of your company, just considering your location, over the last three years? Would you say . . .

[READ LIST]

1=Less than \$750,000

2=\$750,000 - \$5.5 Million

3=\$5.6 Million - \$7.4 Million

4=\$7.5 Million - \$11 Million

5=\$11.1 Million - \$15 Million

6=\$15.1 Million - \$18 Million

7=\$18.1 Million - \$20.5 Million

8=\$20.6 Million - \$24 Million

9=\$24.1 Million or more

98= (DON'T KNOW)

99= (REFUSED)

F3. [ONLY IF A4 = 2] Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .

[READ LIST]

1=Less than \$750,000

2=\$750,000 - \$5.5 Million

3=\$5.6 Million - \$7.4 Million

4=\$7.5 Million - \$11 Million

5=\$11.1 Million - \$15 Million

6=\$15.1 Million - \$18 Million

7=\$18.1 Million - \$20.5 Million

8=\$20.6 Million - \$24 Million

9=\$24.1 Million or more

98= (DON'T KNOW)

99= (REFUSED)

G1. We're interested in whether your company has experienced barriers or difficulties in Denver associated with starting or expanding a business in your industry or with obtaining work. Do you have any thoughts to share on these topics?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

1=VERBATIM

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9=(OTHER - SPECIFY) _____

99=(REFUSED)

Thank you very much for your participation. If you have any questions or concerns, please contact Tanya Davis at the Office of Economic Development with the City and County of Denver at telephone 720-913-1780.

APPENDIX F.

Disparity Tables

Figure F-1.

Table	Time period	Contract area	Contract role	Characteristics			Goals	Potential DBE/MWBE
				Contract	Department	Funding		
F-2	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-3	01/01/12 - 06/30/14	All industries	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-4	07/01/14 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-5	01/01/12 - 12/31/16	Construction	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-6	01/01/12 - 12/31/16	Professional Services	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-7	01/01/12 - 12/31/16	Goods and services	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-8	01/01/12 - 12/31/16	All industries	Prime contracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-9	01/01/12 - 12/31/16	All industries	Subcontracts	N/A	All departments	Federal and non-federal	Goals and no goals	N/A
F-10	01/01/12 - 12/31/16	All industries	Prime contracts	Large	All departments	Federal and non-federal	Goals and no goals	Large
F-11	01/01/12 - 12/31/16	All industries	Prime contracts	Small	All departments	Federal and non-federal	Goals and no goals	Small
F-12	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	Airport	Federal and non-federal	Goals and no goals	N/A
F-13	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	Non-Airport	Federal and non-federal	Goals and no goals	N/A
F-14	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	All departments	Federal	Goals and no goals	N/A
F-15	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	All departments	Non-federal	Goals and no goals	N/A
F-16	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	Goals	N/A
F-17	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	All departments	Federal and non-federal	No goals	N/A
F-18	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	Airport	Federal	Goals and no goals	Potential DBE
F-19	01/01/12 - 12/31/16	All industries	Prime contracts and subcontracts	N/A	All departments	Non-federal	Goals and no goals	Potential MWBE
F-20	01/01/12 - 12/31/16	Construction	Prime contracts and subcontracts	N/A	All departments	Non-federal	Goals and no goals	Potential MWBE
F-21	01/01/12 - 12/31/16	Professional Services	Prime contracts and subcontracts	N/A	All departments	Non-federal	Goals and no goals	Potential MWBE
F-22	01/01/12 - 12/31/16	Goods and services	Prime contracts and subcontracts	N/A	All departments	Non-federal	Goals and no goals	Potential MWBE

