



# **2017 Disparity Study**

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**LA Metro**

**FINAL REPORT**

**Final Report**

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# 2017 Disparity Study

**Prepared for**

Los Angeles County Metropolitan  
Transportation Authority  
One Gateway Plaza  
Los Angeles, CA 90012-2952

**Prepared by**

BBC Research & Consulting  
1999 Broadway, Suite 2200  
Denver, Colorado 80202-9750  
303.321.2547 fax 303.399.0448  
[www.bbcresearch.com](http://www.bbcresearch.com)  
[bbc@bbcresearch.com](mailto:bbc@bbcresearch.com)



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# CHAPTER ES.

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## Executive Summary

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## Executive Summary

The Los Angeles County Metropolitan Transportation Authority (Metro) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to provide information for the agency in implementing the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of United States Department of Transportation (USDOT)-funded contracts. The program comprises various measures to encourage the participation of minority- and woman-owned businesses including *race- and gender-neutral* measures—which are designed to encourage the participation of all businesses—and, potentially, *race- and gender-conscious* measures—which are designed to specifically encourage the participation of minority- and woman-owned businesses (e.g., using DBE contract goals).

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

- The percentage of contracting dollars (including subcontract dollars) that minority- and woman-owned businesses received on construction; professional services; and goods and other services contracts that Metro awarded between January 1, 2011 and December 31, 2015 (i.e., *utilization*);<sup>1</sup> and
- The percentage of construction; professional services; and goods and other services contracting dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of Metro prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding Metro’s implementation of the Federal DBE Program;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business assistance programs that Metro or other entities in its marketplace currently have in place.

Metro could use information from the study to help refine its implementation of the Federal DBE Program including setting an overall goal for the participation of DBEs in Metro’s Federal Transit Administration (FTA)-funded contracting; determining which program measures to use to encourage the participation of minority- and woman-owned businesses and DBEs; and, if appropriate, determining which groups would be eligible for any race- or gender-conscious program measures.

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

BBC summarizes key information from the 2017 Metro Disparity Study in five parts:

- A. Analyses in the disparity study;
- B. Utilization and disparity analysis results;
- C. Overall DBE Goal;
- D. Program implementation; and
- E. Qualitative Research Results Summary.

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

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

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of federal, state, and local requirements related to minority- and woman-owned business programs including the Federal DBE Program (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of the success of minorities; women; and minority- and woman-owned businesses throughout Los Angeles. In addition, the study team collected qualitative information about potential barriers that minority- and woman-owned businesses face in the local marketplace through in-depth interviews, telephone surveys, public meetings, and written testimony (see Chapter 3, Appendix C, and Appendix D).
- BBC analyzed the percentage of relevant Metro contracting dollars that minority- and woman-owned businesses are available to perform. That analysis was based on telephone surveys that the study team completed with more than 1,100 Los Angeles County businesses that work in industries related to the types of construction; professional services; and goods and other services contracts that Metro awards (see Chapter 5 and Appendix E).
- BBC analyzed the dollars that minority- and woman-owned businesses received on more than 12,000 construction; professional services; and goods and other services prime contracts and subcontracts that Metro awarded between January 1, 2011 and December 31, 2015 (i.e., the study period) (see Chapter 6).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on the construction; professional services; and goods and other services contracts that Metro awarded during the study period (see Chapter 7, Chapter 8, and Appendix F).
- BBC provided Metro with information from the availability analysis and other research that the agency might consider in setting its three-year overall DBE goal including the base figure and consideration of a "step-2" adjustment (see Chapter 9).



- BBC reviewed Metro’s current contracting practices and DBE program measures and provided guidance related to additional program options and refinements to those practices and measures (see Chapter 10, Chapter 11, and Appendix G).

## B. Utilization and Disparity Analysis Results

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

**Utilization results.** The study team measured the participation of minority- and woman-owned businesses in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on Metro prime contracts and subcontracts during the study period. Figure ES-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction; professional services; and goods and other services contracts that Metro awarded during the study period. As shown in Figure ES-1, overall, minority- and woman-owned businesses received 23.2 percent of the relevant contracting dollars that Metro awarded during the study period. The darker portion of the bar represents the percentage of contracting dollars—14.7 percent—that went to certified DBEs.

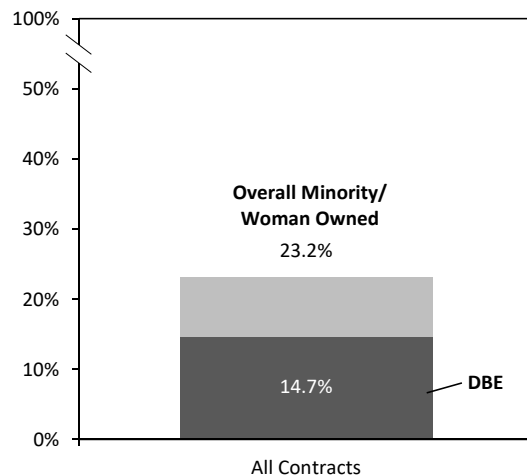
**Figure ES-1.**  
**Participation of minority- and woman-owned businesses**

**Notes:**

The study team analyzed 12,149 prime contracts and subcontracts.  
The darker portion of the bar represents participation of certified DBEs.  
For more detail, see Figure F-2 in Appendix F.

**Source:**

BBC Research & Consulting utilization analysis.



**Disparity analysis results.** Although information about the participation of minority- and woman-owned businesses in Metro contracts is useful on its own, it is even more useful when it is compared with the level of participation that might be expected based on the availability of minority- and woman-owned businesses for Metro work. In the disparity analysis, BBC compared the participation of minority- and woman-owned businesses in Metro prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work. BBC expressed both participation and availability as percentages of the total dollars that a particular group received for a

particular set of contracts. BBC then calculated a *disparity index* by dividing participation by availability and multiplying by 100.<sup>2</sup> A disparity index of 100 indicates an exact match between participation and availability for a particular group for a specific set of contracts (often referred to as *parity*). A disparity index of less than 100 may indicate a disparity between participation and availability, and disparities of less than 80 are described in this report as *substantial*.<sup>3</sup> Disparity analysis results for key contract sets are described below.

**All contracts.** Figure ES-2 presents disparity analysis results for all construction; professional services; and goods and other services contracts that Metro awarded during the study period. The line down the center of the graph shows a disparity index of 100, which indicates parity between participation and availability. For reference, a line is also drawn at a disparity index level of 80, because many courts use 80 as a threshold for what indicates a substantial disparity. As shown in Figure ES-2, overall, the participation of minority- and woman-owned businesses in contracts that Metro 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 74 indicates that minority- and woman-owned businesses considered together received approximately \$0.74 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that Metro awarded during the study period. White woman-, Black American-, and Hispanic American-owned firms exhibited disparity indices substantially below parity.

**Figure ES-2.**  
**Disparity indices by group**

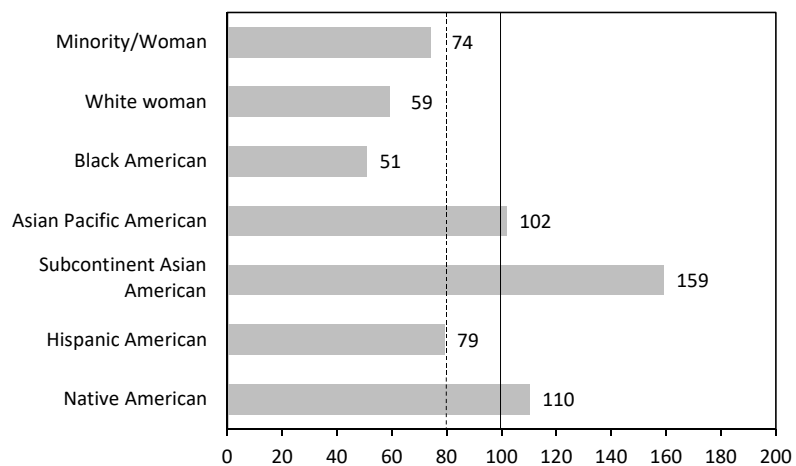
Note:

The study team analyzed 12,149 prime contracts/subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



Note that during part of the study period Metro used DBE contract goals (a race-and gender conscious measure) on USDOT-funded contracts.

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

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

**Contracts with and without race- or gender-conscious measures.** On many of the contracts during the study period, Metro applied race- and gender-conscious DBE subcontracting goals. It is important to consider disparity analyses on sets of contracts where goals were applied with those that were not subject to race- or gender-conscious measures. Examining participation in no-goals contracts provides useful information about outcomes for minority-owned businesses and woman-owned businesses on contracts that Metro awarded in a race-neutral and gender-neutral environment and whether there is evidence that certain groups face any discrimination or barriers as part of Metro’s contracting.<sup>4, 5, 6</sup> Figure ES-3 presents disparity analysis results for contracts awarded using DBE goals and contracts awarded without using DBE goals. As shown in Figure ES-3, overall, most groups experienced greater disparities on contracts awarded without goals than on those where DBE goals were applied. All groups, with the exception of Subcontinent Asian American-owned businesses, exhibited disparity indices substantially below parity on contracts without DBE goals.

**Figure ES-3.**  
**Disparity indices for goals and no-goals contracts**

Note:

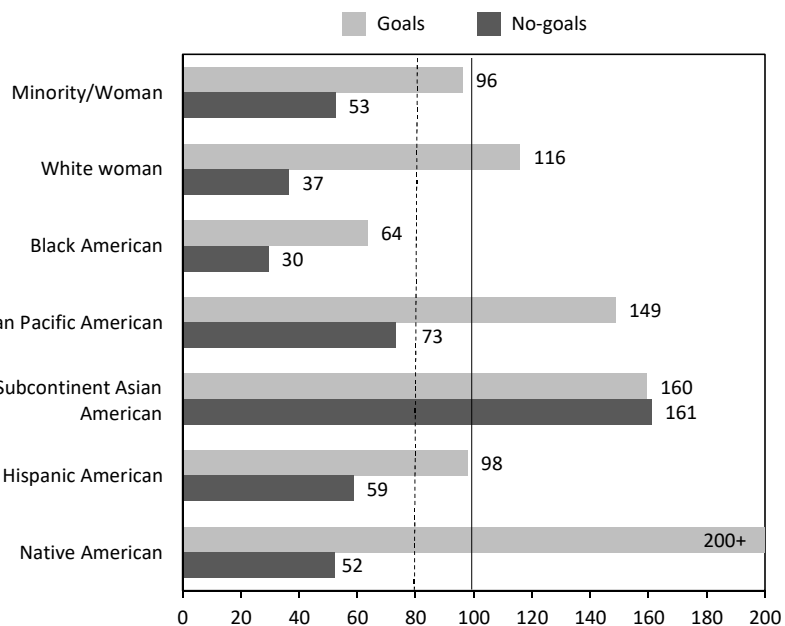
The study team analyzed 5,293 contract elements to which subcontracting goals applied. The study team analyzed 6,896 contract elements to which no subcontracting goals applied.

Race-conscious goals were applied beginning in June of 2013 and gender-conscious goals began in October of 2015. Those contracts included in the goals analysis included race and/or gender conscious goals or both.

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

Source:

BBC Research & Consulting disparity analysis.



### C. Overall DBE Goal

According to 49 Code of Federal Regulations (CFR) Part 26, an agency is required to develop and submit an overall goal for DBE participation. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate on the agency’s USDOT-funded contracts. The agency must try to meet the goal using race- and gender-neutral means and, if necessary, race- and gender-conscious means.<sup>7</sup> As specified in the Final

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> H. B. Rowe Co., Inc. v. Wyndo Tippett, NCDOT, et al., 615 F.3d 233,246 (4th Cir. 2010).

<sup>7</sup> 49 CFR Sections 26.45, 26.51.

Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every three years.<sup>8</sup> However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable it to meet the goal in the next year.

Metro must prepare and submit an overall DBE goal for federal fiscal years (FFYs) 2019 through 2021 that is supported by information about the steps that it used to develop the goal. Federal regulations require Metro to establish its overall DBE goal using a two-step process:

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

**Determining a base figure.** Establishing a base figure is the first step in calculating an overall DBE goal for Metro’s FTA-funded contracts. BBC calculated the base figure by measuring the availability of *potential DBEs*—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26. BBC examined the availability of potential DBEs for FTA-funded prime contracts and subcontracts that Metro awarded during the study period. BBC’s approach to calculating Metro’s base figure is consistent with relevant court decisions, federal regulations, and USDOT guidance. BBC’s analysis indicates that the availability of potential DBEs for Metro’s FTA-funded contracts is 27.0 percent. Metro might consider 27.0 percent as the base figure for its overall goal for DBE participation.<sup>9</sup>

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

- Current capacity of DBEs to perform agency work as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.<sup>10</sup>

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<sup>8</sup> <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

<sup>9</sup> Metro should consider whether the types, sizes, and locations of FTA-funded contracts that the agency anticipates awarding in the time period that the goal will cover will be similar to the types of FTA-funded contracts that the agency awarded during the study period.

<sup>10</sup> 49 CFR Section 26.45.

Based on information from the disparity study, there are several reasons why Metro might consider adjusting the 27.0 percent base figure:

- Metro might consider making an upward adjustment to its base figure to account for barriers that minorities, women, and minority- and woman-owned businesses face in the Los Angeles marketplace related to human capital, financial capital, business ownership, and business success (for details, see Chapter 3 and Appendices C and D). Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”<sup>11</sup>
- Metro might also consider a downward adjustment to its base figure based on the volume of work that DBEs have performed in recent years on its contracts. Metro’s utilization reports for FFYs 2011 through 2014 indicated median annual DBE participation of 3.7 percent for those years, which is lower than its base figure. (BBC’s analyses showed DBE participation on Metro contracts during the study period to be 15.1 percent.) USDOT’s “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation.

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

## **D. Program Implementation**

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

- Metro should consider continuing and expanding its efforts to network with minority- and woman-owned businesses (such as the monthly Transportation Business Advisory Council (TBAC) meetings).
- To further encourage the participation of small businesses—including many minority- and woman-owned businesses—Metro should consider making efforts to unbundle relatively large contracts (e.g. large construction or design/build contracts) into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation.
- Given the anticipated size and types of projects expected with Measure M, Metro should consider information presented in Appendix G regarding best practices for encouraging participation by small businesses, and minority- and women-owned businesses on design-build, public private partnership (P3), and other “mega-projects.”

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<sup>11</sup> 49 CFR Section 26.45 (b).

- Metro should consider continuing to explore ways to increase prime contracting opportunities for small businesses including many minority- and woman-owned businesses. For example, Metro might consider expanding its set aside small prime contractor program for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. Metro could consider increasing the number of contracts included in the small prime contractor set aside program, as well, as the dollar limits around those contracts.
- Metro should also explore ways to increase subcontracting opportunities for small, minority-, and woman-owned businesses. Metro could consider implementing a program that requires prime contractors to include certain minimum levels of subcontracting as part of their bids and proposals. Prime contractors bidding on the contract would be required to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be responsive. Due to Proposition 209, Metro cannot implement race and gender conscious measures on state- and locally-funded contracts.
- Disparity analysis results indicated that most racial/ethnic and gender groups showed disparities on contracts where race- and gender-conscious measures were not in place during the study period. As a result, Metro should consider using DBE contract goals in the future. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).
- Many small businesses who participated in in-depth interviews and public meetings discussed the difficulties they experienced with cash flow due to delayed payment. Metro should continue to review prompt payment programs and policies that help address those issues, especially for second- and third-tier subcontractors.

As part of the disparity study, the study team also examined information concerning conditions in the local marketplace for minorities; women; and minority- and woman-owned businesses including results for different racial/ethnic and gender groups. Metro should review the full disparity study report, as well as other information it may have, in determining whether it needs to use any race- or gender-conscious measures as part of its efforts to comply with the Federal DBE Program, and if so, what groups might be considered eligible to participate in such measures.

## **E. Qualitative Research Results Summary**

Throughout the disparity study, business owners and managers; trade association representatives; and other key stakeholders had the opportunity to share their experiences with working in the Los Angeles metropolitan area. BBC collected testimony and qualitative information about the local marketplace through a variety of efforts including:

- Conducting in-depth interviews;
- Conducting telephone surveys;
- Facilitating focus groups;
- Facilitating public meetings; and
- Soliciting stakeholders for written testimony.

BBC analyzed the qualitative information and public testimony that we collected throughout the study and identified several important themes around key study topics. Those results are summarized below. For details about the various efforts that BBC used, see Appendix D.

BBC study team engaged the Transportation Business Advisory Council (TBAC) in the disparity study by attending four TBAC meetings to update the board and its members on the progress of the disparity study and to encourage participation through written testimony and to complete availability and utilizations surveys, if contacted.

**Experiences Working with Metro and Other Public Sector Organizations.** Business owners and managers shared their experiences working with Metro and with other public sector organizations.

**Many business owners and managers offered positive comments about working with Metro and other public sector organizations.** Key comments included the following:

- Several businesses felt that public sector work was advantageous, because it was often more profitable, set clearer expectations for contractors, and there was less favoritism by prime contractors during project team selection because of SBE and DBE requirements.
- Three business owners viewed Metro as more approachable and focused on small business development than other public agencies. One business owner stated, “The biggest difference is that Metro, over the last years and during the recession, had the most opportunities [compared to other agencies and cities]. Many consultants of my type tried to get work with other agencies, and we agree that Metro provides the most opportunity for SBE and DBE firms and are the strongest in bringing along small firms.”
- Two business owners praised Metro’s “Meet the Primes” event as particularly helpful for small businesses. One business owner commented, “[Metro] had a master outreach event that had all their general contractors in one building. And it was great. You could move from room to room to room and walk around. And ... it's free parking. That's huge.”
- Most business owners and managers expressed support for small business set-asides on Metro and other public sector contracts.

**Some business owners and managers had negative comments about working with Metro and other public sector organizations.** Key comments included the following:

- Business owners and managers identified the general complexity and difficulty of the public sector bidding process; the length and large size of projects; and the lack of transparency in the bid selection process as challenges, especially for small, disadvantaged businesses. For example, one business owner noted, “[Public sector work is] harder because of the competition involved, the bond requirements, insurance requirements, and the necessary capital to perform the work.” Another business executive stated, “Our firm is small so our marketing group is one full-time person. We don’t have the experience or staff to prepare proposals, especially [consistent with] what we think would be expected by Metro.”
- The most common complaints about doing business with Metro included difficulties finding out about contract opportunities, the complexity of RFP requirements, meeting contract pre-

qualification standards, and finding out which businesses were awarded contracts. Business owners highlighted the difficulty of navigating Metro’s website and finding contract opportunities through Metro’s vendor portal.

- Two business owners raised concerns about timely payment on Metro contracts.

**Some business owners and managers offered recommendations for Metro to improve its contracting processes.** Many business owners commented on Metro’s mentor-protégé initiative. Small business owners generally favored this type of program. However, five business owners felt that Metro needs to clarify program expectations and desired outcomes to ensure effectiveness. One business owner said, “Metro is now including a provision for mentoring, but they don’t have a clear program with structure. If Metro is going to [the program] seriously, primes need a clear idea of what the mentoring is supposed to do [and of the objectives]. [The primes] wonder, ‘Why would somebody train a company that is going to be a competitor?’”

**Other business owners and managers encouraged Metro to improve its contract notification process.** Business owners recommended a number of possible solutions, including:

- Metro should consider streamlining how it organizes opportunities on its vendor portal to make it easier to locate relevant contracting opportunities;
- Metro should create a separate vendor portal for small business opportunities; and
- Metro should do a better a job communicating about contract opportunities, especially via email. For example, one business owner said, “[Metro’s] online system is a little complicated. I mean it’s kind of hard to navigate. I mean they could probably simplify that a little more because on one section—where it asks you to look at the solicitations where they have numbers and they have the descriptions—it’s so many. So, if they can ‘segmentize’—if that’s a word—things that are for the janitorial contractors as primes, list that in a section, then we can look. Because we’re scrolling through a lot of stuff that doesn’t pertain to us. When you go through the section of solicitations, you have to scroll through pages and pages of stuff that doesn’t pertain to us at all.”

**Barriers and Challenges for Small Businesses in Los Angeles.** Business owners and managers discussed the challenges that they and others face in the Los Angeles marketplace.

Business owners and managers also discussed the continued existence of double standards for and stereotypical attitudes about minorities and women in the LA marketplace. For example, the Hispanic American male owner of a DBE- and MBE-certified specialty contracting company observed, “When we first started, we had to prove every step of the way we had the ability to do the work.” [Caltrans Interview #46a] However, some minority and woman business owners that the study team interviewed did not think that their businesses had been affected by any race- or gender-based discrimination.



Theme	Frequency Count	Illustrative Quote
<b>Insurance Requirements and Obtaining Insurance</b>	13	The executive of a non-Hispanic white male-owned landscape architecture firm explained, “In this case, the insurance requirements shouldn’t be one-size-fits-all...sometimes we’re being asked to have insurance coverage which is the same as the engineer or the architect who needs to have it for the [total project cost of] \$20,000,000. So, for us to be paying for insurance coverage which is far greater than our role in the project is not good, and many agencies and companies don’t recognize that...We can’t justify paying that amount of insurance for one project when our fee on that project is not adequate to cover the additional insurance.” [Interview #5]
<b>Obtaining Financing</b>	11	The Black American female owner of a construction-related business stated that the biggest challenge to starting and maintaining her company is obtaining funding. She reported having very little cash or other resources to invest at startup, which affected her ability to pursue opportunities, purchase equipment, and fund the day-to-day operations of her business. [Caltrans Interview #2]
<b>Delayed Payment, Lack of Payment and Other Payment Issues</b>	9	The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, “[Payment is] always a challenge because we don’t get paid fast enough. My challenge is 30 percent of my total contract goes to my subs. And all those subs want their money fast. And because I’m a small company I always pay them fast because I want to maintain a relationship with those companies. If we don’t get paid fast enough we can’t pay them. We always have a huge cash flow issue.” [Interview #13]

**DBE Certification and Program Implementation.** Business owners and managers offered several comments about DBE certification and Metro’s implementation of the Federal DBE program.

- The majority of business owners praised DBE certification as advantageous. For example, one business owner said that one of the advantages of being certified is the fact that prime contractors will take notice of certified businesses more than non-certified businesses because of public project requirements and the credit that they receive. She went on to add, “It puts your name out there more.”
- One business owner, when asked how the DBE program impacts her firm’s business said, “Oh, positively, 100 percent.” She added, “Bigger corporations will not give you the time of day unless you have that certification. Two companies specifically wanted to use us because of our DBE [certification]. Now, they kept using us because of our customer service and our DBE [status].”

**Business owners and managers offered differing opinions about the effectiveness of Metro and other agencies’ implementations of the Federal DBE program and expressed differing opinions about the program’s effectiveness.** For example:

- Several business owners thought the DBE program was helpful but were concerned about Metro’s enforcement of it. A representative of a trade association stated that many prime contractors do not know that Metro has eliminated good faith effort guidelines. He stated,

“They think they can put down some [DBE] firms on their list and not follow through. They don’t realize Metro is serious.” The manager of another business said, “The DBE- program is great, but it is not perfect.” He explained that if Metro wants to limit disparities, there must be change at the policy and procedural level. He explained that if there is a billion dollar project and 20 percent of it has to be committed to DBEs, then there needs to be more monitoring in place to make sure the prime contractor is actually awarding the work to the DBEs that it identified in the bid.

- Several business representatives felt that the DBE and other disadvantaged business programs in California have adverse effects on other businesses and on marketplace competition. For example, several business owners questioned how a minority should be defined in the context of southern California’s relatively high concentration of racial/ethnic minorities. One business owner stated, “The minority-owned [certification] programs in southern California should hold no weight anymore, because there is no majority. It’s Southern California.”