Figure F-2.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

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	21,790	\$3,497,551	\$3,497,551				
(2) Minority and woman-owned businesses	4,543	\$519,020	\$519,020	14.8	23.7	-8.9	62.6
(3) Non-Hispanic white woman-owned	2,235	\$184,110	\$184,110	5.3	10.9	-5.6	48.4
(4) Minority-owned	2,308	\$334,911	\$334,911	9.6	12.8	-3.3	74.5
(5) Asian American-owned	397	\$40,636	\$42,054	1.2	3.2	-2.0	37.6
(6) Black American-owned	234	\$54,199	\$56,089	1.6	3.3	-1.7	47.9
(7) Hispanic American-owned	1,298	\$211,314	\$218,683	6.3	6.2	0.1	101.6
(8) Native American-owned	87	\$17,475	\$18,084	0.5	0.1	0.4	200+
(9) Unknown minority-owned	292	\$11,287					
(10) MWBE-certified	2,572	\$354,141	\$354,141	10.1			
(11) Non-Hispanic white woman-owned	1,028	\$112,018	\$112,018	3.2			
(12) Minority-owned MWBE	1,544	\$242,123	\$242,123	6.9			
(13) Asian American-owned MWBE	254	\$16,522	\$16,522	0.5			
(14) Black American-owned MWBE	185	\$40,315	\$40,341	1.2			
(15) Hispanic American-owned MWBE	1,038	\$174,415	\$174,528	5.0			
(16) Native American-owned MWBE	60	\$10,714	\$10,721	0.3			
(17) Unknown minority-owned MWBE	7	\$156					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.

Time period: 01/01/2012 - 06/30/2014

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,467	\$1,779,818	\$1,779,818				
(2) Minority and woman-owned businesses	1,869	\$228,601	\$228,601	12.8	23.1	-10.2	55.7
(3) Non-Hispanic white woman-owned	942	\$80,186	\$80,186	4.5	11.5	-7.0	39.1
(4) Minority-owned	927	\$148,415	\$148,415	8.3	11.6	-3.2	72.2
(5) Asian American-owned	175	\$11,369	\$11,746	0.7	3.0	-2.3	22.0
(6) Black American-owned	71	\$36,652	\$37,866	2.1	3.5	-1.4	60.2
(7) Hispanic American-owned	530	\$89,248	\$92,206	5.2	4.9	0.3	105.6
(8) Native American-owned	38	\$6,386	\$6,597	0.4	0.1	0.2	200+
(9) Unknown minority-owned	113	\$4,761					
(10) MWBE-certified	1,028	\$154,498	\$154,498	8.7			
(11) Non-Hispanic white woman-owned	450	\$43,030	\$43,030	2.4			
(12) Minority-owned MWBE	578	\$111,468	\$111,468	6.3			
(13) Asian American-owned MWBE	96	\$7,422	\$7,422	0.4			
(14) Black American-owned MWBE	54	\$28,368	\$28,374	1.6			
(15) Hispanic American-owned MWBE	399	\$72,691	\$72,706	4.1			
(16) Native American-owned MWBE	27	\$2,965	\$2,965	0.2			
(17) Unknown minority-owned MWBE	2	\$23					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.

Time period: 07/01/2014 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

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	12,323	\$1,717,733	\$1,717,733				
(2) Minority and woman-owned businesses	2,674	\$290,419	\$290,419	16.9	24.4	-7.5	69.3
(3) Non-Hispanic white woman-owned	1,293	\$103,924	\$103,924	6.1	10.2	-4.2	59.2
(4) Minority-owned	1,381	\$186,495	\$186,495	10.9	14.2	-3.3	76.5
(5) Asian American-owned	222	\$29,267	\$30,328	1.8	3.4	-1.6	51.9
(6) Black American-owned	163	\$17,548	\$18,184	1.1	3.2	-2.1	33.5
(7) Hispanic American-owned	768	\$122,066	\$126,492	7.4	7.4	-0.1	98.9
(8) Native American-owned	49	\$11,089	\$11,491	0.7	0.2	0.5	200+
(9) Unknown minority-owned	179	\$6,526					
(10) MWBE-certified	1,544	\$199,643	\$199,643	11.6			
(11) Non-Hispanic white woman-owned	578	\$68,988	\$68,988	4.0			
(12) Minority-owned MWBE	966	\$130,654	\$130,654	7.6			
(13) Asian American-owned MWBE	158	\$9,100	\$9,100	0.5			
(14) Black American-owned MWBE	131	\$11,947	\$11,959	0.7			
(15) Hispanic American-owned MWBE	639	\$101,724	\$101,828	5.9			
(16) Native American-owned MWBE	33	\$7,750	\$7,758	0.5			
(17) Unknown minority-owned MWBE	5	\$133					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.

Time period: 01/01/2012 - 12/31/2016

Contract type: Construction

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,218	\$2,233,136	\$2,233,136				
(2) Minority and woman-owned businesses	2,639	\$339,256	\$339,256	15.2	19.0	-3.8	80.0
(3) Non-Hispanic white woman-owned	1,250	\$109,279	\$109,279	4.9	10.8	-5.9	45.3
(4) Minority-owned	1,389	\$229,977	\$229,977	10.3	8.2	2.1	125.8
(5) Asian American-owned	151	\$12,275	\$12,468	0.6	1.6	-1.0	35.6
(6) Black American-owned	116	\$15,154	\$15,393	0.7	1.9	-1.2	37.2
(7) Hispanic American-owned	973	\$182,384	\$185,265	8.3	4.6	3.7	180.7
(8) Native American-owned	70	\$16,588	\$16,850	0.8	0.2	0.6	200+
(9) Unknown minority-owned	79	\$3,576					
(10) MWBE-certified	1,756	\$257,570	\$257,570	11.5			
(11) Non-Hispanic white woman-owned	705	\$72,156	\$72,156	3.2			
(12) Minority-owned MWBE	1,051	\$185,414	\$185,414	8.3			
(13) Asian American-owned MWBE	79	\$7,601	\$7,601	0.3			
(14) Black American-owned MWBE	115	\$14,824	\$14,824	0.7			
(15) Hispanic American-owned MWBE	798	\$152,288	\$152,288	6.8			
(16) Native American-owned MWBE	59	\$10,702	\$10,702	0.5			
(17) Unknown minority-owned MWBE	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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.

Time period: 01/01/2012 - 12/31/2016

Contract type: Professional services

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

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	4,480	\$520,234	\$520,234				
(2) Minority and woman-owned businesses	1,074	\$101,057	\$101,057	19.4	40.4	-20.9	48.1
(3) Non-Hispanic white woman-owned	530	\$33,826	\$33,826	6.5	15.8	-9.3	41.0
(4) Minority-owned	544	\$67,230	\$67,230	12.9	24.5	-11.6	52.7
(5) Asian American-owned	204	\$9,939	\$10,293	2.0	2.6	-0.6	76.8
(6) Black American-owned	73	\$36,727	\$38,036	7.3	11.5	-4.1	63.8
(7) Hispanic American-owned	218	\$18,180	\$18,828	3.6	10.4	-6.8	34.7
(8) Native American-owned	2	\$71	\$74	0.0	0.1	0.0	25.0
(9) Unknown minority-owned	47	\$2,313					
(10) MWBE-certified	657	\$62,510	\$62,510	12.0			
(11) Non-Hispanic white woman-owned	245	\$15,858	\$15,858	3.0			
(12) Minority-owned MWBE	412	\$46,652	\$46,652	9.0			
(13) Asian American-owned MWBE	167	\$6,699	\$6,699	1.3			
(14) Black American-owned MWBE	51	\$23,713	\$23,793	4.6			
(15) Hispanic American-owned MWBE	187	\$16,083	\$16,137	3.1			
(16) Native American-owned MWBE	0	\$0	\$0	0.0			
(17) Unknown minority-owned MWBE	7	\$156					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.

Time period: 01/01/2012 - 12/31/2016

Contract type: Goods and services

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

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	8,092	\$744,182	\$744,182				
(2) Minority and woman-owned businesses	830	\$78,708	\$78,708	10.6	26.3	-15.7	40.3
(3) Non-Hispanic white woman-owned	455	\$41,004	\$41,004	5.5	7.6	-2.1	72.3
(4) Minority-owned	375	\$37,704	\$37,704	5.1	18.7	-13.6	27.2
(5) Asian American-owned	42	\$18,423	\$21,501	2.9	8.5	-5.6	34.0
(6) Black American-owned	45	\$2,319	\$2,706	0.4	2.2	-1.8	16.7
(7) Hispanic American-owned	107	\$10,749	\$12,546	1.7	7.9	-6.2	21.5
(8) Native American-owned	15	\$815	\$951	0.1	0.1	0.0	104.8
(9) Unknown minority-owned	166	\$5,398					
(10) MWBE-certified	159	\$34,061	\$34,061	4.6			
(11) Non-Hispanic white woman-owned	78	\$24,004	\$24,004	3.2			
(12) Minority-owned MWBE	81	\$10,058	\$10,058	1.4			
(13) Asian American-owned MWBE	8	\$2,223	\$2,223	0.3			
(14) Black American-owned MWBE	19	\$1,779	\$1,779	0.2			
(15) Hispanic American-owned MWBE	53	\$6,044	\$6,044	0.8			
(16) Native American-owned MWBE	1	\$13	\$13	0.0			
(17) Unknown minority-owned MWBE	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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts

Contract agency: All departments

Funding source: Federal and non-federal

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	18,799	\$2,874,356	\$2,874,356				
(2) Minority and woman-owned businesses	2,926	\$251,445	\$251,445	8.7	23.6	-14.8	37.1
(3) Non-Hispanic white woman-owned	1,548	\$99,704	\$99,704	3.5	10.8	-7.3	32.2
(4) Minority-owned	1,378	\$151,741	\$151,741	5.3	12.8	-7.5	41.2
(5) Asian American-owned	271	\$27,213	\$28,927	1.0	3.4	-2.4	29.6
(6) Black American-owned	165	\$30,201	\$32,103	1.1	3.2	-2.1	34.5
(7) Hispanic American-owned	617	\$73,592	\$78,227	2.7	6.1	-3.4	44.6
(8) Native American-owned	57	\$11,744	\$12,484	0.4	0.1	0.4	200+
(9) Unknown minority-owned	268	\$8,989					
(10) MWBE-certified	1,279	\$142,703	\$142,703	5.0			
(11) Non-Hispanic white woman-owned	540	\$51,413	\$51,413	1.8			
(12) Minority-owned MWBE	739	\$91,289	\$91,289	3.2			
(13) Asian American-owned MWBE	150	\$4,910	\$4,910	0.2			
(14) Black American-owned MWBE	119	\$16,547	\$16,547	0.6			
(15) Hispanic American-owned MWBE	438	\$64,777	\$64,777	2.3			
(16) Native American-owned MWBE	32	\$5,055	\$5,055	0.2			
(17) Unknown minority-owned MWBE	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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

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	2,991	\$623,195	\$623,195				
(2) Minority and woman-owned businesses	1,617	\$267,575	\$267,575	42.9	24.4	18.5	175.8
(3) Non-Hispanic white woman-owned	687	\$84,405	\$84,405	13.5	11.4	2.2	119.0
(4) Minority-owned	930	\$183,170	\$183,170	29.4	13.0	16.4	200+
(5) Asian American-owned	126	\$13,423	\$13,593	2.2	2.2	0.0	97.9
(6) Black American-owned	69	\$23,998	\$24,303	3.9	3.9	0.0	100.4
(7) Hispanic American-owned	681	\$137,721	\$139,471	22.4	6.4	16.0	200+
(8) Native American-owned	30	\$5,731	\$5,803	0.9	0.5	0.4	182.9
(9) Unknown minority-owned	24	\$2,298					
(10) MWBE-certified	1,293	\$211,439	\$211,439	33.9			
(11) Non-Hispanic white woman-owned	488	\$60,605	\$60,605	9.7			
(12) Minority-owned MWBE	805	\$150,834	\$150,834	24.2			
(13) Asian American-owned MWBE	104	\$11,613	\$11,613	1.9			
(14) Black American-owned MWBE	66	\$23,768	\$23,792	3.8			
(15) Hispanic American-owned MWBE	600	\$109,638	\$109,752	17.6			
(16) Native American-owned MWBE	28	\$5,659	\$5,665	0.9			
(17) Unknown minority-owned MWBE	7	\$156					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.