# CHAPTER 1.

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Introduction

# CHAPTER 1.

## Introduction

The Los Angeles County Metropolitan Transportation Authority (Metro) is the transportation planner, coordinator, designer, builder, and operator of the public transportation system for Los Angeles County. As a United States Department of Transportation (USDOT) fund recipient, Metro implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address any potential discrimination against DBEs in the award and administration of USDOT-funded contracts.

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

- The percentage of contract dollars (including subcontract dollars) that Metro 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 Metro's prime contracts and subcontracts (i.e., *availability*).

BBC also assessed other quantitative and qualitative information related to:

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

The following reasons demonstrate why the disparity study will be useful to Metro as it makes decisions about its implementation of the Federal DBE Program:

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

BBC introduces the 2017 Metro Disparity Study in three parts:

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

## **A. Background**

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

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

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

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

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

<sup>2</sup> 49 CFR Section 26.51.

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

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

## **B. Study Scope**

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

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

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

**DBEs.** DBEs are minority- and woman-owned businesses that are specifically certified as such through CUCP certifying agencies, such as, Metro. A determination of DBE eligibility includes assessing businesses' gross revenues and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-

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

owned businesses do not qualify as DBEs because of gross revenue or net worth requirements.<sup>4</sup> Businesses seeking DBE certification in California are required to submit an application to Metro or other UCP Certifying Agencies. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of their owners. Metro reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm business information.

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

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

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

- Classifying those businesses as both minority-owned and woman-owned;
- Creating unique groups of minority woman-owned businesses;

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

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

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

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

At the time of this study, the overall revenue limit for DBE certification was \$23,980,000 based on a three-year average of gross receipts. There were lower revenue limits for specific subindustries according to United States Small Business Administration (SBA) small business size standards. Only a few minority- and woman-owned businesses appeared to have exceeded those revenue limits based on information that they provided as part of availability surveys.

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

- Classifying minority woman-owned businesses with all other woman-owned businesses; and
- Classifying minority woman-owned businesses with their corresponding minority groups.

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

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

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

**Analyses in the disparity study.** The disparity study examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on Metro contracts. The study focused on transportation-related construction; professional services including architecture and engineering; and goods and other services contracts that Metro awarded between January 1, 2011 and December 31, 2015 (i.e., the study period). For the second half of the study (after June 1, 2013), Metro applied DBE contract goals to many of the federally-funded contracts that it awarded. Prior to June of 2013, Metro operated a race- and gender neutral program.

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

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

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

**Legal framework and analysis.** The study team conducted a detailed analysis of relevant federal regulations, case law, state law, and other information to guide the methodology for the disparity study. The analysis included a review of federal and state requirements concerning Metro's implementation of the Federal DBE Program. The legal framework and analysis for the study is summarized in **Chapter 2** and presented in detail in **Appendix B**.



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

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

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

**Utilization analysis.** BBC analyzed contract dollars that Metro spent with minority- and woman-owned businesses on transportation-related contracts that the agency awarded between January 1, 2011 and December 31, 2015. Those data included information about associated subcontracts.<sup>5</sup> Metro applied DBE contract goals to many of those contracts. BBC analyzed utilization separately for businesses owned by specific minority groups and non-Hispanic women and for different types of contracts. Results from the utilization analysis are presented in **Chapter 6.**

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

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

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<sup>5</sup> Prime contractors—not Metro—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to Metro as *awarding* subcontracts.

**Overall DBE goal.** Based on information from the availability analysis and other research, BBC provided Metro with information that will help the agency set its overall DBE goal including the base figure and consideration of a step-2 adjustment. Information about Metro’s overall DBE goal is presented in **Chapter 9**.

**Race- and gender-neutral measures.** BBC reviewed information regarding evidence of discrimination in the Los Angeles County contracting marketplace; analyzed Metro’s experience with meeting its overall DBE goal in the past; and provided information about Metro’s past performance in encouraging the participation of minority- and woman-owned businesses using race- and gender-neutral measures. Information from those analyses is presented in **Chapter 10**. **Appendix G** provides information on measures to encourage participation specifically on large projects such as design/build contract or public-private partnerships.

**Federal DBE Program.** BBC reviewed Metro’s implementation of the Federal DBE Program. BBC provided guidance related to additional program options. The study team’s review and guidance is presented in **Chapter 11**.

### **C. Study Team Members**

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

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

**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 Los Angeles businesses to gather information for the utilization and availability analyses.

**GCAP Services.** GCAP is a minority-owned, small business professional services firm based in Costa Mesa and Sacramento, California. GCAP conducted in-depth interviews with Los Angeles businesses, and assisted the project team with community engagement and data collection tasks.

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

**PDA Consulting Group.** PDA is a minority woman-owned, small business professional services firm based in Inglewood, California. PDA conducted in-depth interviews with Los Angeles businesses as part of the study team’s qualitative analyses of marketplace conditions.

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

**Bohica Advisors, LLC.** Bohica is a Disadvantaged Veteran Business Enterprise (DVBE) owned consulting firm based in Irvine, California. Bohica conducted in-depth interviews with Los Angeles businesses as part of the qualitative analyses of the marketplace conditions.

# **CHAPTER 2.**

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## **Legal Analysis**

# CHAPTER 2.

## Legal Analysis

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

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

### A. Program Elements

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

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

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

A determination of economic disadvantage includes assessing businesses' gross revenues and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and

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

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

in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

**Certification requirements.** Businesses seeking DBE certification in California are required to submit an application to a certifying agency of the California Unified Certification Program (CUCP). Metro is a certifying agency for CUCP. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners through an online portal. CUCP reviews each application for approval. The review process involves on-site meetings and additional documentation to confirm required business information.

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

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

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

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

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

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

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

Metro implemented the Federal DBE Program using different approaches during the study period (i.e., January 1, 2011 through Dec 31, 2015). Between January 1, 2011 and May 31, 2013, Metro operated an entirely race- and gender-neutral program. However, beginning on June 1, 2013, Metro began using DBE contract goals in awarding many of its USDOT-funded contracts.

## B. Legal Standards

Metro's use of DBE contract goals is considered a race- and gender-conscious measure. Prime contractors can meet DBE contract goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to meet the goals but could not do so. The United States Supreme Court has established that government programs that include race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.<sup>5</sup> The two key U.S. Supreme Court cases that established the strict scrutiny standard for such measures are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;<sup>6</sup> and
- The 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.<sup>7</sup>

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

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

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

**Strict scrutiny standard.** An agency must meet both the *compelling governmental interest* and the *narrow tailoring* components of the strict scrutiny standard. A program that fails to meet either component is unconstitutional. Many programs have failed to meet the strict scrutiny standard, because they have failed to meet the compelling governmental interest requirement, the narrow tailoring requirement, or both. However, many other programs have met the strict scrutiny standard and courts have deemed them to be constitutional. Appendix B provides detailed discussions of the related case law.

**Compelling governmental interest.** An agency must demonstrate a *compelling governmental interest* in remedying past identified discrimination in order to use race- or gender-conscious measures. An agency that uses race- or gender-conscious measures as part of a minority- or woman-owned business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Agencies cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.<sup>8</sup> It is not necessary for a government agency itself to have discriminated against minority- or woman-owned businesses for it to act. In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, “if [the governmental entity] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

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

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

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

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

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

- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.<sup>9</sup>

**Proposition 209.** In addition to USDOT-funded contracts, Metro awards transportation contracts that are solely funded through local sources. The Federal DBE Program does not apply to those contracts. Many agencies apply minority- and woman-owned business goals to locally-funded contracts in a manner that is very similar to how they set DBE goals on individual federally-funded contracts. For example, the Texas Department of Transportation operates a Historically Underutilized Business Program that includes contract goals on certain state-funded contracts. The North Carolina Department of Transportation and the Indiana Department of Transportation both use goals programs in place for to their locally-funded contracts that mirror the race- and gender-conscious aspects of the Federal DBE Program.

Metro does not apply minority- and woman-owned business goals to its locally-funded contracts because of Proposition 209, which California voters passed in November 1996. Proposition 209 amended state law to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. However, Proposition 209 did not prohibit those actions if an agency is required to take them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.” Thus, Proposition 209 prohibits government agencies in California from applying race- and gender-conscious measures to locally-funded contracts but not necessarily to federally-funded contracts.

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<sup>9</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted).



# **CHAPTER 3.**

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## **Marketplace Conditions**

## CHAPTER 3.

# Marketplace Conditions

Historically, there have been a myriad of 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.<sup>1,2,3,4</sup> Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.<sup>5</sup>

In the 19<sup>th</sup> and early 20<sup>th</sup> centuries, minorities in Los Angeles County faced barriers that were similar to those that minorities faced nationwide. Discriminatory treatment was common for minorities in Los Angeles County. Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans routinely experienced housing discrimination in the form of racially-restrictive housing covenants.<sup>6,7</sup> Employment discrimination was also a barrier for race/ethnic minorities. Black Americans, Hispanic Americans, and Native Americans were excluded from unionized skilled trades and typically worked low skill, temporary jobs that paid low wages.<sup>8,9,10,11</sup> Black Americans, Native Americans, and Chinese Americans were also the victims of racially-motivated harassment and violence in Los Angeles County, including assaults, lynching, and bombings.<sup>12,13,14</sup> In addition, the City of Los Angeles passed legislation in the early 20<sup>th</sup> century to set limits on the number and location of Chinese American-owned businesses within their jurisdiction.<sup>15</sup>

In the middle of the 20<sup>th</sup> century, many legal and workplace reforms opened up new opportunities for minorities and women nationwide. *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of race-based and gender-based discrimination. Workplaces adopted formalized personnel policies and implemented programs to diversify their staffs.<sup>16</sup> Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women<sup>17,18,19,20</sup> 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.<sup>21,22,23</sup>

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-based and gender-based discrimination in that marketplace.<sup>24,25,26</sup> The United States Supreme Court and other federal courts have held that analyses of conditions in a local marketplace for minorities; women, minority-owned businesses, and woman-owned businesses are instructive in determining whether agencies' implementations of minority-owned business and woman-owned business programs are appropriate and justified. Those analyses help

agencies determine whether they are *passively participating* in any race-based or gender-based discrimination that makes it more difficult for minority-owned businesses and woman-owned businesses to successfully compete for their contracts. Passive participation in discrimination means that agencies unintentionally perpetuate race-based or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race-based or gender-based discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.<sup>27, 28, 29</sup>

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, minority-owned businesses, and woman-owned businesses face any barriers in the Los Angeles County construction; professional services; or goods and other services industries. The study team also examined the potential effects that any such barriers have on the formation and success of minority-owned businesses and woman-owned businesses and on their participation in, and availability for, contracts that the Los Angeles County Metropolitan Transportation Authority (Metro) 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-owned businesses 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-based 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.<sup>30, 31, 32, 33</sup> Any race-based 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.<sup>34, 35</sup> Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education that they receive.<sup>36, 37</sup> Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.<sup>38</sup> In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.<sup>39</sup> 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.<sup>40</sup>

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

Many of the individuals participating in in-depth interviews and public meetings stated that prior to starting their own business, they worked for other businesses in the field and that allowed them to gain the education and experience to enable them to start their own business. For instance, the Asian American male owner of a structural and civil engineering firm indicated that opening his own engineering firm had always been a childhood dream. He explained how he first began working for small government and private companies inspecting cement bridges and buildings abroad in the 1960s. After migrating to the U.S., he enrolled into a university in Los Angeles where he studied earthquake engineering. After gaining experience working for small engineering firms in the U.S., he decided to open his own business in 1982. He stated: “With all the resources like the savings and the experiences, including the clients of my original employers, I was able to have those former clients of my employers to be the ones I should start looking for project or projects that might help in this newly formed office of mine.”

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

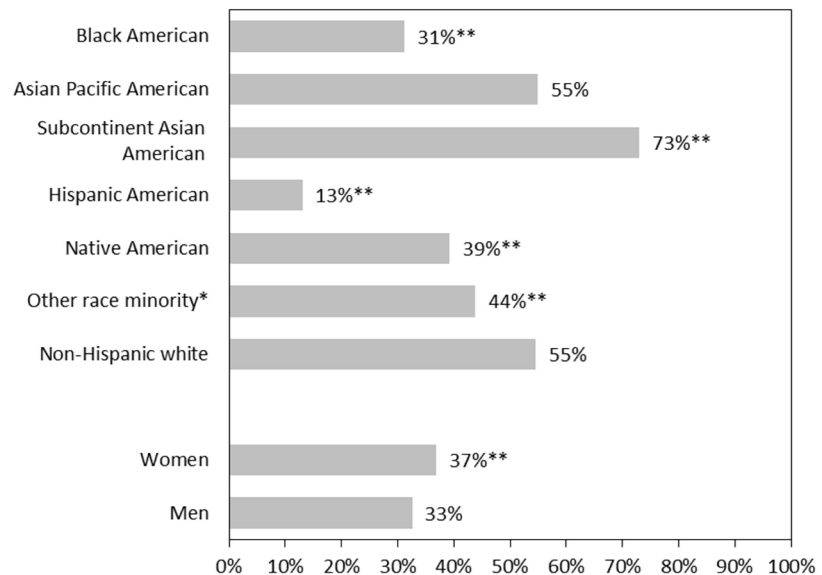
Note:

\* Represents other races not represented in any of the other race categories

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

Source:

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



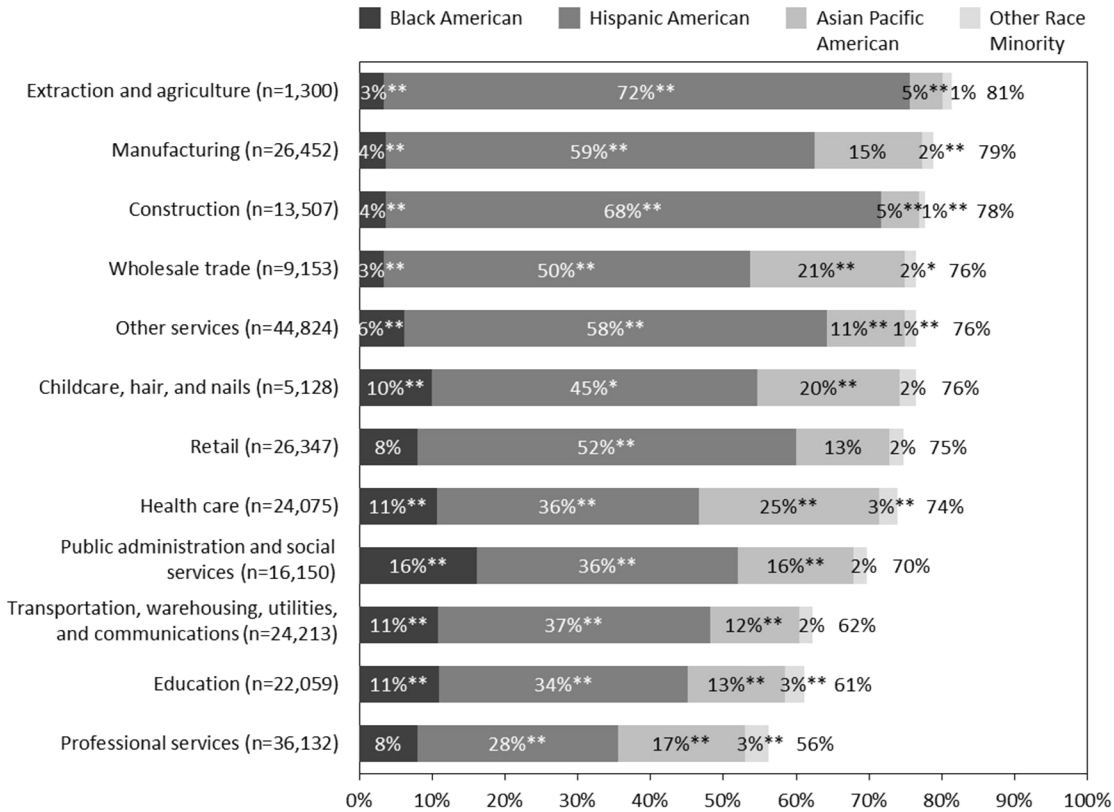
**Employment and management experience.** An important precursor to business ownership and success is acquiring direct work and management experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related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

**Employment.** On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire relevant work experience. Minorities and women are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.<sup>41, 42, 43</sup> When employed, minorities and women are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.<sup>44, 45, 46, 47, 48</sup> In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in California and nationwide, which contributes to a number of labor difficulties including difficulties finding jobs and relatively slow wage growth.<sup>49, 50, 51, 52</sup>

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

Some of the individuals participating in the in-depth interviews and public meetings made comments regarding the difficulties around finding experienced employees. For instance, the non-Hispanic white male president and CEO of a pest control firm said "I have a hard time finding people with experience. There are some provisions that I can train people. I want to get Spanish-speaking or bilingual people. People who are culturally-sensitive. Females in this job tend to have a harder time, this tends to be a male [industry.] I have a female that works for me, a technician. I had to fight internally, like 'No I'm going to give this person a chance. They're qualified. This is the United States.' I think learning the trade for females can be a problem."

**Figure 3-2.**  
**Percent representation of minorities in various industries in Los Angeles County, 2011-2015**



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

. The representation of minorities among all LA County workers is 8% for Black Americans, 46% for Hispanic Americans, 14% for Asian Pacific Americans, 2% for other race minorities and 71% for all minorities considered together.

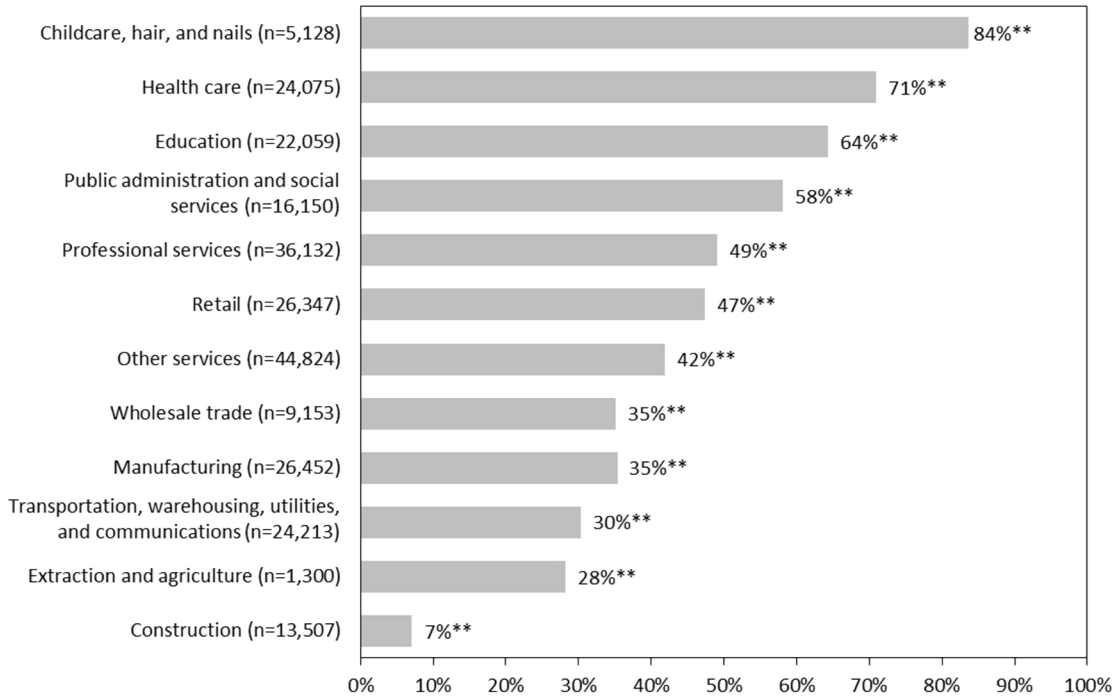
"Other race minority" includes Asian Pacific Americans, Subcontinent Asian Americans, Native Americans, and other races.

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

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

Figures 3-3 indicates that the Los Angeles County industries with the highest representations of women workers are childcare, hair, and nails; healthcare; and education. The Los Angeles County industries with the lowest representations of women workers are transportation, warehousing, utilities, and communications; extraction and agriculture; and construction.

**Figure 3-3.**  
**Percent representation of women in various industries in Los Angeles County, 2011-2015**



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

The representation of women among all Los Angeles County workers is 46%.

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

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

**Management experience.** Managerial experience is an essential predictor of business success. However, race-based and gender-based discrimination remains a persistent obstacle to greater diversity in management positions.<sup>53, 54, 55</sup> Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.<sup>56, 57</sup> Similar outcomes appear to exist for minorities and women in Los Angeles County. The study team examined the concentration of minorities and women in management positions in the Los Angeles County construction; professional services; and goods and other services industries. As shown in Figure 3-4:

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

- Compared to non-Hispanic whites, smaller percentages of Black Americans, Hispanic Americans, and other race minorities work as managers in the Los Angeles County goods and other services industry. In addition, a smaller percentage of women than men work as managers in the Los Angeles County goods and other services industry.

Many individuals that participated in in-depth interviews and public meetings expressed their frustration with the difficulties around gained experience in the industries where they work. For example, the female representative of a minority woman owned DBE-certified supply firm commented, “A lot of these larger corporations have men in power; thus, they want to work with a man that has the same power.” She added, “When they walk into a room, some of these guys don’t speak because they don’t even want to work with women in business because they don’t feel that they’re on the same level. This attitude impedes progress and advancement in the industry.”

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

	Construction	Professional Services	Goods and Services
<b>Race/ethnicity</b>			
Black American	8.1 % **	5.6 %	0.7 % **
Asian Pacific American	11.6 **	2.1 **	3.1 **
Subcontinent Asian American	19.1	0.0	4.7
Hispanic American	2.5 **	3.7	0.8 **
Native American	4.1 **	0.0 †	6.2
Other Race Minority	12.4	0.0 †	0.0 *
Non-Hispanic white	15.6	4.1	4.9
<b>Gender</b>			
Women	7.1 %	1.7 % **	1.3 % **
Men	6.1	4.2	2.5
<b>All individuals</b>	<b>6.2 %</b>	<b>3.6 %</b>	<b>2.1 %</b>

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

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

**Intergenerational business experience.** Having a family member who owns a business and is working in that business is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks; obtain knowledge of best practices and business etiquette; and receive hands-on experience in helping to run businesses. However, at least nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.<sup>58,59</sup> 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.<sup>60,61,62</sup> Individuals can acquire financial capital through many sources including employment wages, personal wealth, homeownership, and financing. If race-based 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.<sup>63, 64, 65</sup> For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.<sup>66, 67</sup> Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 84 percent the median hourly wage of men.<sup>68</sup> Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

BBC observed wage gaps in Los Angeles County consistent with those that researchers have observed nationally. Figure 3-5 presents mean annual wages for Los Angeles County workers by race/ethnicity and gender. As shown in Figure 3-5, Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities in Los Angeles County 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-neutral 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, or other race minority was associated with substantially lower earnings than being non-Hispanic white, even after accounting for various race-neutral 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).

Some individuals participating in in-depth interviews and public hearings had comments about income disparity. For instance, the Asian-Pacific American male director of an architectural, planning and engineering services firm stated “...What I would personally like to see is less of a focus on ethnicity, speaking as an Asian male, and more of a focus on perhaps income disparity. Because if you come from a poor family and if you grew up in a poor neighborhood, whether you’re black or white or Asian or Hispanic, it shouldn’t really matter. If we have a program that says, ‘If you can prove that your parents were economically disadvantaged, and we have a program to help you overcome that.’ I think that would be wonderful. Get away from the whole ethnicity thing. Because speaking as a Canadian company, it’s amazing how the Canadians are completely blind to ethnicity. They really don’t see color at all. I think the real disparity is income disparity. And you can be white and poor, and why don’t you deserve help? That’s my own personal feelings. If we have a program, a disadvantaged program, let’s look at income.”