Time period: 01/01/2012 - 12/31/2016

Large prime contracts

Contract type: All relevant industries

Contract role: Prime contracts

Contract agency: All departments

Funding source: Federal and non-federal

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	595	\$2,062,837	\$2,062,837				
(2) Minority and woman-owned businesses	72	\$133,541	\$133,541	6.5	21.1	-14.7	30.6
(3) Non-Hispanic white woman-owned	20	\$37,062	\$37,062	1.8	10.5	-8.7	17.0
(4) Minority-owned	52	\$96,479	\$96,479	4.7	10.6	-5.9	44.2
(5) Asian American-owned	5	\$16,108	\$16,318	0.8	2.6	-1.8	30.6
(6) Black American-owned	10	\$20,398	\$20,663	1.0	1.9	-0.9	53.4
(7) Hispanic American-owned	32	\$49,948	\$50,597	2.5	6.1	-3.7	40.0
(8) Native American-owned	4	\$8,786	\$8,901	0.4	0.0	0.4	200+
(9) Unknown minority-owned	1	\$1,238					
(10) MWBE-certified	49	\$87,546	\$87,546	4.2			
(11) Non-Hispanic white woman-owned	10	\$26,057	\$26,057	1.3			
(12) Minority-owned MWBE	39	\$61,489	\$61,489	3.0			
(13) Asian American-owned MWBE	0	\$0	\$0	0.0			
(14) Black American-owned MWBE	7	\$8,233	\$8,233	0.4			
(15) Hispanic American-owned MWBE	31	\$49,256	\$49,256	2.4			
(16) Native American-owned MWBE	1	\$4,000	\$4,000	0.2			
(17) Unknown minority-owned MWBE	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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.

Time period: 01/01/2012 - 12/31/2016

Small prime contracts

Contract type: All relevant industries

Contract role: Prime contracts

Contract agency: All departments

Funding source: Federal and non-federal

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	18,204	\$811,518	\$811,518				
(2) Minority and woman-owned businesses	2,854	\$117,904	\$117,904	14.5	29.8	-15.3	48.8
(3) Non-Hispanic white woman-owned	1,528	\$62,642	\$62,642	7.7	11.4	-3.6	68.0
(4) Minority-owned	1,326	\$55,262	\$55,262	6.8	18.4	-11.6	36.9
(5) Asian American-owned	266	\$11,105	\$12,917	1.6	5.5	-3.9	29.0
(6) Black American-owned	155	\$9,803	\$11,403	1.4	6.7	-5.3	21.0
(7) Hispanic American-owned	585	\$23,644	\$27,502	3.4	6.0	-2.6	56.4
(8) Native American-owned	53	\$2,958	\$3,440	0.4	0.3	0.2	167.2
(9) Unknown minority-owned	267	\$7,751					
(10) MWBE-certified	1,230	\$55,157	\$55,157	6.8			
(11) Non-Hispanic white woman-owned	530	\$25,357	\$25,357	3.1			
(12) Minority-owned MWBE	700	\$29,800	\$29,800	3.7			
(13) Asian American-owned MWBE	150	\$4,910	\$4,910	0.6			
(14) Black American-owned MWBE	112	\$8,314	\$8,314	1.0			
(15) Hispanic American-owned MWBE	407	\$15,521	\$15,521	1.9			
(16) Native American-owned MWBE	31	\$1,055	\$1,055	0.1			
(17) Unknown minority-owned MWBE	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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: Airport

Funding source: Federal and non-federal

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	1,700	\$1,534,904	\$1,534,904				
(2) Minority and woman-owned businesses	847	\$216,488	\$216,488	14.1	20.9	-6.8	67.6
(3) Non-Hispanic white woman-owned	368	\$56,123	\$56,123	3.7	12.7	-9.0	28.8
(4) Minority-owned	479	\$160,365	\$160,365	10.4	8.2	2.3	127.8
(5) Asian American-owned	80	\$8,283	\$8,336	0.5	1.1	-0.5	50.0
(6) Black American-owned	58	\$31,269	\$31,469	2.1	2.6	-0.5	79.4
(7) Hispanic American-owned	314	\$110,400	\$111,107	7.2	4.4	2.8	164.3
(8) Native American-owned	18	\$9,392	\$9,452	0.6	0.1	0.5	200+
(9) Unknown minority-owned	9	\$1,021					
(10) MWBE-certified	663	\$164,536	\$164,536	10.7			
(11) Non-Hispanic white woman-owned	262	\$43,102	\$43,102	2.8			
(12) Minority-owned MWBE	401	\$121,433	\$121,433	7.9			
(13) Asian American-owned MWBE	58	\$6,235	\$6,235	0.4			
(14) Black American-owned MWBE	53	\$23,155	\$23,164	1.5			
(15) Hispanic American-owned MWBE	277	\$86,541	\$86,577	5.6			
(16) Native American-owned MWBE	11	\$5,452	\$5,454	0.4			
(17) Unknown minority-owned MWBE	2	\$50					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: Non-Airport

Funding source: Federal and non-federal

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	20,090	\$1,962,647	\$1,962,647				
(2) Minority and woman-owned businesses	3,696	\$302,533	\$302,533	15.4	26.0	-10.5	59.4
(3) Non-Hispanic white woman-owned	1,867	\$127,987	\$127,987	6.5	9.5	-2.9	69.0
(4) Minority-owned	1,829	\$174,546	\$174,546	8.9	16.5	-7.6	53.9
(5) Asian American-owned	317	\$32,353	\$34,375	1.8	4.8	-3.1	36.2
(6) Black American-owned	176	\$22,930	\$24,363	1.2	3.9	-2.7	31.4
(7) Hispanic American-owned	984	\$100,914	\$107,220	5.5	7.5	-2.1	72.7
(8) Native American-owned	69	\$8,083	\$8,588	0.4	0.2	0.3	200+
(9) Unknown minority-owned	283	\$10,266					
(10) MWBE-certified	1,909	\$189,606	\$189,606	9.7			
(11) Non-Hispanic white woman-owned	766	\$68,916	\$68,916	3.5			
(12) Minority-owned MWBE	1,143	\$120,690	\$120,690	6.1			
(13) Asian American-owned MWBE	196	\$10,287	\$10,287	0.5			
(14) Black American-owned MWBE	132	\$17,160	\$17,176	0.9			
(15) Hispanic American-owned MWBE	761	\$87,874	\$87,951	4.5			
(16) Native American-owned MWBE	49	\$5,262	\$5,267	0.3			
(17) Unknown minority-owned MWBE	5	\$106					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal

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	2,262	\$435,612	\$435,612				
(2) Minority and woman-owned businesses	675	\$77,234	\$77,234	17.7	22.5	-4.8	78.8
(3) Non-Hispanic white woman-owned	325	\$22,877	\$22,877	5.3	9.2	-4.0	57.0
(4) Minority-owned	350	\$54,356	\$54,356	12.5	13.3	-0.8	93.8
(5) Asian American-owned	82	\$9,441	\$9,598	2.2	3.0	-0.8	73.1
(6) Black American-owned	32	\$6,784	\$6,897	1.6	3.3	-1.7	47.9
(7) Hispanic American-owned	206	\$35,973	\$36,572	8.4	6.8	1.6	123.1
(8) Native American-owned	15	\$1,269	\$1,290	0.3	0.2	0.1	185.8
(9) Unknown minority-owned	15	\$890					
(10) MWBE-certified	486	\$62,066	\$62,066	14.2			
(11) Non-Hispanic white woman-owned	199	\$17,784	\$17,784	4.1			
(12) Minority-owned MWBE	287	\$44,282	\$44,282	10.2			
(13) Asian American-owned MWBE	55	\$2,577	\$2,577	0.6			
(14) Black American-owned MWBE	30	\$6,759	\$6,762	1.6			
(15) Hispanic American-owned MWBE	187	\$34,291	\$34,308	7.9			
(16) Native American-owned MWBE	13	\$632	\$633	0.1			
(17) Unknown minority-owned MWBE	2	\$23					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Non-federal