**Figure 3-5.**  
**Mean annual wages**  
**among Los Angeles**  
**County workers, 2011-**  
**2015**

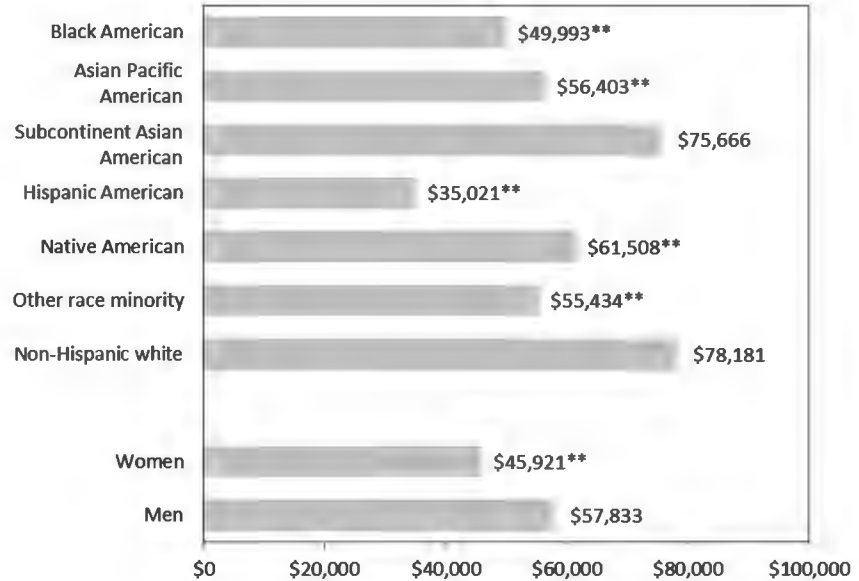
Note:

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

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

Source:

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



**Personal wealth.** Another important potential source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.<sup>69, 70</sup> For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent that of non-Hispanic whites, respectively. In California and nationwide, approximately one-quarter of Black Americans and Hispanic Americans are living in poverty, about double the comparable rates for non-Hispanic whites.<sup>71</sup> Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.<sup>72</sup>

**Homeownership.** Homeownership and home equity have been shown to be key sources of business capital.<sup>73, 74</sup> However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.<sup>75</sup> Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.<sup>76, 77</sup> 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.<sup>78, 79</sup> 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.<sup>80, 81</sup>

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

**Figure 3-6.**  
**Home ownership rates in**  
**Los Angeles County, 2011-**  
**2015**

Note:  
 The sample universe is all households.  
 \*\* Denotes statistically significant differences  
 from non-Hispanic whites at the 95%  
 confidence level.  
 Source:  
 BBC Research & Consulting from 2011-2015  
 ACS 5% Public Use Microdata sample. The raw  
 data extract was obtained through the IPUMS  
 program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

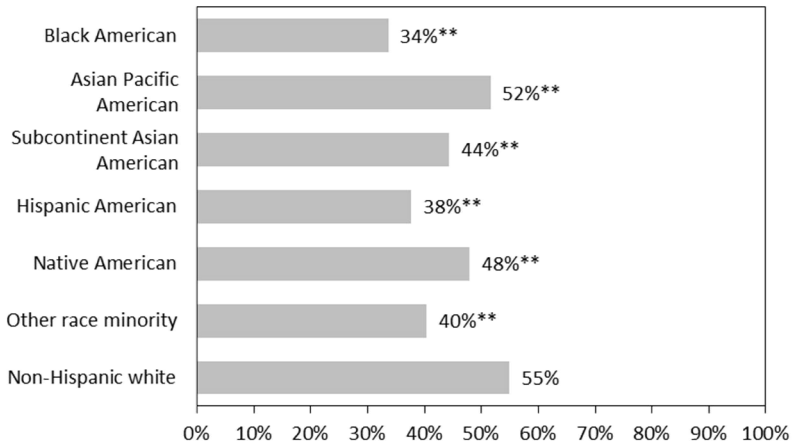
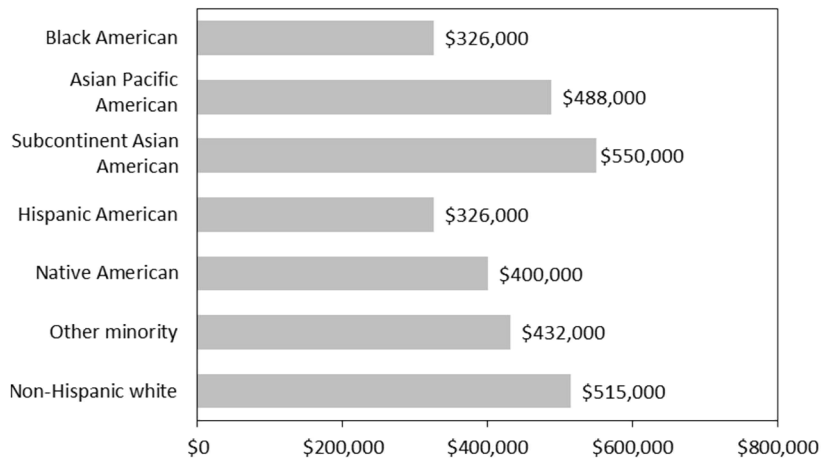


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Los Angeles County. Consistent with national trends, homeowners of certain minority groups—Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities—own homes that,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

**Figure 3-7.**  
**Median home values in Los**  
**Angeles County, 2011-2015**

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



**Access to financing.** Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race-based and gender-based discrimination that exist in credit markets.<sup>82, 83, 84, 85, 86, 87</sup> The study team summarizes results related to difficulties that minorities, women, minority-owned businesses, and woman-owned businesses face in the home credit and business credit markets.

Some individuals participating in in-depth interviews and public meetings spoke to the difficulties of getting financing as a small business. For example, the Black American female owner of a construction-related business stated that the biggest challenge to starting and maintaining her company is obtaining financing. She reported having very little cash or other resources to invest at startup, which affected her ability to pursue opportunities, purchase equipment, and fund the day-to-day operations of her business.

**Home credit.** Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.<sup>88, 89, 90, 91, 92</sup> Race-based and gender-based barriers in home credit markets, as well as the recent foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.<sup>93, 94, 95, 96</sup>

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 data for Los Angeles County and the United States as a whole. As shown in Figure 3-8, all relevant race/ethnic minority groups exhibit higher home loan denial rates than non-Hispanic whites in the United States. In Los Angeles County, Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or other Pacific Islanders exhibit higher home loan denial rates than non-Hispanic whites. In addition, the study team's analyses indicate that certain minority groups in Los Angeles County are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-14 in Appendix C).

**Business credit.** Minority-owned businesses and woman-owned businesses face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.<sup>97</sup> 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-neutral and gender-neutral factors.<sup>98, 99, 100</sup> In addition, women are less likely to apply for credit and receive loans of less value when they do.<sup>101, 102</sup> Without equal access to business capital, minority-owned businesses and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.<sup>103, 104, 105, 106</sup>

Several individuals participating in in-depth interviews and public meetings commented on the difficulties of obtaining business credit. For example, the Asian-American male owner of a DBE, MBE, and SBE-certified environmental engineering firm responded "When I started my own firm, I had no savings. I cashed out my PTO, and that was my capital. I went to the bank that has my mortgage, and they would not even issue me a company credit card. I attended small business training at resource centers and the Value Development Counsel. They would introduce you to a bank, but I would always get declined. What nobody tells you [at the resource centers] is that the bank wants three years of business activity. There is a definite problem with funding. Not a lot of people who have dreams of starting a small business have more than \$20,000 in their account. Now that my cash flow is positive and the bank is seeing \$60,000 to \$70,000 in a month they send me invitations to apply [for credit]. But, Wells Fargo who has seen my account go from zero to a quarter of a million still will not issue me a company credit card. Finally, Quickbooks invited me to apply for a small business loan. Even though I don't need the money, I applied, because I want to build credit. I was immediately given \$20,000. There should be more banks like this. This is a space that needs a lot of work."

**Public finance.** Minority-owned banks<sup>107</sup> are a key source of banking services for minorities and for minority-owned businesses.<sup>108,109</sup> Minority-owned banks are more likely to locate branches in predominately minority and low income communities and offer loans to individuals with weaker credit profiles.<sup>110</sup> The 2008 financial crisis caused bank consolidation that reduced the number of FDIC-insured minority-owned banks in some areas. The acquisition of closing or failing minority-owned banks by co-ethnic financial institutions helped to maintain the presence of minority-owned banks in many communities. However, despite the persistence of minority-owned banks, the financial crisis left those institutions in a diminished marketplace role in the disadvantaged communities they typically serve. After the crisis, minority-owned banks had a smaller market share of FDIC-insured deposits in predominately minority and low income communities because of a sharp increase in deposits with majority-owned banks. Those shifts may make it difficult in some parts of the United States for public agencies to find minority-owned banks that are available for public finance projects or have diminished capacity to offer such services.

Asian American-owned banks in Los Angeles County maintained a strong market presence relative to minority-owned banks in the rest of the US. In 2015, for example, there were 34 minority-owned banks headquartered in Los Angeles County, which held \$79 billion in assets. The majority (29) of those banks and assets (\$78B) were held by Asian American-owned banks. Asian American-owned banks in Los Angeles County hold 40 percent of all the assets deposited in Minority-owned banks nationwide.<sup>111</sup> The concentration of Asian American-owned banks in Los Angeles County offers local public agencies an option to complete a variety of banking and public finance services with minority-owned banks in their community.

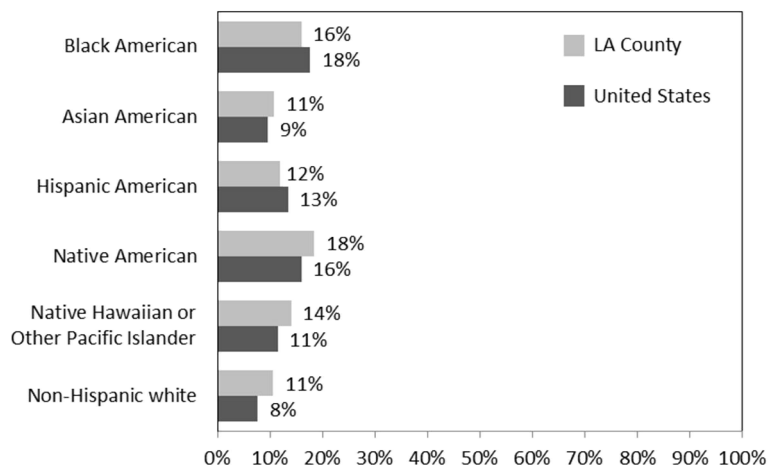
**Figure 3-8.**  
Denial rates of conventional purchase loans for high-income households, Los Angeles County and the United States, 2015

Note:

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

Source:

FFIEC HMDA data 2015. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.



### C. Business Ownership

Nationally, there has been substantial growth in the number of minority-owned 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.<sup>112</sup> Despite the progress that minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black

Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.<sup>113, 114, 115, 116</sup> In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.<sup>117, 118, 119</sup>

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

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

**Figure 3-9.**  
**Business ownership rates in study-related industries in Los Angeles County, 2011-2015**

	Construction	Professional Services	Goods and Services
<b>Race/ethnicity</b>			
Black American	20.2 % **	10.1 % **	4.3 % **
Asian Pacific American	33.7	12.4 **	12.8 **
Subcontinent Asian American	25.7	20.3	8.1 **
Hispanic American	25.7 **	10.9 **	10.1 **
Native American	29.1	0.0 †	11.2
Other Race Minority	28.2	0.0 †	21.6
Non-Hispanic white	34.5	17.5	15.4
<b>Gender</b>			
Women	13.9 % **	10.8 % **	10.2 % **
Men	29.0	16.1	11.7
<b>All individuals</b>	<b>27.9 %</b>	<b>14.6 %</b>	<b>11.1 %</b>

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

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

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

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-neutral 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 Los Angeles County, 2011-2015**

Source:

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

Industry and Group	Coefficient
<b>Construction</b>	
Black American	-0.3482
Hispanic American	-0.2485
Women	-0.5989
<b>Professional Services</b>	
Black American	-0.4572
Women	-0.2128
<b>Goods &amp; Services</b>	
Black American	-0.5830
Asian Pacific American	-0.1556
Subcontinent Asian American	-0.3726
Hispanic American	-0.2388

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

- Being Black American or Hispanic American was associated with a lower likelihood of business ownership in the construction industry. In addition, being a woman was associated with a lower likelihood of business ownership in the Construction industry.
- Being Black American was associated with a lower likelihood of business ownership in the professional services industry. In addition, being a woman was associated with a lower likelihood of business ownership in the professional services industry.
- Being Black American, Asian Pacific American, Subcontinent Asian American or Hispanic American was associated with a lower likelihood of business ownership in the goods and other services industries.
  - 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-neutral 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-owned businesses 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-owned businesses 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).<sup>120,121, 122</sup> The study team examined data on business closure, business receipts,

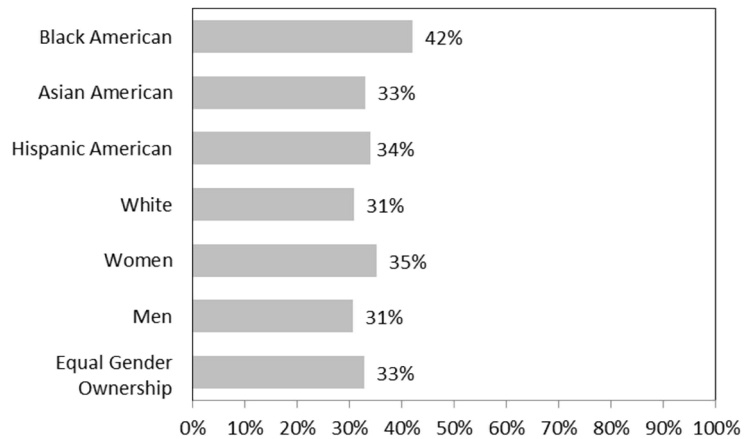
and business owner earnings to further explore the success of minority-owned businesses and woman-owned businesses in Los Angeles County.

**Business closure.** The study team examined the rates of closure among California 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 California appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses in California appear to close at higher rates than businesses owned by men. Increased rates of business closure among minority-owned businesses and woman-owned businesses may have important effects on their availability for government contracts in California and Los Angeles County.

**Figure 3-11.**  
**Rates of business closure in California, 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.



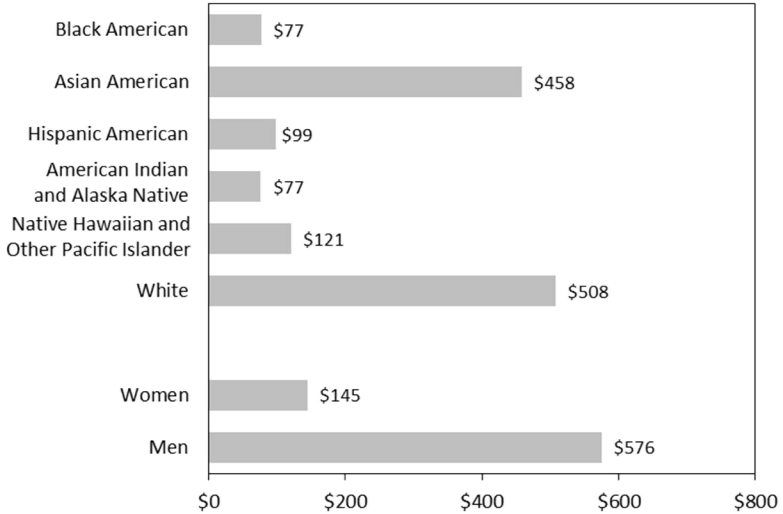
**Business receipts.** BBC also examined data on business receipts to assess whether minority-owned businesses and woman-owned businesses in Los Angeles County earn as much as businesses owned by whites or business owned by men, respectively. Figure 3-12 shows mean annual receipts for Los Angeles County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



**Figure 3-12.**  
**Mean annual business receipts**  
**(in thousands) in Los Angeles**  
**County, 2012**

Note:  
 Includes employer and non-employer firms.  
 Does not include publicly-traded companies or  
 other firms not classifiable by race/ethnicity and  
 gender.  
 All race/ethnicity and gender categories include  
 Hispanic Americans. Estimates for Non-Hispanic  
 race/ethnic groups are not available combined  
 statistical areas. Those estimates are only  
 available at the state level.

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

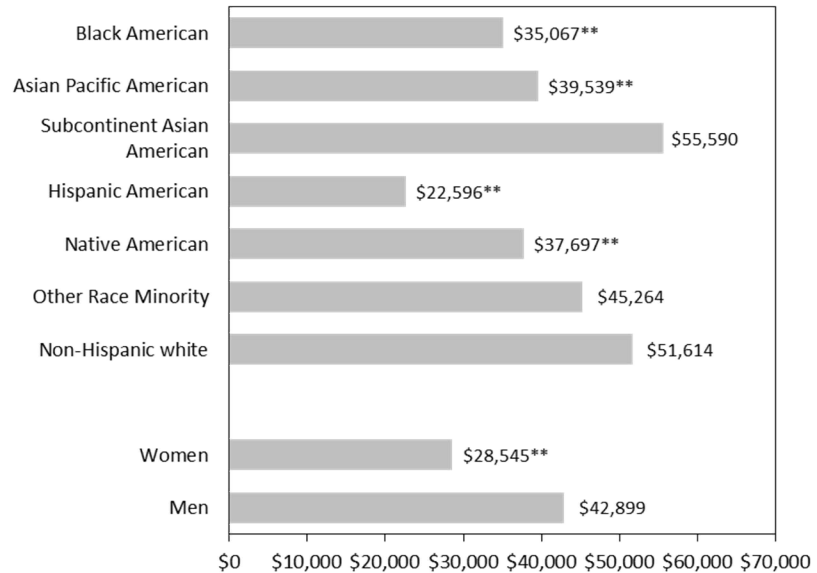


**Business owner earnings.** The study team analyzed business owner earnings to assess whether minorities and women in Los Angeles County earn as much from the businesses that they own as non-Hispanic whites and men do. As shown in Figure 3-13, Black Americans, Asian Pacific Americans, Hispanic Americans, and Native Americans in Los Angeles County earned less on average from their businesses than non-Hispanic whites earned from their businesses. In addition, women in Los Angeles County earned less from their businesses than men earned from their businesses. BBC also conducted regression analyses to determine whether earnings disparities in Los Angeles County exist even after statistically controlling for various race-neutral and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that Black Americans, Asian Pacific Americans, and Hispanic Americans earned significantly less from their own businesses than non-Hispanic white business owners. Women business owners also earned significantly less than men (for details, see Figure C-30 in Appendix C).

**Figure 3-13.**  
**Mean annual business**  
**owner earnings in Los**  
**Angeles County, 2011-2015**

Note:  
 The sample universe is business owners age  
 16 and over who reported positive  
 earnings. All amounts in 2015 dollars.  
 \*, \*\* Denote statistical significance at the  
 90% and 95% confidence levels,  
 respectively.  
 † Denotes significant differences in  
 proportions not reported due to small  
 sample size.

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



## E. Summary

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

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in relevant Los Angeles County industries—construction; professional services; goods and other 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 Los Angeles County marketplace indicates that government agencies in the state are passively participating in race-based and gender-based discrimination that makes it more difficult for minority-owned businesses and woman-owned businesses to successfully compete for their contracts. Many courts have held that passive participation in any race-based or gender-based discrimination establishes a compelling governmental interest for agencies to take remedial action to address such discrimination.<sup>1</sup>

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<sup>1</sup> In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, “if [the governmental entity] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

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- <sup>26</sup> *Adarand VII* at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal*, 2014 WL 1309092 at \*14.
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# **CHAPTER 4.**

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

# CHAPTER 4.

## Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies that the Los Angeles County Metropolitan Transportation Authority (Metro) uses to award contracts; the contracts that the study team analyzed as part of the disparity study; and the process that the study team used to collect relevant prime contract and subcontract data.<sup>1</sup> Chapter 4 is organized into seven parts:

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

### A. Overview of Metro Reporting Systems

Metro is the transportation planner, coordinator, designer, builder, and operator of the public transportation system for Los Angeles County. Metro relies on several data systems to collect and maintain data on construction, professional services, and goods and other services contracts. The following are the data systems used to gather contract data for the Metro disparity study.

**Contract Compliance Systems (B2Gnow and CCMS).** The Diversity & Economic Opportunity Department (DEOD) is responsible for tracking utilization of DBE and SBE contractors on Metro procurements. DEOD staff currently uses B2Gnow, a commercial software package designed to help agencies comply with federal, state, and local regulations and maintain data on contracts and procurements. During the study period, Metro changed their compliance and reporting system from Compliance Certification Management System (CCMS) to B2Gnow. During the transition from CCMS to B2Gnow, all contracts that were less than 75% complete were transferred to the B2Gnow system. DEOD is responsible for entering and maintaining data within the B2Gnow system. B2Gnow contains the following:

- Prime contractor;
- Award amount;
- Award date;
- Contract description;

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

- Paid to date amount;
- DBE or SBE program goals;
- Funding;
- Subcontractor; and
- Subcontract award amount.

Between B2GNow and CCMS, Metro and BBC Research & Consulting (BBC) were able to collect data on most large construction and professional services contracts analyzed in the disparity study.

**Financial Management Systems (FIS and CIMS).** The procurement department manages the financial systems Metro uses to encumber funds and make payments to contractors. During the study period, Metro transitioned from using software created by FIS to the Contract Information Management System (CIMS). Within these systems, Metro tracks purchase order information and data regarding utilized prime vendors. FIS and CIMS contain the following:

- Vendor name and address;
- Purchase order number;
- Prime contractor;
- Award date;
- Award amount; and
- Contract description.

CIMS and FIS provided data on the majority of goods and other services purchase orders analyzed during the study period as well as data on small construction and professional services procurements.

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

BBC collected contracting and vendor data from Metro's DEOD to serve as the basis for key disparity study analyses including the utilization, availability, and disparity analyses. The study team collected the most comprehensive set of data that was available on prime contracts and subcontracts that Metro awarded during the study period (i.e., January 1, 2011 through December 31, 2015). 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- or women-owned business enterprises (MBE/WBEs). The study team collected data on construction; professional services; and goods and other services prime contracts and subcontracts that Metro awarded during the study period.

As part of its implementation of the Federal DBE Program, Metro applied DBE goals, as appropriate, to individual construction; professional services; and goods and other services contracts to meet its overall goal for DBE participation on USDOT-funded projects. In addition, as

part of its Small Business Enterprise program, Metro applied small business goals for locally-funded contracts that it awarded during the study period.

**Prime contract data collection.** Metro provided the study team with electronic data on construction; professional services; and goods and other services prime contracts that the agency awarded during the study period. BBC collected the following information about each relevant construction; professional services; and goods and other services prime contract:

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount;
- Amount paid-to-date;
- Prime contractor name; and
- Prime contractor identification number.

Metro advised the study team on how to interpret the provided data including how to identify unique bid opportunities and, as appropriate, how to aggregate related procurement dollar amounts. BBC worked with Metro staff to review and analyze data coming from both B2Gnow/CCMS and FIS/CIMS to avoid any double counting of contracts and dollars.

**Subcontract data collection.** Metro also provided the study team with electronic data on subcontracts that the agency awarded during the study period related to construction and professional services contracts. In order to gather more comprehensive subcontract data, the study team reviewed hard copy data kept by DEOD and the procurement department. B2Gnow had comprehensive prime and subcontract data. The CCMS data contained prime and limited subcontract information. The BBC study team reviewed evaluation forms provided by the Metro study team to collect additional subcontractor information.

Subcontractor information was not available electronically for purchase orders. The BBC study team reviewed procurement and project folders to collect all subcontractor name and award amounts. BBC and Metro study teams discussed at length the potential for subcontracting opportunities on goods and other services contract. To ensure subcontracting opportunities were included, BBC and Metro study teams reviewed project folders, board reports, and other relevant document to determine purchase orders that may have included subcontractors. Documents for all purchase orders over \$500,000 were reviewed and a relatively low number of purchase order were found to have subcontractors.

**Contracts included in study analyses.** The study team collected information on 10,785 prime contracts and 1,364 associated subcontracts that Metro awarded during the study period in the areas of construction; professional services; and goods and other services. Those contracts accounted for approximately \$3 billion of Metro contracting dollars during the study period. Figure 4-1 presents dollars by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

**Figure 4-1.**  
**Number of Metro contracts and subcontracts included in the study**

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

Contract Type	Number of Contract Elements	Dollars (in thousands)
Construction	1,321	\$1,597,672
Professional services	1,006	\$719,882
Goods and other services	9,822	\$711,071
<b>Total</b>	<b>12,149</b>	<b>\$3,028,625</b>

Source:  
 BBC Research & Consulting from METRO contract data.

**Prime contract and subcontract amounts.** For each contract included in the study team’s analyses, BBC examined the dollars that Metro awarded to each prime contractor and the dollars that the prime contractor awarded to any subcontractors.<sup>2</sup>

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

**Mega project prime contract and subcontract amounts.** Metro let three large or “mega” design/build projects during the study period which were still in various stages of completion at the time of data collection and analysis. All three projects had completed the design phase of the project and were in the beginning or middle of the construction phase. As such, design prime contractor and subcontractor data was complete; however, the data available for the construction phase was not complete. Prime contractor award amount was available but not all construction subcontractors had been identified. Therefore, BBC and Metro study teams made the decision to examine dollars to design portions of the mega project on an award basis and to examine dollars to construction portions of the mega project on a paid-to-date basis.

### C. Collection of Vendor Data

Metro maintains a list of businesses that have worked with Metro on a construction-related; professional services; or goods and other services contact within their financial system. The BBC study team compiled the following information on businesses that participated on Metro construction; professional services; and goods and other services contracts and procurements awarded during the study period:

- Business name;
- Addresses and phone numbers;
- Ownership status (i.e., whether each business was minority- or woman-owned);
- Ethnicity of ownership (if minority-owned);

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<sup>2</sup> BBC used the amount awarded to prime contractors and subcontractors during the study period in all cases that it was available. In all other cases, BBC used the amount paid to prime contractors and subcontractors.

- MBE/WBE certification status;
- DBE certification status;
- Primary line of work;
- Business size;
- Year of establishment; and
- Additional contact information.

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

- Metro contract data;
- Metro vendor lists;
- CUCP certification list;
- Metro Small Business Certification list;
- 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;
- Business websites; and
- Reviews that Metro conducted of study information.

## **D. Relevant Geographic Market Area**

The study team used Metro’s contracting and vendor data to help determine the relevant geographic market area—the geographical area in which the agency spends the substantial majority of its contracting dollars—for the study. The study team’s analysis showed that 74 percent of Metro’s construction; professional services; and goods and other services contracting dollars during the study period went to businesses with locations in Los Angeles County, indicating that Los Angeles County should be considered the relevant geographic market area for the study. BBC’s analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on Los Angeles County.

## **E. Relevant Types of Work**

For each prime contract and subcontract, the study team determined the prime contractor’s *subindustry* that best characterized the business’s primary line of work (e.g., heavy construction). BBC identified subindustries based on Metro 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 other services subindustries that BBC included in its analyses.

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

- Included Transit Vehicle Manufacturer (TVM) and Original Equipment Manufacturer (OEM) purchases (\$234 million of associated contract dollars);
- Metro awarded to computer and computer and communication related services (\$75 million of associated contract dollars);
- Were classified in subindustries which often include insurance and workers’ compensation (e.g., real estate or legal services) (\$21 million of associated contract dollars);
- Metro awarded to advertising and promotional agencies and services (\$9 million of associated contract dollars);
- Metro awarded to universities, government agencies, or non-profit organizations (\$2 million of associated contract dollars); and
- Were classified in subindustries that are not typically included in a disparity study and also account for small proportions of Metro’s contracting dollars (\$76 million of associated contract dollars).<sup>3</sup>

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<sup>3</sup> Examples of industries not typically included in a disparity study include retail stores, training services, and miscellaneous goods purchases.

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

Industry	Total (in Thousands)
<b>Construction</b>	
Major design-build construction	\$701,935
Building construction	\$164,005
Heavy construction	\$142,049
Electrical work	\$123,692
Rebar and reinforcing steel	\$96,522
Trucking	\$55,069
Water, sewer, and utility lines	\$54,288
Heavy construction equipment rental	\$50,019
Land site prep	\$47,406
Landscape services	\$38,746
Plumbing, heating, and air	\$12,861
Asphalt and concrete supply	\$11,062
Wrecking and demolition	\$7,562
Railroad construction	\$7,203
Excavation and drilling	\$7,165
Fencing, guardrails, and signs	\$5,849
Roofing, siding, and sheetmetal work	\$4,349
Flagging services	\$3,644
Painting and striping	\$2,572
Other construction	\$51,932
Other construction supplies	\$9,740
<b>Total construction</b>	<b>\$1,597,672</b>
<b>Professional services</b>	
Engineering	\$497,740
Transportation consulting	\$108,039
Environmental research and consulting	\$41,831
Construction management	\$33,867
Surveying and mapping	\$17,745
Landscape architecture	\$8,838
Testing services	\$6,431
Public finance	\$5,272
Other professional services	\$119
<b>Total professional services</b>	<b>\$719,882</b>



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

Note:

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

Source:

BBC Research & Consulting from Metro contract data.

<b>Goods and other services</b>	
Towing	\$92,044
Cleaning and janitorial services	\$90,230
Petroleum products	\$85,511
Elevator goods and services	\$66,740
Ticket counting and fare collection	\$53,758
Bikeshare	\$50,790
Electrical supplies	\$41,052
Passenger transport	\$38,060
Vehicle parts	\$23,019
Pest control	\$19,853
Security services	\$14,722
Waste services	\$13,695
Vehicle	\$13,364
Industrial equipment and machinery	\$12,393
Uniforms and vestments	\$10,629
Vehicle body repair	\$8,428
Office goods	\$8,212
Communications equipment	\$6,289
Cleaning supplies	\$5,394
Security and safety supplies	\$5,106
Paints and allied products	\$2,040
Repair services	\$1,006
Other goods and supplies	\$43,044
Other services	\$5,693
<b>Total other professional services</b>	<b>\$711,071</b>
<b>GRAND TOTAL</b>	<b>\$3,028,625</b>

## F. Collection of Bid and Proposal Data

BBC conducted a case study analysis of bids and proposals for a sample of contracts that Metro awarded during the study period. Metro provided documents related to bid, proposal, and other related information to the BBC study team for those contracts. BBC successfully collected and examined bid and proposal information for a sample of 56 construction, 67 professional services, and 83 goods and other services contracts that Metro awarded during the study period. For details about the case study analysis, see Chapter 8.

## G. Agency Review Process

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

# CHAPTER 5.

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## Availability Analysis

# CHAPTER 5.

## Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on Los Angeles County Metropolitan Transportation Authority (Metro) construction, professional services, and goods and other services prime contracts and subcontracts. Chapter 5 describes the availability analysis in seven parts:

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

Appendix E provides supporting information related to the availability analysis.

### A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for Metro prime contracts and subcontracts to provide information for the agency in implementing the Federal Disadvantaged Business Enterprise (DBE) Program. In addition, BBC used availability analysis results as inputs in the disparity analysis. In the disparity analysis, BBC compared the percentage of Metro contract dollars that went to minority- and woman-owned businesses during the study period (i.e., *utilization*) to the percentage of dollars that one might expect those businesses to receive based on their availability for specific types and sizes of Metro prime contracts and subcontracts (i.e., *availability*). Comparisons between utilization and availability allowed the study team to determine whether any minority- or woman-owned business groups were underutilized during the study period relative to their availability for Metro work (for details, see Chapter 8).

### B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work (i.e., subindustries) related to the types of transportation-related construction, professional services, goods and other services prime contracts and subcontracts that Metro awarded during the study period. BBC began the availability analysis by identifying the specific subindustries in which Metro spends the majority of its contracting dollars (for details, see Chapter 5) as well as the geographic areas in which the majority of the businesses with which Metro spends those contracting dollars are located (i.e., the *relevant geographic market area*, which BBC identified as Los Angeles County). The study team then developed a representative, unbiased, and statistically-valid database of potentially

available businesses through surveys with businesses located in the relevant geographic market area that perform work within relevant subindustries. That method of examining availability is referred to as a *custom census* and has been accepted in federal court as a valid methodology for conducting availability analyses.<sup>1,2,3</sup> Figure 5-1 summarizes the strengths of BBC’s custom census approach.

**Overview of availability surveys.** The study team conducted telephone surveys with business owners and managers to identify Los Angeles County businesses that are potentially available for Metro construction, professional services, and goods and other services prime contracts and subcontracts.<sup>4</sup> BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of Los Angeles County businesses—that is, not only those businesses that are minority- and woman-owned but *all* businesses—that perform work in relevant industries. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace.<sup>5</sup>

BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the contracts that Metro awarded during the study period. BBC obtained listings on 7,582 Los Angeles County businesses that do work related to those work specializations. However, BBC did not have working phone numbers for 1,066 of those businesses. BBC attempted availability surveys with the remaining 6,516 business establishments. BBC augmented data from D&B using information from Los Angeles County chambers of commerce and Metro vendor data.

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

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

The objective of BBC’s availability approach was not to collect information about each and every relevant business that is operating in Los Angeles County. Instead, it was to collect information from a large, unbiased subset of Los Angeles County businesses that appropriately represents the entire relevant business population of Los Angeles County. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses in an accurate, statistically-valid manner.

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<sup>1</sup> *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 (7<sup>th</sup> Cir. 2016).

<sup>2</sup> *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

<sup>3</sup> *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), *aff’d* 473 F.3d 715 (7<sup>th</sup> Cir. 2007)

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

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

**Availability survey information.** The BBC project team conducted telephone surveys with the owners or managers of the identified business establishments. Survey questions covered many topics about each business including:

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Role as a contractor (i.e., prime contractor, subcontractor, or both);
- Qualifications in performing work for Metro;
- Interest in performing work for Metro;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

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

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

- Being a private business (as opposed to a nonprofit organization);
- Having performed work relevant to Metro construction, professional services, or goods and other services contracting;
- Having bid on or performed construction, professional services, or goods and other services prime contracts or subcontracts in either the public sector or private sector in Los Angeles County in the past five years;
- Being able to perform work or serve customers in the geographical area in which the work took place;
- Being qualified to perform Metro work; and
- Being interested in performing Metro work.<sup>6</sup>

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

- The largest contract they bid on or performed in the past five years; and
- The year in which they were established.

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<sup>6</sup> That information was gathered separately for prime contract and subcontract work.

## C. Businesses in the Availability Database

After conducting availability surveys with thousands of local businesses, the study team developed a representative, unbiased, and statistically-valid database of information about businesses that are potentially available for Metro construction, professional services, and goods and other services contracts. Figure 5-2 presents the percentage of businesses in the study team's *availability database* that were minority- or woman-owned. The information in Figure 5-2 reflects a simple *head count* of businesses with no analysis of their availability for specific Metro prime contracts and subcontracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for Metro work. The database included 582 businesses that are potentially available for specific transportation-related construction, professional services, and goods and other services contracts that Metro awarded during the study period. As shown in Figure 5-2, of those businesses, 47 percent were minority- or woman-owned.

**Figure 5-2.**  
**Percentage of businesses in the availability database that were minority- or woman-owned**

**Note:**

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

**Source:**

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	12.4 %
Black American-owned	7.7
Asian Pacific American-owned	6.4
Subcontinent Asian American-owned	1.4
Hispanic American-owned	18.6
Native American-owned	0.5
<b>Total Minority- and Woman-owned</b>	<b>46.9 %</b>

## D. Availability Calculations

BBC analyzed information from the availability database to develop dollar-weighted estimates of the availability of minority- and woman-owned businesses for Metro contracting work. Those estimates represent the percentage of Metro construction, professional services, and goods and other services contracting dollars that minority- and woman-owned businesses would be expected to receive based on their availability for specific types and sizes of Metro prime contracts and subcontracts.

**Steps to calculating availability.** BBC used a bottom up, contract-by-contract matching approach to calculate availability. Only a portion of the businesses in the availability database was considered potentially available for any given Metro prime contract or subcontract. BBC first examined the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*) including type of work, location of work, contract size, and contract date. BBC then identified businesses in the availability database that perform work of that type, in that role (i.e., as a prime contractor or subcontractor), in that location, of that size, and that were in business in the year that Metro awarded the contract element.

BBC identified the specific characteristics of each prime contract and subcontract that the study team examined as part of the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
  - Are qualified and interested in performing construction, professional services, and goods and other services work in that particular role for that specific type of work for Metro;
  - Are able to serve customers in the geographical area in which the work took place;
  - Have bid on or performed work of that size in the past five years; and
  - Were in business in the year that Metro awarded the contract element.
2. The study team then counted the number of minority-owned businesses, non-Hispanic white woman-owned businesses, and businesses owned by non-Hispanic white men in the availability database that met the criteria specified in Step 1.
3. The study team translated the numeric availability of businesses for the contract element into percentage availability.

BBC repeated those steps for each contract element that the study team examined as part of the disparity study. BBC multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses, both overall and separately for each racial/ethnic and gender group. Figure 5-3 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that Metro awarded during the study period.

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

**Figure 5-3.  
Example of the availability  
calculation  
for a Metro subcontract**

On a contract that Metro awarded in 2013, the prime contractor awarded a subcontract worth \$5,500 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 2013;
- b. Indicated that they performed electrical work;
- c. Reported bidding on work of similar or greater size in the past; and
- d. Reported qualifications and interest in working as a subcontractor on Metro projects.

The study team found 20 businesses in the availability database that met those criteria. Of those businesses, 8 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 40 percent (i.e.,  $8/20 \times 100 = 40$ ).

**BBC's approach accounts for type of work.** Federal regulations suggest calculating availability based on businesses' abilities to perform specific types of work. For example, the United States

Department of Transportation (USDOT) gives the following example in “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program:”

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

The BBC study team took type of work into account by examining 54 different subindustries related to construction, professional services, and goods and other services as part of estimating availability for Metro prime contracts and subcontracts.

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

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

**BBC’s approach accounts for the relative capacity of businesses.** BBC considered the size—in terms of dollar value—of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., *relative capacity*) when determining whether to count that business as available for a particular contract element. BBC considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value. BBC’s approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.*,<sup>8</sup> *Western States Paving Company v. Washington State DOT*,<sup>9</sup> *Rothe Development Corp. v. U.S. Department of Defense*,<sup>10</sup> and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*<sup>11</sup>).

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

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

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

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



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

## E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for the 12,149 transportation-related construction, professional services, and goods and other services prime contracts and subcontracts that Metro awarded between January 1, 2011 and December 31, 2015. Figure 5-4 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for those contracts.

**Figure 5-4.**  
**Overall dollar-weighted availability estimates by racial/ethnic and gender group**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	4.4 %
Black American-owned	6.8
Asian Pacific American-owned	2.5
Subcontinent Asian American-owned	0.6
Hispanic American-owned	16.3
Native American-owned	0.7
<b>Total Minority- and Woman-owned</b>	<b>31.3 %</b>

Overall, the availability of minority- and woman-owned businesses for Metro construction, professional services, and goods and other service contracts is 31.3 percent. Hispanic American-owned businesses (16.3%) and Black American-owned businesses (6.8%) exhibited the highest availability percentages among all groups. Note that availability estimates varied when the study team examined different subsets of those contracts (for availability results for specific contract sets, see Appendix F). Assuming that the mix of the types, sizes, and locations of the contracts that Metro awards in the future are similar to that of the contracts that the agency awarded during the study period, one might expect 31.3 percent of Metro’s contracting dollars to go to minority- and woman-owned businesses based on their availability for that work.

## F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in Metro’s Federal Transit Administration (FTA)-funded transportation contracts.<sup>12</sup> BBC calculated the base figure using the same availability database and approach described above except that calculations only included potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements

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

<sup>12</sup> The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

described in 49 Code of Federal Regulations Part 26—and only included FTA -funded prime contracts and subcontracts. BBC’s approach to calculating Metro’s base figure is consistent with:

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

BBC’s availability analysis indicates that the availability of potential DBEs for Metro’s USDOT -funded transportation contracts is 27.0 percent. Metro might consider 27.0 percent as the base figure for its overall goal for DBE participation, assuming that the types, sizes, and locations of USDOT -funded contracts that the agency awards in the time period that the goal will cover are similar to the types of USDOT -funded contracts that the agency awarded during the study period. For details about Metro’s base figure for its overall DBE goal, see Chapter 9.

**Differences from overall MBE/WBE availability.** The availability of potential DBEs for USDOT -funded contracts is slightly lower than the overall availability of minority- and woman-owned businesses that is presented in Figure 5-4. BBC’s calculation of the overall availability of minority- and woman-owned businesses includes three groups of minority- and woman-owned businesses that the study team did not count as potential DBEs when calculating the base figure:

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

In addition, the study team’s analyses for calculating the base figure for USDOT-funded contracts only included USDOT-funded prime contracts and subcontracts. The calculations for the overall availability of minority- and woman-owned businesses included both USDOT- and local-funded transportation prime contracts and subcontracts.

**Additional steps before Metro determines its overall DBE goal.** Metro must consider whether to make a step-2 adjustment to the base figure as part of determining its overall DBE goal. Step-2 adjustments can be upward or downward, but there is no requirement for Metro to make a step-2 adjustment as long as the agency can explain what factors it considered and why no adjustment was warranted. Chapter 9 discusses factors that Metro might consider in deciding whether to make a step-2 adjustment to the base figure.

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

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

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

# CHAPTER 6.

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## Utilization Analysis

# CHAPTER 6.

## Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction, professional services, and goods and other services contracts that the Los Angeles County Metropolitan Transportation Authority (Metro) awarded between January 1, 2011 and December 31, 2015. Chapter 6 is organized in two parts:

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

### A. Overview of Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in Metro contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that Metro awarded to minority- and woman-owned businesses during the study period. For example, if 5 percent of Metro 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.<sup>1</sup> The study team measured the participation of all minority- and woman-owned businesses regardless of certification and separately of minority- and woman-owned businesses that were certified as Disadvantaged Business Enterprises (DBEs).

The Federal Transit Administration (FTA) requires Metro to submit reports about the participation of DBEs in its federally-funded transportation contracts twice each year (typically in June and December). BBC's analysis of the participation of minority- and woman-owned businesses in Metro contracting goes beyond what the agency currently reports to FTA. Two key differences are that:

- BBC counts all minority- and woman-owned businesses in its analysis, not only certified DBEs; and
- BBC examines federally- and non-federally-funded contracts, not only federally-funded contracts.

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

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<sup>1</sup> BBC uses the terms "white woman-owned businesses" and "non-Hispanic white woman-owned businesses" interchangeably.

they are certified as DBEs. The study team included minority- and woman-owned businesses that:

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

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

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

## B. Utilization Analysis Results

Figure 6-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction, professional services, and goods and other services contracts that Metro awarded during the study period (including both prime contracts and subcontracts). The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period. As shown in Figure 6-1, overall, minority- and woman-owned businesses received 23 percent of the relevant contracting dollars that Metro awarded during the study period. The darker portion of the bar shows that 15 percent of relevant contracting dollars went to certified DBEs.

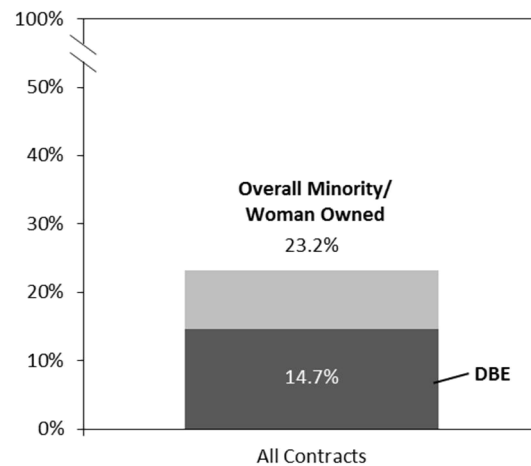
**Figure 6-1.**  
**Participation of minority- and woman-owned businesses**

**Notes:**

The study team analyzed 12,149 prime contracts and subcontracts.  
The darker portion of the bar represents participation of certified DBEs.  
For more detail, see Figure F-2 in Appendix F.

**Source:**

BBC Research & Consulting utilization analysis.



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

In addition, BBC examined participation in Metro contracting separately for each relevant racial/ethnic and gender group. Those results are presented in Figure 6-2. Overall, Hispanic American-owned businesses and Black American -owned businesses exhibited higher levels of participation on Metro contracts than all other groups (12.9% for Hispanic American-owned businesses and 3.4% for Black American-owned businesses).

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

**Note:**

The study team analyzed 12,149 prime contracts and subcontracts.

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

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

**Source:**

BBC Research & Consulting utilization analysis.

	Total	
	\$ in Thousand	Percent
<b>Minority-/Woman-owned</b>		
Black American-owned	\$104,362	3.4 %
Asian Pacific American-owned	76,961	2.5
Subcontinent Asian American-owned	29,148	1.0
Hispanic American-owned	391,976	12.9
Native American-owned	21,768	0.7
White woman-owned	79,021	2.6
<b>Total minority-/woman-owned</b>	<b>703,237</b>	<b>23.2 %</b>
Majority-owned	2,325,388	76.8
<b>Total</b>	<b>\$3,028,625</b>	<b>100.0 %</b>
<b>DBEs</b>		
Black American-owned	\$96,283	3.2 %
Asian Pacific American-owned	54,277	1.8
Subcontinent Asian American-owned	22,248	0.7
Hispanic American-owned	223,764	7.4
Native American-owned	21,274	0.7
White male-owned	0	0.0
White woman-owned	27,825	0.9
<b>Total DBE</b>	<b>\$445,671</b>	<b>14.7 %</b>
Non-DBE	2,582,954	85.3
<b>Total</b>	<b>\$3,028,625</b>	<b>100.0 %</b>

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

- A Black American-owned heavy construction equipment business received 36 percent of the total dollars that went to Black American-owned businesses (approximately \$38 million of \$105 million);
- A Hispanic American-owned rebar contractor received 16 percent of the total dollars that went to Hispanic American-owned businesses (approximately \$64 million of \$392 million);
- A Native American-owned trucking business received 27 percent of the total dollars that went to Native American-owned businesses (approximately \$5.8 million of \$22 million);
- An Asian Pacific American-owned transportation consulting business received 18 percent of the total dollars that went to Asian Pacific American-owned businesses (approximately \$13.8 million of \$77 million);

- A Subcontinent Asian American-owned environmental research and consulting business received 25 percent of the total dollars that went to Subcontinent Asian American-owned businesses (approximately \$7.2 million of \$29 million); and
- A white woman-owned construction business received 7 percent of the total dollars that went to white woman-owned businesses (approximately \$5.6 million of \$79 million).

Information about the participation of minority- and woman-owned businesses is instructive on its own, but it is even more instructive when it is compared with the participation that one might expect based on the availability of minority- and woman-owned businesses for Metro work. BBC presents such comparisons as part of the disparity analysis in Chapter 7 and further exploration of disparities in Chapter 8.



# CHAPTER 7.

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## Disparity Analysis

# CHAPTER 7.

## Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses on transportation contracts that the Los Angeles County Metropolitan Transportation Authority (Metro) awarded between January 1, 2011 and December 31, 2015 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work. The analysis focused on transportation-related construction, professional services, and goods and other services contracts. Chapter 7 presents the disparity analysis in five parts:

- A. Overview of disparity analysis;
- B. Overall disparity analysis results;
- C. Disparity analysis results by DBE goal status; and
- D. Statistical significance of disparity analysis results.