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	19,528	\$3,061,939	\$3,061,939				
(2) Minority and woman-owned businesses	3,868	\$441,787	\$441,787	14.4	23.9	-9.5	60.4
(3) Non-Hispanic white woman-owned	1,910	\$161,233	\$161,233	5.3	11.1	-5.9	47.4
(4) Minority-owned	1,958	\$280,554	\$280,554	9.2	12.8	-3.6	71.7
(5) Asian American-owned	315	\$31,195	\$32,396	1.1	3.2	-2.2	32.9
(6) Black American-owned	202	\$47,415	\$49,240	1.6	3.4	-1.7	47.9
(7) Hispanic American-owned	1,092	\$175,340	\$182,088	5.9	6.1	-0.1	98.2
(8) Native American-owned	72	\$16,206	\$16,830	0.5	0.1	0.4	200+
(9) Unknown minority-owned	277	\$10,397					
(10) MWBE-certified	2,086	\$292,075	\$292,075	9.5			
(11) Non-Hispanic white woman-owned	829	\$94,234	\$94,234	3.1			
(12) Minority-owned MWBE	1,257	\$197,841	\$197,841	6.5			
(13) Asian American-owned MWBE	199	\$13,945	\$13,945	0.5			
(14) Black American-owned MWBE	155	\$33,556	\$33,579	1.1			
(15) Hispanic American-owned MWBE	851	\$140,124	\$140,219	4.6			
(16) Native American-owned MWBE	47	\$10,082	\$10,089	0.3			
(17) Unknown minority-owned MWBE	5	\$133					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.

Time period: 01/01/2012 - 12/31/2016

Goals contracts

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

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	3,412	\$1,430,487	\$1,430,487				
(2) Minority and woman-owned businesses	1,797	\$345,053	\$345,053	24.1	23.1	1.0	104.4
(3) Non-Hispanic white woman-owned	767	\$115,952	\$115,952	8.1	12.2	-4.1	66.5
(4) Minority-owned	1,030	\$229,101	\$229,101	16.0	10.9	5.1	146.7
(5) Asian American-owned	170	\$17,060	\$17,242	1.2	2.0	-0.8	59.0
(6) Black American-owned	97	\$26,290	\$26,570	1.9	2.3	-0.4	81.5
(7) Hispanic American-owned	706	\$171,708	\$173,540	12.1	6.4	5.7	189.9
(8) Native American-owned	33	\$11,625	\$11,749	0.8	0.2	0.6	200+
(9) Unknown minority-owned	24	\$2,418					
(10) MWBE-certified	1,418	\$277,677	\$277,677	19.4			
(11) Non-Hispanic white woman-owned	550	\$88,582	\$88,582	6.2			
(12) Minority-owned MWBE	868	\$189,095	\$189,095	13.2			
(13) Asian American-owned MWBE	117	\$12,298	\$12,298	0.9			
(14) Black American-owned MWBE	93	\$25,740	\$25,755	1.8			
(15) Hispanic American-owned MWBE	626	\$142,811	\$142,896	10.0			
(16) Native American-owned MWBE	26	\$8,134	\$8,139	0.6			
(17) Unknown minority-owned MWBE	6	\$112					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.

Time period: 01/01/2012 - 12/31/2016

No goals contracts

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Federal and non-federal

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	18,378	\$2,067,064	\$2,067,064				
(2) Minority and woman-owned businesses	2,746	\$173,967	\$173,967	8.4	24.1	-15.7	34.9
(3) Non-Hispanic white woman-owned	1,468	\$68,158	\$68,158	3.3	10.0	-6.7	33.1
(4) Minority-owned	1,278	\$105,809	\$105,809	5.1	14.2	-9.1	36.1
(5) Asian American-owned	227	\$23,576	\$25,733	1.2	4.0	-2.7	31.2
(6) Black American-owned	137	\$27,910	\$30,463	1.5	4.1	-2.6	36.0
(7) Hispanic American-owned	592	\$39,606	\$43,229	2.1	6.0	-3.9	34.9
(8) Native American-owned	54	\$5,849	\$6,385	0.3	0.1	0.2	200+
(9) Unknown minority-owned	268	\$8,868					
(10) MWBE-certified	1,154	\$76,464	\$76,464	3.7			
(11) Non-Hispanic white woman-owned	478	\$23,436	\$23,436	1.1			
(12) Minority-owned MWBE	676	\$53,028	\$53,028	2.6			
(13) Asian American-owned MWBE	137	\$4,224	\$4,224	0.2			
(14) Black American-owned MWBE	92	\$14,576	\$14,588	0.7			
(15) Hispanic American-owned MWBE	412	\$31,604	\$31,630	1.5			
(16) Native American-owned MWBE	34	\$2,580	\$2,582	0.1			
(17) Unknown minority-owned MWBE	1	\$44					