### A. Overview of Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation of minority- and woman-owned businesses in Metro prime contracts and subcontracts with the percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability for that work. BBC made those comparisons for each relevant racial/ethnic and gender group. BBC reports disparity analysis results for all Metro contracts considered together and separately for different sets of contracts (e.g., prime contracts and subcontracts).

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

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<sup>1</sup> Many courts have deemed disparity indices below 80 as being “substantial” and have accepted them as evidence of adverse conditions for minority- and woman-owned businesses (e.g., see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

The disparity analysis results that BBC presents in Chapter 7 summarize detailed results tables provided in Appendix F. Each table in Appendix F presents disparity analysis results for a different set of Metro contracts. For example, Figure 7-2, which is identical to Figure F-2 in Appendix F, presents disparity analysis results for *all* Metro contracts that the study team examined as part of the study—that is, transportation-related construction, professional services, and goods and other services prime contracts and subcontracts that Metro awarded during the study period. Appendix F includes analogous tables for different subsets of contracts including those that present results separately for:

- Construction, professional services, and goods and other services contracts;
- Prime contracts and subcontracts;
- USDOT- and locally-funded contracts; and
- Large and small prime contracts.

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

A review of Figure 7-2 helps to introduce the calculations and format of all of the disparity analysis tables in Appendix F. As illustrated in Figure 7-2, the disparity analysis tables present information about each relevant racial/ethnic and gender group (as well as about all businesses) in separate rows:

- “All businesses” in row (1) pertains to information about all businesses owned by non-Hispanic white men (i.e., majority-owned businesses) and all minority- and woman-owned businesses considered together.
- Row (2) provides results for all minority- and woman-owned businesses, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).
- Row (3) provides results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) provides results for all minority-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (10) provide results for businesses of each individual minority group, regardless of whether they were certified as DBEs.

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

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

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

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

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

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	12,149	\$3,028,625	\$3,028,625				
(2) MBE/WBE	3,411	\$703,237	\$703,237	23.2	31.3	-8.1	74.1
(3) WBE	574	\$79,021	\$79,021	2.6	4.4	-1.8	59.2
(4) MBE	2,837	\$624,216	\$624,216	20.6	26.9	-6.3	76.6
(5) Black American-owned	195	\$101,992	\$104,362	3.4	6.8	-3.3	50.9
(6) Asian Pacific American-owned	461	\$75,213	\$76,961	2.5	2.5	0.0	101.8
(7) Subcontinent Asian American-owned	139	\$28,486	\$29,148	1.0	0.6	0.4	159.1
(8) Hispanic American-owned	1,744	\$383,074	\$391,976	12.9	16.3	-3.4	79.2
(9) Native American-owned	17	\$21,273	\$21,768	0.7	0.7	0.1	110.2
(10) Unknown MBE	281	\$14,177					
(11) DBE-certified	1,723	\$445,672	\$445,672	14.7			
(12) Woman-owned DBE	110	\$27,825	\$27,825	0.9			
(13) Minority-owned DBE	1,602	\$412,759	\$412,759	13.6			
(14) Black American-owned DBE	156	\$96,279	\$96,283	3.2			
(15) Asian Pacific American-owned DBE	361	\$54,275	\$54,277	1.8			
(16) Subcontinent Asian American-owned DBE	27	\$22,247	\$22,248	0.7			
(17) Hispanic American-owned DBE	1,049	\$223,754	\$223,764	7.4			
(18) Native American-owned DBE	17	\$21,273	\$21,274	0.7			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

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

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

Source: BBC Research & Consulting disparity analysis.

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

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that the study team analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-2, the study team analyzed 12,149 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 195 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-2, the study team examined approximately \$3 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 \$104 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that the study team identified as minority-owned or as DBEs, but for which specific race/ethnicity information was not available. The dollar totals include both prime contract and subcontract dollars.
- Column (d) presents the utilization percentage of each racial/ethnic and gender group as a percentage of total dollars associated with the set of contract elements. The study team calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for Black American-owned businesses, the study team divided \$104 million by \$3 billion and multiplied by 100 for a result of 3.4%, as shown in row (6) of column (d)).

**Availability results.** Column (e) of Figure 7-2 presents the availability of each relevant racial/ethnic and gender group for all contract elements that the study team analyzed as part of the contract set. Availability estimates, which are represented as a percentage of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare utilization results for specific groups for specific sets of contracts (e.g., as shown in row (6) of column (e), the availability of Black American-owned businesses is 6.8%).

**Differences between utilization and availability.** The next step in analyzing whether there was a disparity between the participation and availability of minority- and woman-owned businesses is to subtract the utilization percentage from the availability percentage. Column (f) of Figure 7-2 presents the percentage point difference between utilization and availability for each relevant racial/ethnic and gender group. For example, as presented in row (6) of column (f)

of Figure 7-2, the participation of Black American-owned businesses in Metro contracts was 3.3 percentage points less than their availability.

**Disparity indices.** It is sometimes difficult to interpret absolute percentage differences between participation and availability. Therefore, BBC also calculated a disparity index for each relevant racial/ethnic and gender group, which measured actual participation relative to availability and served as a metric to compare any disparities across different groups and different sets of contracts. BBC calculated disparity indices by dividing the utilization percentage for each group by the availability percentage for each group and multiplying by 100. Smaller disparity indices indicate greater disparities (i.e., a greater degree of underutilization).

Column (g) of Figure 7-2 presents the disparity index for each relevant racial/ethnic and gender group. For example, as reported in row (6) of column (g), the disparity index for Black American-owned businesses was approximately 51, indicating that Black American-owned businesses actually received only \$0.51 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that Metro awarded during the study period.

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

- When BBC’s calculations showed a disparity index exceeding 200, BBC reported an index of “200+.” A disparity index of 200+ means that participation was more than twice as much as availability for a particular group for a particular set of contracts.
- When there was no participation and no availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.
- When participation for a particular group for a particular set of contracts was greater than 0 percent but availability was 0 percent, BBC reported a disparity index of “200+.”<sup>2</sup>

## B. Overall Disparity Analysis Results

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

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

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

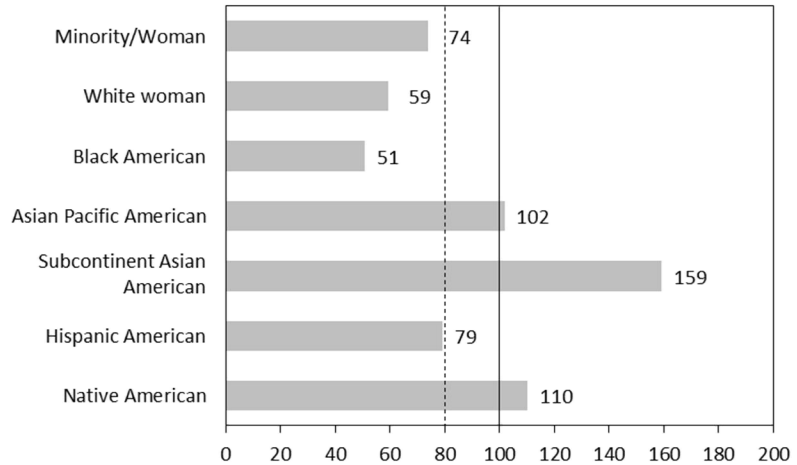
Note:

The study team analyzed 12,149 prime contracts/subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



As shown in Figure 7-3, overall, the participation of minority- and woman-owned businesses in contracts that Metro awarded during the study period was lower than what one might expect based on the availability of those businesses for that work. The disparity index of 74 indicates that minority- and woman-owned businesses considered together received approximately \$0.74 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that Metro awarded during the study period. Disparity analysis results by individual group showed that:

- Three groups exhibited disparity indices substantially below parity—Black American-owned businesses (disparity index of 51), Hispanic American-owned businesses (disparity index of 79), and white woman-owned businesses (disparity index of 59).
- Three groups did not exhibit disparities—Asian Pacific American-owned businesses (disparity index of 102), Subcontinent Asian American-owned businesses (disparity index of 159), and Native American-owned businesses (disparity index of 110)

Note that Metro applied DBE contract goals to many of the contracts that it awarded during the study period so the disparity analysis results shown in Figure 7-3 are reflective of the use of those measures.

### C. Disparity Analysis Results by DBE Goal Status

Metro used race- and gender-conscious DBE subcontracting goals on many contracts during the study period to encourage the participation of disadvantaged business enterprises. It is useful to compare disparity analysis results between contracts that Metro awarded with the use of DBE subcontracting goals (goals contracts) and contracts that Metro awarded without the use of DBE subcontracting goals (no-goals contracts). Examining participation in no-goals contracts provides useful information about outcomes for minority-owned businesses and woman-owned businesses on contracts that Metro awarded in a race-neutral and gender-neutral environment

and whether there is evidence that certain groups face any discrimination or barriers as part of Metro’s contracting.<sup>3, 4, 5</sup>

Figure 7-4 presents disparity analysis results separately for goals contracts and no-goals contracts. Note that the results presented in Figure 7-4 include both prime contracts and subcontracts associated with projects that Metro awarded with and without the use of goals. As shown in Figure 7-4, overall, minority-owned businesses and woman-owned businesses showed better outcomes on goals contracts than on no-goals contracts. Whereas minority-owned businesses and woman-owned businesses showed a substantial disparity on no-goals contracts (disparity index of 56), they did not show a substantial disparity on goals contracts (disparity index of 96). Results for individual groups indicated that:

- Only Black American-owned business (disparity index of 64) showed substantial disparities on goals contracts.
- All groups except Subcontinent Asian American-owned businesses showed substantial disparities on no-goals contracts.

**Figure 7-4.**  
**Disparity indices for goals and no-goals contracts**

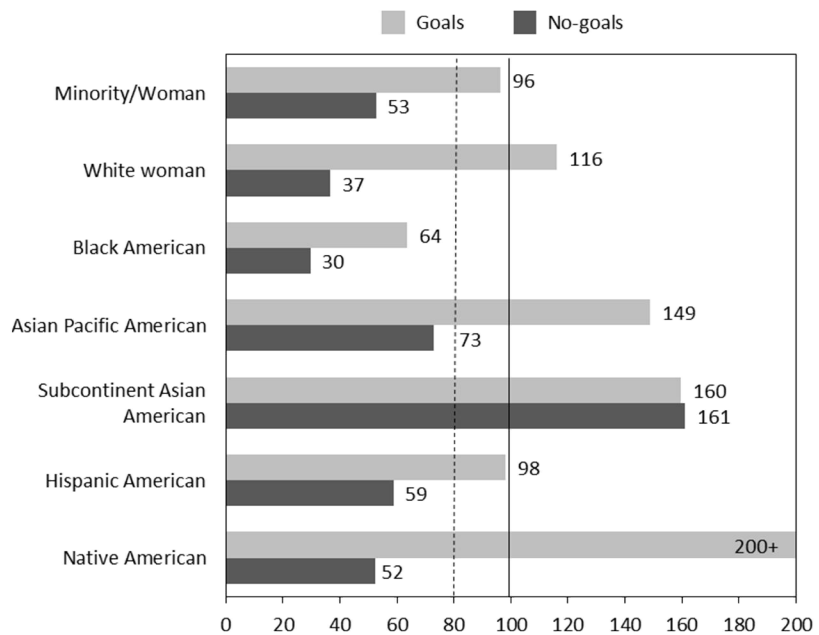
Note:

The study team analyzed 5,293 contract elements to which subcontracting goals applied. The study team analyzed 6,896 contract elements to which no subcontracting goals applied.

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

Source:

BBC Research & Consulting disparity analysis.



Taken together, the results presented in Figure 7-4 show that Metro’s use of DBE goals is effective in encouraging the participation of minority-owned businesses and woman-owned businesses in its contracts. Moreover, those results indicate that when Metro does not use race-

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> H. B. Rowe Co., Inc. v. Lyndo Tippett, NCDOT, et al., 615 F.3d 233,246 (4th Cir. 2010).



conscious and gender-conscious measures, most relevant business groups suffer from substantial underutilization in Metro contracting.

#### **D. Statistical Significance of Disparity Analysis Results**

Statistical significance tests allow researchers to test the degree to which they can reject random chance as an explanation for any observed quantitative differences. In other words, a statistically significant difference is one that one can consider to be reliable or *real*. Random chance is the factor that researchers consider most in determining the statistical significance of results that are based on population samples.

**Monte Carlo analysis.** BBC used a computational algorithm that relies on repeated, random simulations to examine the statistical significance of disparity analysis results. That approach is referred to as a *Monte Carlo* method. The analyses that the study team completed as part of the disparity study were well-suited for using Monte Carlo analysis to test statistical significance. Monte Carlo analysis was appropriate for that purpose, because, among the contracts that Metro awarded during the study period, there were many individual chances for businesses to win prime contracts and subcontracts, each with a different payoff (i.e., each with a different dollar value). Figure 7-5 provides additional information about how the study team used a Monte Carlo method to test the statistical significance of disparity analysis results. It is important to note that Monte Carlo simulations may not be appropriate to use with very small populations of contracts.

**Results.** The study team identified substantial disparities for various racial/ethnic and gender groups on all contracts without race- or gender-conscious DBE subcontracting goals (see Table F-15 in Appendix F). BBC used Monte Carlo analysis to test whether the disparities that the study team observed were statistically significant.

As shown in Figure 7-6, results from the Monte Carlo analysis indicated that the disparities for all minority- and woman-owned businesses, non-Hispanic white woman-owned businesses, all minority-owned businesses, Black American-owned businesses and Hispanic American-owned businesses were statistically significant at the 95 percent confidence level.

**Figure 7-5.  
Monte Carlo Analysis**

The study team began the Monte Carlo analysis by examining individual contract elements. For each contract element, BBC’s availability database provided information on individual businesses that are available for that contract element based on type of work, contractor role, contract size, and location of the work. The study team assumed that each available business had an equal chance of winning that contract element. For example, the odds of a non-Hispanic white woman-owned business receiving that contract element were equal to the number of non-Hispanic white woman-owned businesses available for the contract element divided by the total number of businesses available for the contract element. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to win the contract element.

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

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

**Figure 7-6.  
Monte Carlo simulation results for disparity analysis results**

Race/Ethnicity and Gender	Disparity Index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
<b>Total minority-/woman-owned</b>	53	0	<0.1 %
White woman-owned	37	200	<0.1 %
<b>Total minority-owned</b>	57	0	<0.1 %
Black American-owned	30	0	<0.1 %
Asian Pacific American-owned	73	134,743	13.5 %
Subcontinent Asian American-owned	161	N/A	N/A
Hispanic American-owned	59	88	<0.1 %
Native American-owned	52	403,619	40.4 %

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

Source: BBC Research & Consulting disparity analysis.

# **CHAPTER 8.**

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## **Further Explorations of Disparities**

# CHAPTER 8.

## Further Exploration of Disparities

As presented in Chapter 7, the study team observed substantial disparities between the participation and availability of white women-owned businesses, Black American owned businesses and Hispanic American-owned businesses when considering all Los Angeles County Metropolitan Transportation Authority (Metro) contracts together. Moreover, the study team observed substantial disparities for most racial/ethnic and gender groups when examining contracts to which the agency did not apply Disadvantaged Business Enterprise (DBE) or minority- and woman-owned business enterprise (MBE/WBE) contract goals (Subcontinent Asian American-owned businesses were the only exception). Six areas of questions provide a framework for further exploration of the disparities that the study team observed between the participation and availability of minority- and woman-owned businesses:

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

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

### **A. Are there Disparities for USDOT- and Local-Funded Contracts?**

BBC Research & Consulting (BBC) examined disparity analysis results separately for United State Department of Transportation- (USDOT-) and local-funded contracts that Metro awarded during the study period. Comparing results between USDOT- and local-funded contracts is one way to assess the effectiveness of Metro's implementation of the Federal DBE Program, which applies to USDOT-funded contracts. Figure 8-1 presents disparity indices for all relevant racial/ethnic and gender groups separately for USDOT- and local-funded contracts.

Overall, minority- and woman-owned businesses exhibited substantial disparities on locally-funded contracts (disparity index of 53) and exhibited a disparity on USDOT-funded contracts (disparity index of 85):

- White woman-owned businesses (disparity index of 74) and Black American-owned businesses (disparity index of 56) exhibited substantial disparities for USDOT-funded contracts.

- White woman-owned businesses (disparity index of 40), Black American-owned businesses (disparity index of 37), Hispanic American-owned businesses (disparity index of 51), and Native American-owned businesses (disparity index of 71) exhibited substantial disparities for locally-funded contracts.

**Figure 8-1.**  
**Disparity indices for USDOT-**  
**and locally-funded contracts**

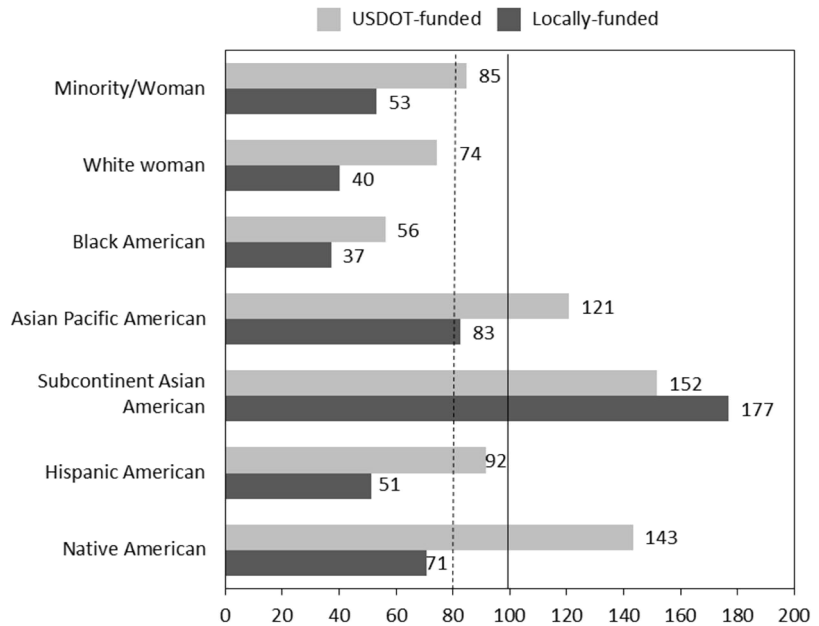
Note:

The study team analyzed 10,189 USDOT-funded contracts and 1,960 local-funded contract elements.

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

Source:

BBC Research & Consulting disparity analysis.



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

BBC examined disparity analysis results separately for construction, professional services, and goods and other services contracts that Metro awarded during the study period. That information might help Metro refine its implementation of the Federal DBE Program for particular contracting areas. Figure 8-2 presents disparity indices for all relevant racial/ethnic and gender groups separately for each contracting area. Overall, minority- and woman-owned businesses did not exhibit substantial disparities for construction contracts (disparity index of 90) or professional services contracts (disparity index of 135). However, minority- and woman-owned businesses did exhibit a substantial disparity for goods and other services contracts (disparity index of 37). There were several key differences in disparities by contract type and group:

- Black American-owned businesses (disparity index of 73) and Hispanic American-owned businesses (disparity index of 77) exhibited substantial disparities for construction contracts.
- Black American-owned businesses (disparity index of 28) exhibited substantial disparities for professional services contracts.
- All groups of minority- and woman-owned businesses exhibited substantial disparities for goods and other services contracts.

Metro applied DBE or SBE contract goals to most of the construction and professional services contracts that it awarded during the study period. In contrast, Metro had limited DBE or SBE

contract goals on goods and other services contracts. The disparity analysis results shown in Figure 8-2 are largely reflective of the use of those measures.

**Figure 8-2.**  
**Disparity indices for construction, professional services, and goods and other services**

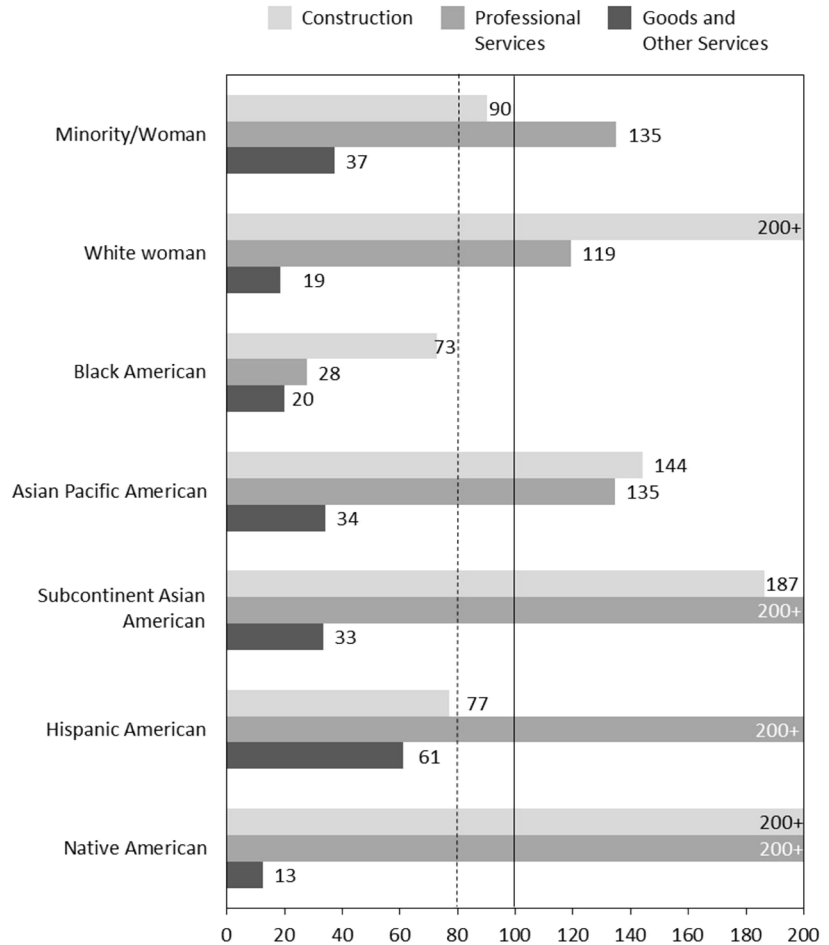
Note:

The study team analyzed 1,526 construction contracts; 875 professional services contracts; and 9,778 goods and other services contracts.

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

Source:

BBC Research & Consulting disparity analysis.



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

BBC examined disparity analysis results separately for prime contracts and subcontracts to assess whether minority- and woman-owned businesses exhibited different outcomes based on their roles as either prime contractors or subcontractors. Figure 8-3 presents disparity indices for all relevant racial/ethnic and gender groups separately for prime contracts and subcontracts.

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

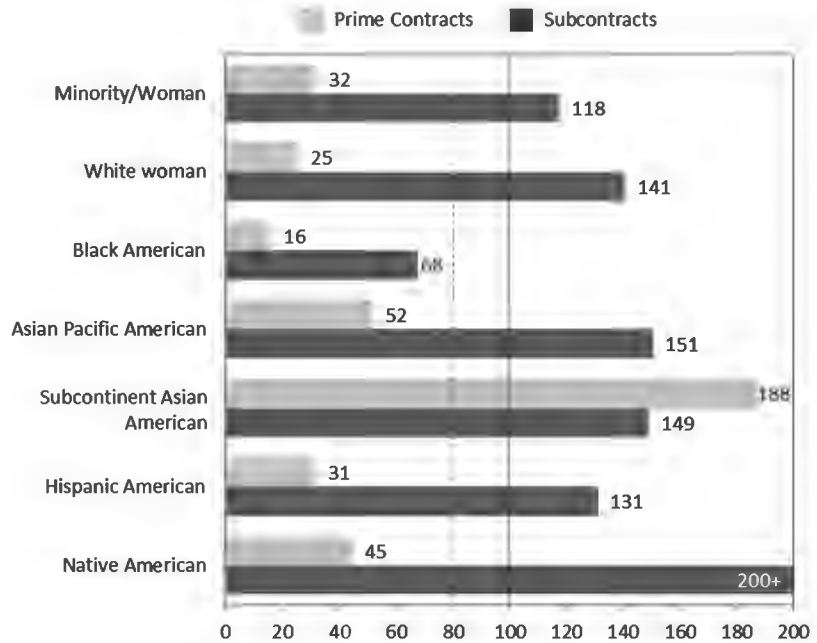
Note:

The study team analyzed 10,785 prime contracts and 1,364 subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



Overall, minority- and woman-owned businesses exhibited substantial disparities for prime contracts (disparity index of 32) but not for subcontracts contracts (disparity index of 118). There were key differences in disparities by contract type and group:

- Black American-owned businesses (disparity index of 16), Asian Pacific American-owned businesses (disparity index of 52), Hispanic American-owned businesses (disparity index of 31), Native American-owned businesses (disparity index of 45), and white woman-owned businesses (disparity index of 25) exhibited substantial disparities for prime contracts.
- Black American-owned businesses (disparity index of 68) exhibited substantial disparities for subcontracts.

Note that Metro’s use of DBE contract goals are subcontracting goals programs. Disparity analysis results for subcontracts indicate that the use of those goals is largely effective in encouraging the participation of minority- and woman-owned businesses in Metro subcontracts.

#### **D. Are there Disparities for Different Time Periods?**

BBC examined disparity analysis results separately for two separate time periods—January 1, 2011 through December 31, 2013 (*early study period*) and January 1, 2014 through December 31, 2015 (*late study period*). That information might help Metro 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 8-4 presents disparity indices for all relevant racial/ethnic and gender groups separately for the early and late study periods. Overall, minority- and woman-owned businesses exhibited a disparity for contracts that Metro awarded in the early study period (disparity index of 86), and a substantial disparity for contracts that the agency awarded in the late study period (disparity index of 65).

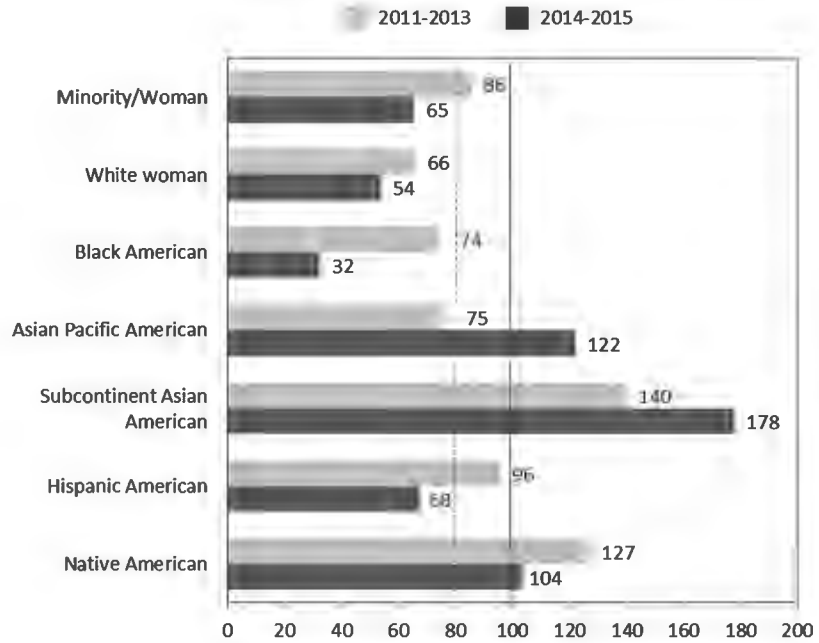
**Figure 8-4.**  
**Disparity indices for early**  
**and late study period**

Note:

The study team analyzed 6,220 contracts in the early study period and 5,929 contracts in the late study period. For more detail, see Figures F-3 and F-4 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



There were key differences in disparities by study period and group:

- Black American-owned businesses (disparity index of 74), Asian Pacific American-owned businesses (disparity index of 75), and white woman-owned businesses (disparity index of 66) exhibited substantial disparities for contracts that Metro awarded in the early study period.
- Black American-owned businesses (disparity index of 32), Hispanic American-owned businesses (disparity index of 68), and white woman-owned businesses (disparity index of 54) exhibited substantial disparities for contracts that Metro awarded in the late study period.

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

BBC compared disparity analysis results for “large” prime contracts and “small” prime contracts that Metro awarded during the study period to assess whether contract size affected disparity analysis results for prime contracts. “Large” prime contracts were defined as construction contracts worth more than \$2 million; professional services contracts worth more than \$500,000; or goods and other services contracts worth more than \$500,000. “Small” prime contracts were defined as construction contracts worth \$2 million or less; professional services contracts worth \$500,000 or less; or goods and other services contracts worth \$500,000 or less. Figure 8-5 presents disparity indices for all relevant racial/ethnic and gender groups separately for large and small prime contracts.



**Figure 8-5.**  
**Disparity indices for large and small prime contracts**

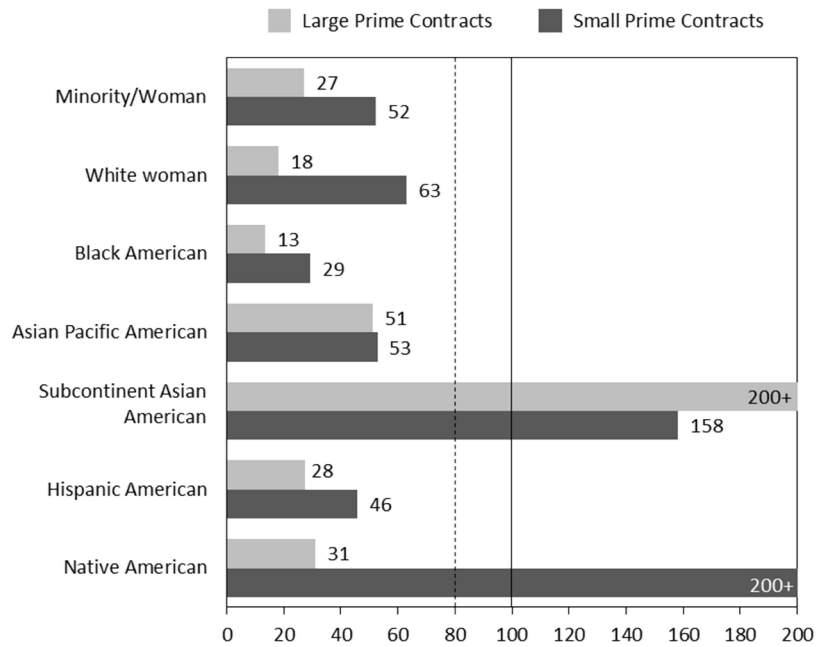
Note:

The study team analyzed 273 large prime contracts and 10,512 small prime contracts.

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

Source:

BBC Research & Consulting disparity analysis.



Overall, minority- and woman-owned businesses exhibited substantial disparities on large prime contracts (disparity index of 27) and small prime contracts (disparity index of 52).

- Black American-owned businesses (disparity index of 13), Asian Pacific American-owned businesses (disparity index of 51), Hispanic American-owned businesses (disparity index of 28), Native American-owned businesses (disparity index of 31), and white woman-owned businesses (disparity index of 18) exhibited substantial disparities for large prime contracts.
- Black American-owned businesses (disparity index of 29), Asian Pacific American-owned businesses (disparity index of 53), Hispanic American-owned businesses (disparity index of 46), and white woman-owned businesses (disparity index of 63) exhibited substantial disparities for small prime contracts.

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

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

**Construction.** BBC examined bid information for a sample of 56 construction contracts that Metro awarded during the study period. In total, Metro received 262 bids for those contracts.

**Number of bids from minority- and woman-owned businesses.** Minority- and woman-owned businesses submitted 50 of the 262 bids (19%) that the study team examined:

- Forty-one bids (16% of all bids) came from minority-owned businesses; and (19 different businesses); and
- Nine bids (3% of all bids) came from white woman-owned businesses (7 different businesses).

As part of availability surveys, the study team asked construction business owners and managers to indicate whether their companies compete as prime contractors on public contracts. Of the business owners and managers that indicated that their companies compete as prime contractors, 34 percent represented minority-owned businesses and 6 percent represented white woman-owned businesses. Those percentages were higher than the percentage of minority-owned and white woman-owned businesses that submitted bids on Metro construction contracts during the study period.

**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 8-6, 32 percent of the bids that minority-owned businesses submitted resulted in contract awards, which was substantially higher than the percent of bids that majority-owned businesses submitted that resulted in contract awards (19%). Of the bids that white woman-owned businesses submitted, 22 percent resulted in contract awards, slightly higher than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

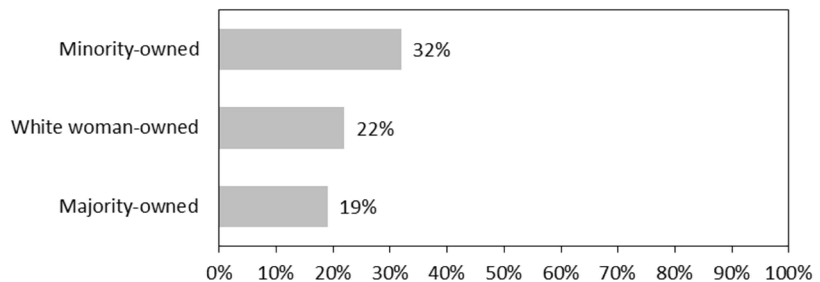
**Figure 8-6.**  
**Percentage of bids on construction contracts that resulted in contract awards**

Note:

Based on analysis of 262 bids on 56 construction contracts.

Source:

BBC Research & Consulting from entity contracting data.



**Professional services.** BBC examined proposal information for a sample of 67 professional services contracts that Metro awarded during the study period. In total, Metro received 224 proposals for those contracts.

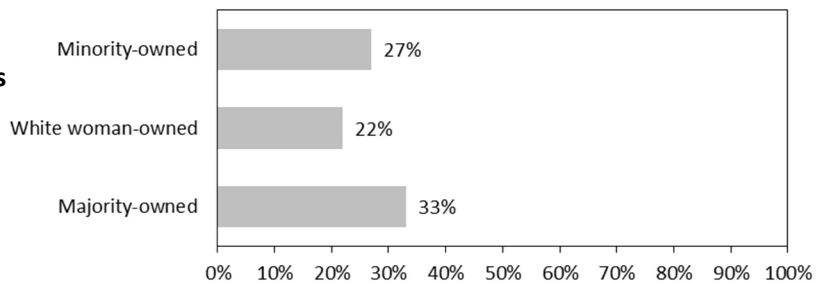
**Number of proposals from minority- and woman-owned businesses.** Minority- and woman-owned businesses submitted 104 of the 224 proposals (46%) that the study team examined:

- Eighty-four proposals (38% of all proposals) came from minority-owned businesses (37 different businesses); and
- Eighteen proposals (8% of all proposals) came from white woman-owned businesses (seven different businesses).

Of the professional services business owners and managers that indicated in availability surveys that their companies are interested in competing as prime contractors on public contracts, 24 percent represented minority-owned businesses and 11 percent represented white woman-owned businesses. Those percentages were lower than the percentage of minority-owned businesses that submitted proposals on Metro’s professional services contracts during the study period but higher than the percentage of white woman-owned businesses that submitted proposals.

**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 8-7, 27 percent of the proposals that minority-owned businesses submitted resulted in contract awards, which was lower than the percent of proposals that majority-owned businesses submitted that resulted in contract awards (33%). Of the proposals that white woman-owned businesses submitted, 22 percent resulted in contract awards, lower than the percent of proposals that majority-owned businesses submitted that resulted in contract awards.

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



Note:

Based on analysis of 224 bids on 67 professional service contracts.

Source:

BBC Research & Consulting from entity contracting data.

**Procurement.** BBC examined bid information for a sample of 83 goods and other services contracts that Metro’s Procurement Division awarded during the study period. In total, Metro received 596 bids for those contracts.

**Number of bids from minority- and woman-owned businesses.** Minority- and woman-owned businesses submitted 201 of the 596 bids (34%) that the study team examined:

- One-hundred seventy-nine bids (30% of all bids) came from minority-owned businesses (seventeen businesses); and
- Twenty-two bids (4% of all bids) came from white woman-owned businesses (fourteen businesses).

Of the procurement business owners and managers that indicated in availability surveys that their companies are interested in competing as prime contractors on public contracts, 49 percent represented minority-owned businesses and 19 percent represented white woman-owned businesses. Those percentages were higher than the percentage of minority-owned and white woman-owned businesses that actually submitted bids on Metro’s procurement contracts during the study period.

**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 8-8, 15 percent of the proposals that minority-owned businesses submitted resulted in contract awards, which was equivalent to the percent of proposals that majority-owned businesses submitted that resulted in contract awards (15%). Of the proposals that white woman-owned businesses submitted, 36 percent resulted in contract awards, substantially higher than the percent of proposals that majority-owned businesses submitted that resulted in contract awards.

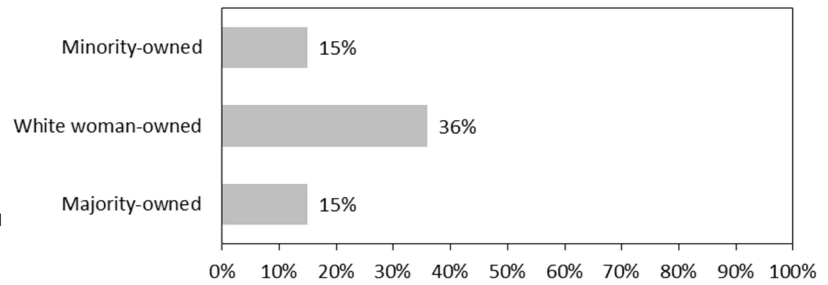
**Figure 8-8.**  
**Percentage of bids on goods and other service contracts that resulted in contract awards**

Note:

Based on analysis of 596 bids on 83 goods and other services contracts.

Source:

BBC Research & Consulting from entity contracting data.



# **CHAPTER 9.**

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**Overall DBE Goal**

# CHAPTER 9.

## Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the Los Angeles County Metropolitan Transportation Authority (Metro) is required to set an overall goal for DBE participation in its Federal Highway Administration (FTA)-funded contracts. The Final Rule effective February 28, 2011 revised requirements for goal-setting so that agencies that implement the Federal DBE Program need to develop overall DBE goals every three years. However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its FTA-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to enable the agency to meet the goal in the next year.

Metro must prepare and submit a Goal and Methodology document to FTA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. Metro last developed an overall DBE goal for FTA-funded contracts for federal fiscal years (FFYs) 2016 through 2018. The agency established an overall DBE goal of 26 percent. Metro indicated to FTA that it planned to meet the goal through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

Metro will be required to develop a new goal for FFYs 2019 through 2021. Chapter 9 provides information that Metro might consider as part of setting its new overall DBE goal. Chapter 9 is organized in two parts that are based on the two-step process that 49 Code of Federal Regulations (CFR) Part 26.45 outlines for agencies to set their overall DBE goals:

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

### **A. Establishing a Base Figure**

Establishing a base figure is the first step in calculating an overall goal for DBE participation in Metro's FTA-funded transportation contracts. As presented in Chapter 5, potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 27.0 percent of Metro's FTA-funded prime contract and subcontract dollars based on their availability for that work. Metro might consider 27.0 percent as the base figure for its overall DBE goal if it anticipates that the types, sizes, and locations of FTA-funded contracts that the agency awards in the future will be similar to the FTA-funded contracts that it awarded during the study period (January 1, 2011 through December 31, 2015).

Figure 9-1 presents the construction, professional services, and goods and other services components of the base figure for Metro's overall DBE goal. The availability estimates presented

in Figure 9-1 are based on the availability of potential DBEs for FTA-funded prime contracts and subcontracts. The overall base figure reflects a weight of 0.72 for construction contracts; 0.11 for professional services contracts; and 0.17 for goods and other services contracts based on the volume of dollars of FTA-funded contracts that Metro awarded during the study period. If Metro expects that the relative distributions of FTA-funded construction, professional services, and goods and other services contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. Metro might also consider evaluating whether the types, sizes, and locations of the FTA-funded contracts that it awards will change substantially in the future.

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

Potential DBEs	Availability Percentage			Weighted Average
	Construction	Professional Services	Goods and Other Services	
Black American owned	6.6 %	3.8 %	8.2 %	6.6 %
Asian Pacific American owned	1.3	3.0	1.6	1.5
Subcontinent Asian American owned	0.4	0.6	0.9	0.5
Hispanic American owned	14.4	3.6	23.1	14.7
Native American owned	0.1	0.0	2.5	0.5
White woman owned	0.6	2.8	14.5	3.2
<b>Total potential DBEs</b>	<b>23.3 %</b>	<b>13.7 %</b>	<b>50.9 %</b>	<b>27.0 %</b>
<b>Industry weight</b>	<b>72 %</b>	<b>11 %</b>	<b>17 %</b>	

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

See Figures F-16, F-17, F-18, and F-19 in Appendix F for corresponding disparity results tables.

Source: BBC Research & Consulting availability analysis.

## B. Considering a Step-2 Adjustment

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

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

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

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

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

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

Figure 9-2 presents past DBE participation based on Metro’s Uniform Reports of DBE Awards or Commitments and Payments as reported to FTA. According to Metro’s Uniform Reports, median DBE participation in USDOT-funded contracts from FFYs 2011 through 2015 was 3.7 percent.

**Figure 9-2.**  
**Past certified DBE participation in USDOT-funded contracts, FFY 2011-2015**

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

FFY	DBE Attainment	Annual DBE Goal	Difference
2011	3.70 %	8.00 %	-4.30 %
2012	8.37	8.00	0.37
2013	0.51	26.00	-25.49
2014	22.41	26.00	-3.59
2015	2.23 %	26.00 %	-23.77 %

The information about past DBE participation supports a downward adjustment to Metro’s base figure. If Metro were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 27.0 percent base figure and the 3.7 percent median past DBE participation, yielding a potential overall DBE goal of 15.4 percent. BBC’s analysis of DBE participation in Metro’s FTA-funded contracts indicates DBE participation (15.1%) that is also lower than the base figure. If Metro were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 27.0 percent base figure and the 15.1 percent DBE participation, yielding a potential overall DBE goal of 21.1 percent.

**2. Information related to employment, self-employment, education, training, and unions.** Chapter 3 summarizes information about conditions in the local contracting industry for minorities, women, and minority- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented

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



in Appendices C and D, respectively. BBC's analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, business ownership, and business success in the Metro study area contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FTA-funded contracts that Metro awards, which supports an upward step-2 adjustment to Metro's base figure.

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

- Being Black American or Hispanic American was associated with a lower likelihood of business ownership in the construction industry. In addition, being a woman was associated with a lower likelihood of business ownership in the Construction industry.
- Being Black American was associated with a lower likelihood of business ownership in the professional services industry. In addition, being a woman was associated with a lower likelihood of business ownership in the professional services industry.
- Being Black American, Asian Pacific American, Subcontinent Asian American or Hispanic American was associated with a lower likelihood of business ownership in the goods and other services industries.

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

The *but for* analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FTA-funded prime contracts and subcontracts that Metro awarded during the study period). The weights for each industry were based on the proportion of FTA-funded contract dollars that Metro awarded in each industry during the study period (i.e., 0.72 weight for construction, 0.11 weight for professional services, and a 0.17 weight for goods and other services). In that way, BBC determined a potential adjustment to Metro's base figure that attempted to account for race- and gender-based barriers in business ownership in the local contracting industry.

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

- a. **Current availability.** Column (a) presents the current availability of potential DBEs by racial/ethnic and gender group and by industry, as also presented in Figure 9-1. Each row presents the percentage availability for each racial/ethnic and gender group. Combined, the current availability of potential DBEs for Metro's FTA-funded contracts is 27.0 percent, as shown in row (28) of column (a).
- b. **Disparity indices for business ownership.** For each group that is significantly less likely than similarly-situated non-Hispanic white men to own construction and engineering businesses, BBC simulated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white men who share similar race- and gender-neutral personal characteristics.

To simulate business ownership rates if minorities and women owned businesses at the same rate as non-Hispanic white men in a particular industry, BBC took the following steps: 1) BBC performed a probit regression analysis predicting business ownership including only workers who were non-Hispanic white men in the dataset; and 2) the study team then used the coefficients from that model and the mean personal characteristics of individual minority groups (or non-Hispanic white women) working in the industry (i.e., personal characteristics, indicators of educational attainment, and indicators of personal financial resources and constraints) to simulate business ownership for each group.

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

- c. **Availability after initial adjustment.** Column (c) presents availability estimates by racial/ethnic and gender group and by industry after initially adjusting for statistically significant disparities in business ownership rates. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100. Note that BBC only made adjustments for those groups that are significantly less likely than similarly-situated non-Hispanic white men to own businesses.
- d. **Availability after scaling to 100 percent.** Column (d) shows adjusted availability estimates that the study team re-scaled so that the sum of the availability estimates equaled 100 percent for each industry. BBC re-scaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under "Total" in column (c)—in row (9) for construction and row (18) for

consulting. For example, the scaled availability estimate for non-Hispanic white woman-owned construction businesses shown in row (6) of column (d) was calculated in the following way:  $(1.4\% \div 105.6\%) \times 100 = 1.3$  percent.

- e. **Components of goal.** Column (e) shows the component of the total base figure attributed to the adjusted availability of minority- and woman-owned businesses for each industry. BBC calculated each component by taking the total availability estimate shown under “Potential DBEs” in column (d)—in row (7) for construction and row (16) for consulting—and multiplying it by the proportion of total FTA-funded contract dollars for which each industry accounts (i.e., 0.72 for construction, 0.11 for professional services, and 0.17 for consulting). For example, BBC used the 27.4 percent shown in row (7) of column (d) for construction and multiplied it by 0.72 for a result of 19.6 percent (see row (7) of column (e)). The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership—14.2 percent, as shown in the bottom row of column (e).

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

Industry and group	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
<b>Construction</b>					
(1) Black American	6.6 %	70	9.5 %	9.0 %	
(2) Asian Pacific American	1.3	n/a	1.3	1.2	
(3) Subcontinent Asian American	0.4	n/a	0.4	0.4	
(4) Hispanic American	14.4	88	16.3	15.5	
(5) Native American	0.1	n/a	0.1	0.1	
(6) White woman	<u>0.6</u>	<u>44</u>	<u>1.4</u>	<u>1.3</u>	
(7) Potential DBEs	23.3 %	n/a	28.9 %	27.4 %	19.6 %
(8) All other businesses ***	<u>76.7</u>	<u>n/a</u>	<u>76.7</u>	<u>72.6</u>	
(9) <b>Total</b>	<b>100.0 %</b>	n/a	<b>105.6 %</b>	<b>100.0 %</b>	
<b>Professional services</b>					
(10) Black American	3.8 %	57	6.6 %	6.4 %	
(11) Asian Pacific American	3.0	n/a	3.0	2.9	
(12) Subcontinent Asian American	0.6	n/a	0.6	0.5	
(13) Hispanic American	3.6	n/a	3.6	3.5	
(14) Native American	0.0	n/a	0.0	0.0	
(15) White woman	<u>2.8</u>	<u>87</u>	<u>3.2</u>	<u>3.1</u>	
(16) Potential DBEs	13.7 %	n/a	17.0 %	16.5 %	1.8 %
(17) All other businesses	<u>86.3</u>	<u>n/a</u>	<u>86.3</u>	<u>83.5</u>	
(18) <b>Total</b>	<b>100.0 %</b>	n/a	<b>103.3 %</b>	<b>100.0 %</b>	
<b>Goods and support services</b>					
(19) Black American	8.2 %	35	23.5 %	18.8 %	
(20) Asian Pacific American	1.6	88	1.8	1.4	
(21) Subcontinent Asian American	0.9	53	1.7	1.4	
(22) Hispanic American	23.1	73	31.7	25.4	
(23) Native American	2.5	n/a	2.5	2.0	
(24) White woman	<u>14.5</u>	<u>n/a</u>	<u>14.5</u>	<u>11.6</u>	
(25) Potential DBEs	50.9 %	n/a	75.7 %	60.7 %	10.4 %
(26) All other businesses	<u>49.1</u>	<u>n/a</u>	<u>49.1</u>	<u>39.3</u>	
(27) <b>Total</b>	<b>100.0 %</b>	n/a	<b>124.8 %</b>	<b>100.0 %</b>	
(28) <b>TOTAL</b>	<b>27.0 %</b>	n/a		n/a	<b>31.9 %</b>

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

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

\*\* Components of potential step-2 adjustment were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FTA-funded contract dollars in each industry (construction = 0.72, professional services = 0.11, and goods and other services = 0.155).