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: Airport

Funding source: Federal

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses							
(2) Minority and woman-owned businesses					16.2		
(3) Non-Hispanic white woman-owned					6.9		
(4) Minority-owned					9.3		
(5) Asian American-owned					1.6		
(6) Black American-owned					2.4		
(7) Hispanic American-owned					5.1		
(8) Native American-owned					0.2		
(9) Unknown minority-owned							
(10) MWBE-certified							
(11) Non-Hispanic white woman-owned							
(12) Minority-owned MWBE							
(13) Asian American-owned MWBE							
(14) Black American-owned MWBE							
(15) Hispanic American-owned MWBE							
(16) Native American-owned MWBE							
(17) Unknown minority-owned MWBE							

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.

Time period: 01/01/2012 - 12/31/2016

Contract type: All relevant industries

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Non-federal

Analysis of potential MWBEs

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) Minority and woman-owned businesses					20.5		
(3) Non-Hispanic white woman-owned					10.1		
(4) Minority-owned					10.4		
(5) Asian American-owned					3.2		
(6) Black American-owned					3.2		
(7) Hispanic American-owned					3.8		
(8) Native American-owned					0.1		
(9) Unknown minority-owned							
(10) MWBE-certified							
(11) Non-Hispanic white woman-owned							
(12) Minority-owned MWBE							
(13) Asian American-owned MWBE							
(14) Black American-owned MWBE							
(15) Hispanic American-owned MWBE							
(16) Native American-owned MWBE							
(17) Unknown minority-owned MWBE							

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.

Time period: 01/01/2012 - 12/31/2016

Contract type: Construction

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Non-federal

Analysis of potential MWBEs

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) Minority and woman-owned businesses					16.5		
(3) Non-Hispanic white woman-owned					9.8		
(4) Minority-owned					6.7		
(5) Asian American-owned					1.5		
(6) Black American-owned					1.8		
(7) Hispanic American-owned					3.2		
(8) Native American-owned					0.2		
(9) Unknown minority-owned							
(10) MWBE-certified							
(11) Non-Hispanic white woman-owned							
(12) Minority-owned MWBE							
(13) Asian American-owned MWBE							
(14) Black American-owned MWBE							
(15) Hispanic American-owned MWBE							
(16) Native American-owned MWBE							
(17) Unknown minority-owned MWBE							

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.

Time period: 01/01/2012 - 12/31/2016

Contract type: Professional services

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Non-federal

Analysis of potential MWBEs

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) Minority and woman-owned businesses					39.5		
(3) Non-Hispanic white woman-owned					15.5		
(4) Minority-owned					24.0		
(5) Asian American-owned					2.9		
(6) Black American-owned					11.2		
(7) Hispanic American-owned					9.9		
(8) Native American-owned					0.1		
(9) Unknown minority-owned							
(10) MWBE-certified							
(11) Non-Hispanic white woman-owned							
(12) Minority-owned MWBE							
(13) Asian American-owned MWBE							
(14) Black American-owned MWBE							
(15) Hispanic American-owned MWBE							
(16) Native American-owned MWBE							
(17) Unknown minority-owned MWBE							

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-22.

Time period: 01/01/2012 - 12/31/2016

Contract type: Goods and services

Contract role: Prime contracts and subcontracts

Contract agency: All departments

Funding source: Non-federal

Analysis of potential MWBEs

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) Minority and woman-owned businesses					19.8		
(3) Non-Hispanic white woman-owned					7.6		
(4) Minority-owned					12.2		
(5) Asian American-owned					8.0		
(6) Black American-owned					2.2		
(7) Hispanic American-owned					1.9		
(8) Native American-owned					0.1		
(9) Unknown minority-owned							
(10) MWBE-certified							
(11) Non-Hispanic white woman-owned							
(12) Minority-owned MWBE							
(13) Asian American-owned MWBE							
(14) Black American-owned MWBE							
(15) Hispanic American-owned MWBE							
(16) Native American-owned MWBE							
(17) Unknown minority-owned MWBE							

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 MWBEs were allocated to minority and MWBE 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 local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.