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

Source: BBC Research & Consulting.

Based on information related to business ownership alone, Metro might consider adjusting the base figure upward to 31.9 percent.

### **3. Any disparities in the ability of DBEs to get financing, bonding, and insurance.**

BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in Los Angeles County 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 Los Angeles County contracting marketplace. Any barriers that minority- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for Metro's FTA-funded prime contracts and subcontracts. Thus, information from the disparity study about financing, bonding, and insurance also supports an upward step-2 adjustment to Metro's base figure.

**4. Other factors.** The Federal DBE Program suggests that federal fund recipients also examine "other factors" when determining whether to make step-2 adjustments to their base figures.<sup>3</sup>

**Success of businesses.** There is quantitative evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix C presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix D. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local contracting industry. Thus, information about the success of businesses also supports an upward step-2 adjustment to Metro's base figure.

**Evidence from disparity studies conducted within the jurisdiction.** USDOT suggests that federal aid recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make step-2 adjustments to their base figures. Metro should review results from those disparity studies when determining its overall DBE goal. However, Metro should note that the results of those studies are tailored specifically to the contracts and policies of each agency and entity. Those contracts and policies may differ in many important respects from those of Metro.

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

*If the evidence suggests that an adjustment is warranted, it is critically important to ensure that there is a rational relationship between the data you are using to make the adjustment and the actual numerical adjustment made.<sup>4</sup>*

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

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

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

- Metro might adjust its base figure upward to account for barriers that minorities and women face in human capital and owning businesses in the local contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”<sup>5</sup>
- Evidence of barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to Metro’s base figure.

There are also reasons why Metro might consider a downward adjustment to its base figure:

- Metro must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. Metro’s utilization reports for FFYs 2011 through 2015 indicated median annual DBE participation of 3.7 percent for those years, which is lower than its base figure.
- USDOT’s “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. BBC’s analysis of DBE participation in METRO’s FTA-funded contracts also indicates DBE participation (15.1%) that is lower than the base figure. If Metro were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of its base figure and the 15.1 percent DBE participation.

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

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

# **CHAPTER 10.**

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## **Program Measures**

# CHAPTER 10.

## Program Measures

The Los Angeles County Metropolitan Transportation Authority (Metro) 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. Metro uses those measures as part of its compliance with the United States Department of Transportation’s (USDOT) Federal Disadvantaged Business Enterprise (DBE) Program. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an entity’s contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified MBEs, WBEs, or DBEs. In contrast, race- and gender-conscious measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an entity’s contracting (e.g., using DBE or MBE/WBE goals on individual contracts).

As part of meeting the *narrow tailoring* requirement of the strict scrutiny standard of constitutional review, agencies that comply with or implement minority- and woman-owned business programs—including the USDOT’s Federal DBE Program—must meet the maximum feasible portion of overall annual minority- and woman-owned business participation goals through the use of race- and gender-neutral measures (for details, see Chapter 2 and Appendix B).<sup>1</sup> If an agency cannot meet its overall minority- or woman-owned business participation goals through the use of race- and gender-neutral measures alone, then it can consider using race- and gender-conscious measures.

As part of the Federal DBE Program, an agency must determine whether it can meet its overall DBE goal solely through race- and gender-neutral measures or whether race- and gender-conscious measures—such as DBE contract goals—are also needed. As part of doing so, an agency must project the portion of its overall DBE goal that it expects to meet through race- and gender-neutral measures and what portion it expects to meet through race- and gender-conscious measures. USDOT offers guidance concerning how an agency should project the portion of its overall DBE goal that it will meet through race- and gender-neutral and race- and gender-conscious measures including the following:

- “USDOT Questions and Answers about 49 CFR Part 26,” which addresses factors for federal aid recipients to consider when projecting the portions of their overall DBE goals that they will meet through the use of race- and gender-neutral measures;<sup>2</sup>

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

<sup>2</sup> <http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc>



- USDOT’s “Tips for Goal-Setting,” which suggests factors for federal aid recipients to consider when making such projections;<sup>3</sup>
- Federal Highway Administration (FHWA) template, which describes how the agency considers approving DBE goal and methodology submissions includes a section on projecting the percentage of overall DBE goals to be met through race- and gender neutral and race- and gender-conscious measures. Figure 10-1 presents an excerpt from that template.

**Figure 10-1.**  
**Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]**

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

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

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

Chapter 10 is organized around each of those general areas of questions.

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

As presented in Chapter 3 as well as in Appendices C and D, BBC Research & Consulting (BBC) examined conditions in the Los Angeles County marketplace related to human capital, financial capital, business ownership, and the success of businesses. There is substantial quantitative evidence of disparities for minority- and woman-owned businesses overall and for specific groups concerning the above issues. Qualitative information also indicated evidence of discrimination affecting the local marketplace. However, some minority and woman business

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

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

owners that the study team interviewed as part of the disparity study did not think that their businesses had been affected by any race- or gender-based discrimination. Metro should review the information about marketplace conditions presented in this report as well as other information it may have when considering the extent to which it can meet its overall DBE goal through race- and gender-neutral measures.

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

Figure 10-2 presents the participation of certified DBEs in Metro’s FTA-funded contracts in recent years, as presented in Metro reports to USDOT. Based on information about awards and commitments to DBE-certified businesses, Metro has not met its overall DBE goal in recent years. In federal fiscal years (FFYs) 2010 through 2015, DBE awards and commitments on USDOT-funded contracts was below Metro’s overall DBE goal by an average of 11.4 percentage points. Metro applied race- and gender-conscious DBE contract goals to USDOT-funded transportation contracts during the latter half of the study period.

**Figure 10-2.**  
**Past certified DBE participation on USDOT-**  
**funded contracts, FFY 2011-2015**

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

FFY	DBE Attainment	Annual DBE Goal	Difference
2011	3.70 %	8.00 %	-4.30 %
2012	8.37	8.00	0.37
2013	0.51	26.00	-25.49
2014	22.41	26.00	-3.59
2015	2.23 %	26.00 %	-23.77 %

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

Metro applied race- and gender-conscious DBE contract goals to many FTA-funded transportation contracts and MBE/WBE goals to many local-funded contracts during the study period (January 1, 2011 through December 31, 2015). However, during half of the study period, the agency did not use race- or gender-conscious program measures on FTA-funded construction contracts. Figure 10-3 presents the participation of certified DBEs in those contracts. DBE participation in those contracts was 3.7 percent.

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

When determining the extent to which Metro could meet its overall DBE goal through the use of race- and gender- neutral measures, the agency should review the neutral measures that it and other local organizations already have in place. Metro should also review measures that it has planned, or could consider, for future implementation. BBC reviewed race- and gender-neutral measures that Metro 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 entities in Los Angeles County use.

**Figure 10-3.**  
**Certified DBE participation in USDOT-funded transportation contracts that did not include race- or gender-conscious measures**

Note:

The study team analyzed 6,856 prime contracts and subcontracts.

Source:

BBC Research & Consulting from Metro contracting data.

	Total	
	\$ in Thousand	Percent
<b>DBEs</b>		
Black American-owned	\$17,220	1.4 %
Asian Pacific American-owned	25,268	2.1
Subcontinent Asian American-owned	6,108	0.5
Hispanic American-owned	101,097	8.2
Native American-owned	6,647	0.5
White male-owned	0	0.0
White woman-owned	14,111	1.1
<b>Total DBE</b>	<b>\$170,451</b>	<b>13.8 %</b>

**Metro’s race- and gender-neutral measures.** Metro currently has a broad range of race- and gender-neutral measures in place to encourage the participation of all small businesses — including DBEs — in its transportation contracts. The agency plans on continuing the use of those measures in the future. Metro’s race- and gender-neutral efforts can be classified into four categories:

- Advocacy and outreach efforts;
- Technical assistance programs;
- Capital, bonding, and insurance assistance;
- Prompt payment policies; and
- Small business preference/set-aside.

**Advocacy and outreach efforts.** Metro participates in various advocacy and outreach efforts including hosting DBE workshops and using communications that are targeted specifically to disadvantaged businesses.

**Communications.** Metro communicates with DBEs through email, its Vendor Portal, and its DBE newsletter. Metro uses its Vendor Portal and its newsletter to announce contracting opportunities, special events, policy changes, and new DBE program measures.

**Networking events and workshops.** Metro hosts various events and workshops for DBEs. Some of those events include Meet the Prime, Meet the Project Managers and Buyers, Salute to Small Business Celebration, and other signature outreach events.

**Capital, bonding, and insurance.** Metro established a Commercial Insurance Broker Panel which assists businesses that are lacking the required insurance coverages. This panel is available to businesses and contractors through the Transportation Business Advisory Council (TBAC), small business outreach events, and Metro’s small business orientation classes.

**Technical assistance programs.** Metro provides an online business toolkit which includes web tutorials for DBEs that cover topics that include how to register as a vendor, the process of bidding on contracts with Metro, contract compliance reporting, certification, and more weekly webinars.

**Prompt payment policies.** Metro has policies in place to help ensure prompt payment to subcontractors. Prime contractors are required to pay their subcontractors within 7 days after receipt of payment from Metro.

**Small business enterprise (SBE) program.** In 1997, Metro started their SBE program to comply with California's Proposition 209, which prohibits explicit consideration of race or gender in the award of state and locally funded contracts.

**Small Business Prime set-aside program.** Metro's Small Business Prime set-aside program started in 2013 and enables small businesses to compete only against other small businesses for projects up to \$5 million, as well as informal projects under \$100,000. Only Metro-certified SBEs can participate in the program.

Figure 10-4 provides details of the many race- and gender-neutral programs offered by Metro.

**Figure 10-4.**  
**Examples of Metro race- and gender-neutral programs**

Type	Program
<b>Advocacy and outreach</b>	Metro Vendor Portal is Metro's central web resource for small businesses to learn to work with Metro easily and efficiently. The portal gives vendors access to registering to work with Metro and allows vendors to sign up to automatically receive project RFPs/solicitations via email.
<b>Advocacy and outreach</b>	Metro Connect is Metro's small business resource that provides vendors with informative Tool Kit, certification information, networking events and workshops, and more. Vendors can also sign up for the MetroConnection newsletter which highlights SBE and DBE businesses, updates vendors on Metro events and bid opportunities, notifies vendor of policy changes, and other legislative news.
<b>Advocacy and outreach</b>	Metro hosts several networking events and workshops including: <ul style="list-style-type: none"> <li>• <i>How to Do Business with Metro</i> which is a monthly workshop on qualification requirements and bidding processes;</li> <li>• The Transportation Business Advisory Council (TBAC) meets monthly at Metro headquarters and includes hosting guest speakers related to current and future contracting opportunities, and contracting-related legislation updates;</li> <li>• <i>Meet the Primes</i> is an annual networking event to connect small businesses with prime contractors;</li> <li>• <i>Meet the Project Managers and Buyers</i> is an annual networking event for small business owners to meet Metro Program Managers and staff; and</li> <li>• <i>Salute to Small Business Celebration</i>.</li> </ul>
<b>Advocacy and outreach</b>	Metro 12-Month Look Ahead project list on the Vendor Portal identifies current and future bidding opportunities, includes info on type of work, general scope, estimated cost/range, industry specific needs, and DBE and SBE goals.
<b>Capital, Bonding, and Insurance</b>	Metro Commercial Insurance Broker Panel was established in 2009 to assist businesses lacking required insurance coverage. The panel provides proposals and insurance placement for contractors in order to assist them in meeting Metro's risk management requirements. The broker panel is disseminated to small businesses through the Transportation Business Advisory Council (TBAC), small business outreach events, Metro's small business orientation classes, and published on Metro's website.
<b>Technical Assistance</b>	Metro's Business Toolkit contains pre-recorded web tutorials on Metro vendor registration and the process of bidding on and fulfilling contracts with Metro. It also contains weekly live webinars for contractor and vendor training (i.e., contract compliance reporting, certification, utilization plan completion).
<b>Mentor- Protégé</b>	<p>Contracting Outreach and Mentoring Plan (COMP):  Proposers bidding on contracts that are greater than \$25 million are required to submit proposals with an innovative DBE Contracting Outreach and Mentoring Plan (COMP). The Proposers' COMP approach will be evaluated as one element of the RFP evaluation criteria, and Metro will review/approve each COMP submittal for the awarded contract. The plans should include the proposers plan for mentoring subcontractors. The goal is for mentors to assist in the advancement of participating protégés, including measurable plans to grow and compete on a larger scale. Mentor Protégés are identified by Proposers/Bidders, not by Metro.</p> <p>DBE and SBE Tier Programs  Proposers are required to identify strategies to create DBE/SBE subcontracting opportunities based on firm size or average annual gross receipts defined by tiered dollar thresholds (i.e. \$3K-\$500K, \$501K-\$1.0M, \$1.1M-\$5M, \$5.1M-\$10M and \$10.1M-\$23.98M). The purpose is to increase DBE/SBE participation by further levelling the playing field and making it easier for DBE/SBEs to compete with firms of a similar size. Proposers are expected to develop and include sub-contracting opportunities at those dollar threshold levels in the COMP approach submitted in their proposals.</p>

Within Los Angeles County, there are many organizations that offer race- and gender-neutral programs to LA business. Figure 10-5 highlights some of those organizations and programs.

**Figure 10-5.**  
**Examples of race- and gender-neutral programs offered by LA organizations**

Type	Program
<b>Advocacy and Outreach</b>	LA Business Portal is a central web resource from the City of Los Angeles for small businesses looking to work with the City.
<b>Capital, Bonding, and Insurance</b>	LA Business Source Centers are community development finance institutions (CDFIs), or have a formal relationship with a CDFI that offer direct financial assistance for small businesses in addition to their SBE advocacy and technical support or services.
<b>Capital, Bonding, and Insurance</b>	City of Los Angeles Contractor Development and Bonding Program (CDABP) assists with obtaining or increasing bonding capacity, including: <ul style="list-style-type: none"> <li>• Access to City of L.A. collateral support for bid, performance, and payment bonds for qualified contractors;</li> <li>• Contract review, project assessment, and field support for program bonded contracts;</li> <li>• Assistance with project risk identification and mitigation;</li> <li>• Third party funds administration;</li> <li>• Accounting cost subsidy for CPA prepared financial statements; and</li> <li>• Access to contract specific financing.</li> </ul>
<b>Capital, Bonding, and Insurance</b>	State of California iBank has a "Just Start Loan Program" that is a state-funded small business microloan program. In the Los Angeles area, loans are financed through the Pacific Coast Regional Small Business Development Corporation and/or the Valley Small Business Development Corporation.
<b>Capital, Bonding, and Insurance</b>	Pacific Coast Regional (PCR) Small Business Development Corporation administers the Metro business Interruption Fund (BIF) for small business owners in LA area impacted by revenue loss due to Metro construction. PCR is a local guarantor for the California Small Business Loan Guarantee Program and a lender and guarantor of the SBA Community Advantage Loan Program.
<b>Capital, Bonding, and Insurance</b>	Valley Economic Development Corp (VEDC) is a non-profit small business lender headquartered in Sherman Oaks that provides loans and micro-financing options to small businesses, particularly those owned by women and minorities, that do not qualify for traditional financing.
<b>Capital, Bonding, and Insurance</b>	Business Resource Group (BRG) partners with Merriwether & Williams to provide financing and build financial capacity of diverse contractors seeking to do business with City of Los Angeles, Los Angeles World Airport, and Port of Los Angeles. Through the Contractors Bonding and Development Program, BRG supports the city of LA's commitment to deliver capital access and specialized assistance services for contractors seeking to expand vendor relationships with the city and its affiliated municipal agencies.
<b>Capital, Bonding, and Insurance</b>	Los Angeles Unified School District (LAUSD) Contractor BondWorks Program provides information and training to help DBEs and other small businesses with bonding and financing to support LAUSD projects.
<b>Mentor-Protégé Programs</b>	The Los Angeles chapter of the Service Corps of Retired Executives (SCORE LA) is a volunteer, non-profit organization that serves as a source of free small business advice for entrepreneurs. SCORE mentors, many of whom are business owners or hold leadership positions in successful companies, provide free and confidential business assistance to both prospective entrepreneurs and existing small business owners. The organization also conducts a variety of workshops at locations throughout the greater Los Angeles area that address many of the essential techniques necessary for establishing and managing a successful business.

**Figure 10-5. (continued)**

**Examples of race- and gender-neutral programs offered by LA organizations**

<p><b>Technical Assistance</b></p>	<p>The Los Angeles District Office (LADO) of the Small Business Administration (SBA) operates the Management and Technical Assistance Program for the greater Los Angeles, Santa Barbara, and Ventura County areas, and provides technical assistance via counseling resource partners, including an extensive network of three SCORE chapters, four Women Business Centers and nine Small Business Development Centers. Services available include:</p> <ul style="list-style-type: none"> <li>• Free counseling, advice, and information on starting a business through SCORE;</li> <li>• Financial assistance for new or existing businesses through guaranteed loans made by area bank and non-bank lenders;</li> <li>• Free consulting services through the network of Small Business Development Centers. SBDCs also conduct training events throughout the district - some require a nominal registration fee;</li> <li>• Assistance to businesses owned and controlled by socially and economically disadvantaged individuals through the Minority Enterprise Development Program;</li> <li>• Women's Business Center (WBC) program - program partially funded by SBA to provide business training, counseling, coaching, mentoring, and other assistance geared toward women, particularly those who are socially and economically disadvantaged;</li> <li>• Special loan programs for businesses involved in international trade;</li> <li>• Guaranteed loans for credit-worthy veterans;</li> <li>• Encore Entrepreneurs program (for business-owners age 50 and older);</li> <li>• Young Entrepreneurs program (for young owners/student entrepreneurs); and</li> <li>• Office of Native American Affairs (ONAA) -- provides a network of training initiatives that include a Native Entrepreneurial Empowerment Workshop, a Native American 8(a) Business Development Workshop, a Money Smart Workshop, an Incubator Workshop, and the online tool, "Small Business Primer: Strategies for Growth."</li> </ul>
<p><b>Technical Assistance</b></p>	<p>The Los Angeles Public Library offers a range of electronic and print resources to support small business owners and entrepreneurs, including access to free business online courses, marketing and industry research databases, and hosted workshops by small business support groups from the community (for example - 2014 workshop on "starting your own business by PACE [Pacific Asian consortium in Employment]).</p>
<p><b>Technical Assistance</b></p>	<p>The Los Angeles Unified School District (LAUSD) Small Business Boot Camp is an eight week program that provides small contractors with the tools necessary to improve their competitive capacity through a comprehensive, hands-on curriculum. At the conclusion of the eight-week program, graduating small contractors will be ready to bid on LAUSD contracts, and will be well-prepared to pursue contracts with other public agencies. The program has both short and long-term benefits for participating contractors and will serve to expand the District's pool of qualified contractors.</p>
<p><b>Technical Assistance</b></p>	<p>California's Small Business Development Center (CA SBDC) Network is one of the state's primary resource partners for small business development. The CA SBDC Network provides small businesses and entrepreneurs with confidential, no-cost, one-on-one advising, expert training and a wide business network. Small business owners access capital, develop business and financial models, create and implement marketing strategies, connect to global markets, and grow their business online with the CA SBDC.</p>

# **CHAPTER 11.**

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## **Program Implementation**



# CHAPTER 11.

## Program Implementation

Chapter 11 reviews information relevant to the Los Angeles County Metropolitan Transportation Authority's (Metro's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for United States Department of Transportation (USDOT)-funded contracts.

### A. Federal DBE Program

Regulations presented in 49 Code of Federal regulations (CFR) Part 26 and associated documents offer agencies guidance related to implementing the Federal DBE Program. Key requirements of the program are described below in the order that they are presented in 49 CFR Part 26.<sup>1</sup>

**Reporting to DOT – 49 CFR Part 26.11 (b).** Metro must periodically report DBE participation in its USDOT-funded contracts to the Federal Transit Administration (FTA). Metro tracks DBE and non-DBE participation through its B2Gnow management software. Prime contractors enter all subcontractor payments into the B2Gnow systems and DBE subcontractors must verify those payments. Metro tracks the total amount of those payments to calculate DBE participation. Based on that information, Metro prepares Uniform Reports of DBE Awards or Commitments and Payments, which it reports to USDOT. Metro plans to continue to collect and report that information in the future using the same approach.

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

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

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

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

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<sup>1</sup> Because only certain portions of the Federal DBE Program are discussed in Chapter 11, Metro should refer to the complete federal regulations when considering its implementation of the program.

**Maintaining comprehensive vendor data.** In order to effectively track the participation of minority- and woman-owned businesses on its contracts, Metro should consider continuing to improve the information that it collects on the ownership status of businesses that participate in its contracts, including both prime contractors and subcontractors. Not only should Metro consider collecting information about DBE status, but it should also consider obtaining information on the race/ethnicity and gender of business owners regardless of certification status. As appropriate, Metro can use business information that the study team collected as part of the 2017 disparity study to augment its vendor data.

**Prompt payment mechanisms – 49 CFR Part 26.29.** Metro’s prompt payment policies appear to comply with the federal regulations in 49 CFR Part 26.29. Prime contractors are required to pay their subcontractors no later than 7 days after receiving payment from Metro. Qualitative information that the study team collected through in-depth interviews and public meetings revealed that some businesses are dissatisfied with how promptly they receive payment on Metro contracts. Metro should consider maintaining the efforts it makes to ensure prompt payment to both prime contractors and subcontractors.

**DBE directory – 49 CFR Part 26.31.** Metro offers a directory on its website of all DBE-certified businesses by business name, industry (NAICS) code, and work type. Qualitative information that the study team collected through in-depth interviews and public meetings indicated that business owners whose firms work as certified DBE subcontractors are aware of the directory and its value, but that prime contractors do not readily use it to find DBE-certified subcontractors. Metro should continue to promote the DBE directory to prime contractors so they can continue to be aware of qualified DBE subcontractors.

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

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

BBC investigated potential overconcentration in Metro contracts. There were eighteen specific subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars for contracts awarded between January 1, 2011 and December 31, 2015 based on contract data that the study team received from Metro:

- Building construction;
- Construction management;
- Electrical supplies;
- Elevator goods and services;
- Fencing, guardrails, and signs;

- Flagging services;
- Heavy construction;
- Heavy construction equipment rental;
- Landscape architecture;
- Landscape services;
- Other goods and supplies;
- Other services;
- Railroad construction;
- Surveying and mapping;
- Testing services;
- Trucking;
- Waste services; and
- Wrecking and demolition.

Because the above industries are based only on subcontract dollars, they do not include work that prime contractors self-performed in those areas. If the study team had included self-performed work in those analyses, the percentages for which DBEs accounted would likely have decreased. Metro should consider continuing to monitor the above types of work for potential overconcentration in the future. This might include collecting data on subcontractor utilization and prime contractor self-performance in each of the work types The USDOT provides the following recommendations for agencies to address over concentration:

*If a recipient finds an area of overconcentration, it would have to devise means of addressing the problem that work in their local situations. Possible means of dealing with the problem could include assisting prime contractors to find DBEs in non-traditional fields or varying the use of contract goals to lessen any burden on particular types of non-DBE specialty contractors. While recipients would have to obtain DOT approval of determinations of overconcentration and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.<sup>2</sup>*

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

- The Small Business Prime set-aside program, which sets aside applicable contracts and enables small businesses to compete only against other small businesses for projects up to \$5 million; and
- The elimination of good faith efforts for non-federally funded contracts.

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<sup>2</sup> 64 F.R. 5106 (February 2, 1999)

Metro should continue to communicate with certified DBEs to ensure that its BDPs provide the most relevant specialized assistance that is tailored to the needs of developing businesses in the Los Angeles marketplace. Metro might explore additional partnerships to implement other BDPs. Such programs could provide specialized assistance that would be tailored to the needs of developing businesses.

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

- A review of DBE participation both prior to and after contract award;
- DBE subcontract payment tracking through its B2Gnow contract management system; and
- Informal meetings with prime contractors and subcontractors.

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

**Fostering small business participation – 49 CFR Part 26.39.** When implementing the Federal DBE Program, Metro must include measures to structure contracting requirements to facilitate competition by small businesses, “taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.”<sup>3</sup> The Final Rule effective February 28, 2011 added a requirement for agencies to foster small business participation in their contracting. It required agencies to submit a plan for fostering small business participation to USDOT in early 2012. USDOT also identifies the following potential strategies for fostering small business participation:

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

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<sup>3</sup> 49 CFR Part 26.39(a).

In order to facilitate small business participation, Metro implements a number of efforts including:

- Small business certification program;
- Small business contract goals on local-funded contracts;
- Small business Prime set-aside program sets aside contracts up to \$5 million in which only small businesses compete against other small businesses; and
- Unbundling of large contracts, when feasible.

In addition, Chapter 10 of the report outlines many of Metro's current and planned race- and gender-neutral measures and provides examples of measures that other organizations in Los Angeles have implemented. Metro should review that information and consider implementing measures that the agency deems to be effective. Metro should also review legal and budgetary issues in considering different measures.

To be of assistance to DBEs and SBEs that may be experiencing difficulties in contract work, the San Francisco Bay Area Rapid Transit District (BART) assigns an individual or firm to act as an Ombudsperson for DBE or SBE subcontractors or supplier to mediate disputes between prime contractor and subcontractor or supplies. Metro should consider a similar program for LA County DBEs and SBEs to help foster relationships between prime contractors and DBE or SBE subcontractors or suppliers.

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

**Setting overall DBE goals – 49 CFR Part 26.45.** In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall DBE goals. As discussed in Chapter 1, agencies such as Metro now need to develop and submit overall DBE goals every three years. Chapter 9 uses data and results from the disparity study to provide Metro with information that could be useful in developing its next overall DBE goal submission.

**Analysis of reasons for not meeting overall DBE goal – 49 CFR Part 26.47(c).** Another addition to the Federal DBE Program made under The Final Rule effective February 28, 2011 requires agencies to take the following actions if their DBE participation for a particular fiscal year is less than their overall goal for that year:

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

Based on information about awards and commitments to DBE-certified businesses, Metro has not met its DBE goal in recent years. In federal fiscal years 2011 through 2015, DBE awards and commitments that Metro made on USDOT-funded contracts were below its overall DBE goal by an average of 11.4 percentage points.

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

- Developing a system to collect information on the race/ethnicity and gender of the owners of all businesses—not just certified DBEs—participating as prime contractors or subcontractors in USDOT-funded contracts;
- Developing internal reports for the participation of all minority- and woman-owned businesses (based on race/ethnicity and gender of ownership; annual revenue; and other factors such as whether the business has been denied DBE certification in the past) in USDOT-funded contracts; and
- Continuing to track participation of certified DBEs on USDOT-funded contracts per USDOT reporting requirements.

**Other steps to evaluate how Metro might better meet its overall DBE goal.** Analyzing the participation of potential DBEs is one step among many that Metro might consider taking when examining any differences between DBE participation and its overall DBE goal. Based on a comprehensive review, Metro must establish specific steps and milestones to correct any problems it identifies to enable it to better meet its overall DBE goal in the future.<sup>5</sup>

**Maximum feasible portion of goal met through neutral program measures – 49 CFR Part 26.51(a).** As discussed in Chapter 10, Metro must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. Metro must project the portion of its overall DBE goal that could be achieved through such measures. The agency should consider the information and analytical approaches presented in Chapter 10 when making such projections.

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

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

<sup>5</sup> 49 CFR Part 26.47(c)(2).

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

If Metro determines that it needs to continue using DBE contract goals on USDOT-funded projects, then it should also evaluate which DBE groups should be considered eligible for those goals. If Metro decides to consider only certain DBE groups (e.g., groups that Metro determines to be *underutilized* DBEs) as eligible to participate in DBE contract goals, it must submit a waiver request to FTA.<sup>6</sup>

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

- Several minority- and woman-owned businesses commented that race- and gender-conscious measures have made a positive impact on their firms by helping them get their “foot in the door” with prime contractors and win public sector work. A number of minority- and woman-owned businesses underlined that these measures open the door to greater opportunity for their businesses, and help their firms become known in the marketplace.
- Several interviewees observed that public agencies, including Metro, should reconsider how they define minority and disadvantaged business owners for race- and gender-conscious measures in present-day California where there is high diversity, and where women and minorities are excelling in certain professional sectors. A few interviewees urged a stronger focus on income disparity.

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

**Flexible use of any race- and gender-conscious measures – 49 CFR Part 26.51(f).** State and local agencies must exercise flexibility in any use of race- and gender-conscious measures such as DBE contract goals. For example, if Metro determines that DBE participation exceeds its overall DBE goal for a fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it

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<sup>6</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006) This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

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

**Good faith efforts procedures – 49 CFR Part 26.53.** USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Part 26. Metro's current implementation of the Federal DBE Program outlines the good faith efforts process that it uses for DBE contract goals. The Final Rule effective February 28, 2011 updated requirements for good faith efforts when agencies use DBE contract goals. Metro should review 49 CFR Part 26.53 and The Final Rule to ensure that its good faith efforts procedures are consistent with federal regulations.

Metro requires contractors to submit good faith efforts documentation and written confirmation in the event that bidders' efforts to include sufficient DBE participation were unsuccessful. Factors that are considered by Metro in evaluating good faith efforts include:

- A bidder's solicitation process;
- Whether a bidder has selected portions of work to be performed by DBEs or has broken out portions of work into more feasible units in order to increase the likelihood that the DBE goal will be achieved;
- Whether a bidder has negotiated in good faith with interested DBEs in an effort to facilitate DBE participation;
- Whether a bidder has performed a comparative cost analysis while understanding that there may be additional costs involved in finding and using DBEs as long as the costs are not excessive and unreasonable; and
- Taking into account the performance of other bidders in meeting a DBE contract goal.

Perfunctory efforts are not considered good faith efforts. Determining the sufficiency of bidders' good faith efforts is at the agency's discretion and using quantitative formulas is not required. On multiple occasions during the study period, Metro accepted prime contractors' good faith efforts in lieu of actual subcontract commitments with DBEs. Several individuals participating in in-depth interviews and public meetings made comments related to good faith efforts. In general, minority- and woman-owned businesses indicated that prime contractors often fail to make genuine efforts to use minority- and woman-owned businesses.

- Several participants indicated that the current DBE program for federally funded projects does not require prime contractors to make anything more than perfunctory good faith efforts in order to comply with the program. A number of business owners noted that primes will reach out to prospective DBE-certified minority- and women-owned businesses but then will not follow through to seek their meaningful participation on projects.



- Several minority business owners also observed that Metro “goes through the motions” but does not always adequately enforce DBE contract goal requirements for federally funded projects to ensure DBE subcontractors are actually awarded project work.

Metro might review such concerns further when evaluating ways to improve its current implementation of the Federal DBE Program. It should also review legal issues including state contracting laws and whether certain program options would meet USDOT regulations.

**Counting DBE participation – 49 CFR Part 26.55.** 49 CFR Part 26.55 describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. Section 26.11 discusses the Uniform Report of DBE Awards or Commitments and Payments. Metro currently tracks that information for all subcontractors including DBE-certified businesses and for uncertified minority- and woman-owned businesses or potential DBEs. Such measures will help the agency track the effectiveness of its efforts to encourage DBE participation. Metro should consider collecting and using the following information:

- Databases that BBC developed as part of the disparity study;
- Contractor/consultant registration documents from businesses working with Metro as prime contractors or subcontractors including information about the race/ethnicity and gender of their owners;
- Prime contractor and subcontractor participation on agency contracts;
- Subcontractor participation data (for all tiers and suppliers) for all businesses regardless of race/ethnicity, gender, or certification status;
- Descriptions of the areas of contracts on which subcontractors worked; and
- Subcontractors’ contact information and committed dollar amounts from prime contractors at the time of contract award on purchase orders.

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

**DBE certification – 49 CFR Part 26 Subpart D.** The California Unified Certification Program (CUCP) is responsible for all DBE certifications in the state of California. Metro is one of the certifying agency members of CUCP. As a member of CUCP, Caltrans also maintains all of the DBE certification records for the state of California. The CUCP certification process is designed to comply with 49 CFR Part 26 Subpart D. As Metro continues to work with DBE-certified businesses, the agency should consider ensuring that the CUCP continues to certify all groups that the Federal DBE Program presumes to be socially and economically disadvantaged in a manner that is consistent with federal regulations.

Many business owners and managers participating in in-depth interviews and public hearings commented on the DBE certification process. Many business owners felt that certification was

highly valuable, but commented on the length, complexity and cost of the certification process. Some business owners were highly critical of the certification process. A number of business owners reported that the process was difficult to understand; required lots of paperwork and sensitive information; and was very time consuming. Appendix D provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process. Metro appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. Metro follows CUCP guidelines and is the only agency that has implemented CUCP's online certification process. However, the agency might research other ways to make the certification process easier for potential DBEs.

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

## **B. Additional Considerations**

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

**Networking and outreach.** Metro hosts and participates in many networking and outreach events that include information about marketing; the DBE and SBE certification processes; doing business with the agency; and available bid opportunities. Metro should consider continuing those efforts but might also consider broadening its efforts to include more partnerships with local trade organizations and other public agencies.

In addition to the scheduled networking and outreach events, Metro also works closely with the Transportation Business Advisory Council (TBAC) to get information out to their members about policies, procedures, and upcoming opportunities. Metro should consider working with TBAC board members to identify firms that might be eligible to become DBE certified. Metro should ask TBAC member to regularly provide updated member lists to identify these firms.

**Subcontract data.** Metro maintains comprehensive data on subcontracts that are associated with the prime contracts that it awards in construction and professional services but not for purchase orders. Metro should consider ensuring that it is collecting subcontracting data on all contracts. In addition, Metro should consider requiring the prime contractor on purchase order without DBE and SBE-goals to submit subcontractor payment data as part of the invoicing process and as a condition of receiving payment. Collecting subcontractor payment information will help ensure

that Metro monitors the participation of minority- and woman-owned businesses for all purchase orders.

**Unbundling Large Contracts.** In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that Metro 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—Metro should consider making efforts to unbundle relatively large contracts into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation.

**Prime Contract Opportunities.** Disparity analysis results indicated substantial disparities for most racial/ethnic and gender groups on the prime contracts that Metro awarded during the study period. Metro currently has a small business prime set-aside program to encourage the participation of minority- and woman-owned businesses as prime contractors. Metro should consider continuing that program for small businesses

**Subcontract opportunities.** Subcontracts represent accessible opportunities for minority- and woman-owned businesses to become involved in public contracting. However, subcontracting accounted for a relatively small percentage of the total contracting dollars that Metro awarded during the study period. Metro could consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals. For each contract to which the program applies, Metro would set a minimum subcontracting percentage based on the type of work involved, the size of the project, and other factors. Prime contractors bidding on the contract would be required to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be responsive. If Metro were to implement such a program, the entity should include flexibility provisions such as a good faith efforts process.

**Goods and other services contracts.** Disparity analysis results indicated substantial disparities for all racial/ethnic and gender groups on goods and other services contracts that Metro's Procurement Division awarded during the study period. Metro should consider working with the Procurement Division to explore race- and gender-neutral, and if appropriate, race- and gender-conscious program measures that might better encourage the participation of minority- and woman-owned businesses on goods and other services contracts in the future (e.g. materials management and inventory contracts).

**DBE contract goals.** Metro currently uses DBE contract goals on many of the contracts that it awards. Prime contractors can meet those goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. Disparity analysis results indicated that most racial/ethnic and gender groups did not show disparities on contracts to which Metro applied DBE contract goals during the study period. In contrast, most racial/ethnic and gender groups showed substantial disparities on contracts to which Metro did not apply DBE contract goals. Metro should consider continuing its use of DBE contract goals in the future. The agency will need to

ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).

**Prompt payment policies.** Metro requires prime contractors to pay their subcontractors within 7 days of receiving payment from the agency. As part of in-depth interviews and public forums, several businesses—including many minority- and woman-owned businesses—reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors (for details, see Appendix D). In light of such comments, Metro should consider reinforcing its prompt payment policies with its procurement staff and with prime contractors. Doing so might help ensure that both prime contractors and subcontractors receive payment in a timely manner.

# **APPENDIX A.**

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## **Definition of Terms**

# APPENDIX A.

## Definitions of Terms

Appendix A defines terms that are useful to understanding the 2017 Los Angeles Metropolitan Transportation Authority (Metro) Disparity Study report. The following definitions are only relevant in the context of this report.

### **49 Code of Federal Regulations (CFR) Part 26**

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

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

### **Anecdotal Information**

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

### **Availability Analysis**

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

## **Business**

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

## **Business Listing**

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

## **Business Establishment**

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

## **Compelling Governmental Interest**

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

## **Consultant**

A consultant is a business performing a professional services contract.

## **Contract**

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

## **Contract Element**

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

## **Contractor**

A contractor is a business performing a construction contract.

## **Control**

Control means exercising management and executive authority of a business.

## **Custom Census**

A custom census availability analysis is one in which researchers attempt extensive surveys with all potentially available businesses working in the local marketplace to collect information about key business characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts that an agency actually awarded during the study period. A custom census availability approach

is accepted in the industry as the platinum standard for conducting availability analyses, because it takes several different factors into account including businesses' primary lines of work and their capacity to perform on an agency's contracts.

## **Disadvantaged Business Enterprise (DBE)**

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

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

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

## **Disparity**

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

## **Disparity Analysis**

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

## **Disparity Index**

A disparity index is computed by dividing the actual participation, or utilization, of a specific group of businesses in Los Angeles Metropolitan Transportation Authority contracting by the availability of those businesses for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.



## **Dun & Bradstreet (D&B)**

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

## **Enterprise**

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

## **Federal DBE Program**

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

## **Federally-funded Contract**

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

## **Federal Highway Administration (FHWA)**

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

## **Firm**

See “business.”

## **Industry**

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

## **Los Angeles Metropolitan Transportation Authority Disparity Study (Metro)**

Metro is the transportation planner, coordinator, designer, builder, and operator of the public transportation system for Los Angeles County.

## **Majority-owned Business**

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

## Minority

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

## Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the racial/ethnic groups that the Federal DBE Program presumes to be socially and economically disadvantaged: Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, or Subcontinent Asian Americans. A business does not have to be certified as a DBE to be considered a minority-owned business. The study team considers businesses owned by minority women as minority-owned businesses.

## Narrow Tailoring

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

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

## Non-DBE

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

## Non-response Bias

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

## Participation

See "utilization."

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

## **Potential DBE**

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

## **Prime Consultant**

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

## **Prime Contract**

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

## **Prime Contractor**

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

## **Project**

A project refers to a construction, professional services, or goods and other services endeavor that Metro bid out during the study period. A project could include one or more prime contracts and corresponding subcontracts.

## **Race- and Gender-Conscious Measures**

Race- and gender-conscious measures are contracting measures that are specifically designed to increase the participation of minority- and woman-owned businesses. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but not other businesses. Similarly, businesses owned by women might be eligible but not businesses owned by men. The use of DBE contract goals is one example of a race- and gender-conscious measure.

## **Race- and Gender-Neutral Measures**

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

## **Relevant Geographic Market Area**

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

## **State-funded Contract**

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

## **Statistically Significant Difference**

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

## **Strict Scrutiny**

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

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

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

## **Subconsultant**

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

## **Subcontract**

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

## **Subcontractor**

A subcontractor is a business that performed services for a prime contractor as part of a larger contract.

## **Subindustry**

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

## **United States Departments of Transportation (USDOT)**

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

### **Utilization**

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

### **Vendor**

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

### **Woman-owned Business**

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

# **APPENDIX B.**

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## **Legal 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 regarding the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (“MAP-21,” “SAFETEA” and “SAFETEA-LU”),<sup>1</sup> and the United States Department of Transportation (“USDOT” or “DOT”) regulations promulgated to implement TEA-21 known as the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,<sup>2</sup> which DBE Program was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act).<sup>3</sup> The appendix also reviews recent cases involving local minority and women-owned business enterprise (“MBE/WBE”) programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Los Angeles County Metropolitan Transportation Authority (“LACMTA”).

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study and the strict scrutiny analysis. In particular, this analysis reviews the Ninth Circuit decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*<sup>6</sup> and *Western States Paving Co. v. Washington State DOT*,<sup>7</sup> and the recent U.S. District Court decisions in the Ninth Circuit in

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<sup>1</sup> Moving Ahead for Progress in the 21<sup>st</sup> Century Act (“MAP-21”), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

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

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

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

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

<sup>6</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013); U.S.D.C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, - 2011), *appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013) -

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

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

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*, (“*AGC, SDC v. Cal. DOT*” or “*Caltrans*”), the Ninth Circuit in 2013 upheld the validity of California DOT’s DBE Program implementing the Federal DBE Program. In *Western States Paving*, the Ninth Circuit upheld the validity of the Federal DBE Program, but the Court held invalid Washington State DOT’s DBE Program implementing the DBE Federal Program. The Court held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state’s transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

In *Mountain West Holding* and *M.K. Weeden*, two U.S. District Courts in Montana upheld the validity of the Montana Department of Transportation’s implementation of the Federal DBE Program. The *Mountain West Holding* decision, at the time of this report, has been appealed to the U.S. Court of Appeals for the Ninth Circuit.<sup>10</sup>

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and a state government agency’s or recipient’s implementation of the DBE program, including: *Dunnet Bay Construction Co. v. Illinois DOT*,<sup>11</sup> *Northern Contracting, Inc. v. Illinois DOT*,<sup>12</sup> *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,<sup>13</sup> *Adarand Construction, Inc. v. Slater*<sup>14</sup> (“*Adarand VII*”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>15</sup> *Geyer Signal, Inc. v. Minnesota DOT*,<sup>16</sup> *Geod Corporation v. New Jersey Transit Corporation*,<sup>17</sup> and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.<sup>18</sup> The analysis also reviews recent cases involving challenges to MBE/WBE programs.

The analyses of *AGC, SDC v. Cal. DOT*, *Western States Paving*, *Mountain West Holding, Inc.*, *M.K. Weeden*, and these other recent cases are instructive to the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program and its implementation by recipients of federal financial assistance governed by 49 CFR Part 26. They also are applicable in terms of the preparation of a DBE Program by LACMTA submitted in compliance with the Federal DBE regulations.

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

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

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

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

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

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

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

<sup>15</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

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

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

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

Following *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.<sup>19</sup> The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.<sup>20</sup> The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.<sup>21</sup>

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

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the Court, stated "that [the Federal DBE Program's] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."<sup>23</sup> Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.<sup>24</sup>

The Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' implementation of the Federal DBE Program is constitutional.<sup>25</sup> The Ninth Circuit found that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.<sup>26</sup>

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<sup>19</sup> Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter USDOT Guidance], available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm); see 49 CFR § 26.9; see, also, 49 CFR Section 26.45.

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

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

<sup>22</sup> *Id.*, 49 CFR § 26.9.

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

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

<sup>25</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F.3d 1187, (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) *appeal dismissed based on standing*, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013).

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

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

Also, recently the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>29</sup> and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*<sup>30</sup>, upheld the implementation of the Federal DBE Program by the Illinois DOT.<sup>31</sup> The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there was no evidence IDOT exceeded its authority under federal law.<sup>32</sup> The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional. The court agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.<sup>33</sup>

## **B. U.S. Supreme Court Cases**

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

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

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

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

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

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

<sup>29</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

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

<sup>31</sup> 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

<sup>32</sup> *Id.*

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

<sup>34</sup> 488 U.S. 469 (1989).

<sup>35</sup> 488 U.S. at 500, 510.

<sup>36</sup> 488 U.S. at 480, 505.

was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

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

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

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

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its jurisdiction.”<sup>42</sup> The Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”<sup>43</sup>

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

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<sup>37</sup> 488 U.S. at 507-510.

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

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

<sup>40</sup> 488 U.S. at 502.

<sup>41</sup> *Id.*

<sup>42</sup> 488 U.S. at 509.

<sup>43</sup> *Id.*

<sup>44</sup> 488 U.S. at 509.

<sup>45</sup> *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.”<sup>46</sup>

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

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

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

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

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

### **1. The Federal DBE Program**

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.<sup>47</sup> Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21<sup>st</sup> Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the

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<sup>46</sup> 488 U.S. at 492.

<sup>47</sup> *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing *The Compelling Interest*.

Moving Ahead for Progress in the 21<sup>st</sup> Century Act (“MAP-21”).<sup>48</sup> In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>49</sup>

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.<sup>50</sup>

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

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.<sup>51</sup> This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient’s market.<sup>52</sup> Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.<sup>53</sup> There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient’s contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.<sup>54</sup> This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.<sup>55</sup>

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<sup>48</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>49</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

<sup>50</sup> 49 CFR § 26.51.

<sup>51</sup> 49 CFR § 26.45(a), (b), (c).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at § 26.45(d).

<sup>54</sup> *Id.*

<sup>55</sup> 49 CFR § 26.45(b)-(d).



Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.<sup>56</sup>

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.<sup>57</sup> A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 CFR § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 CFR § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.<sup>58</sup>

Federal aid recipients are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.

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

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

#### **SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.**

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

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

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<sup>56</sup> 49 CFR § 26.51.

<sup>57</sup> 49 CFR § 26.51(b).

<sup>58</sup> 49 CFR §§ 26.21-26.37.

and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

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

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

(A) SMALL BUSINESS CONCERN-

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

(ii) EXCLUSIONS- The term 'small business concern' does not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals that have average annual gross receipts during the preceding three fiscal years in excess of \$23,980,000, as adjusted annually by the Secretary for inflation<sup>59</sup>

Therefore, Congress in the FAST Act passed on December 3, 2015, has again found based on testimony, evidence and documentation updated since MAP-21 was adopted in 2012 as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.<sup>60</sup>

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

#### **DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).**<sup>61</sup>

On September 6, 2012, the Department of Transportation published a Notice of Proposed Rulemaking (NPRM) entitled, "Disadvantaged Business Enterprise: Program Implementation Modifications" in the Federal Register.<sup>62</sup>

The USDOT noted the DBE Program was reauthorized in the Moving Ahead for Progress in the 21<sup>st</sup> Century Act ("MAP-21"), Public Law 112-141 (enacted July 6, 2012), and that the Department believes this reauthorization is intended to maintain the status quo of the DBE Program.<sup>63</sup>

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

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<sup>59</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

<sup>60</sup> *Id.*

<sup>61</sup> 79 F.R. 59566-59122 (October 2, 2014).

<sup>62</sup> 77 F.R. 54952-55024 (September 6, 2012).

<sup>63</sup> 77 F.R. 54952.

- (1) - The Rule revised the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the U.S. DOT statutory reauthorization, MAP-21;
- (2) - The Rule revised the certification-related program provisions and standards; and
- (3) - The Rule amended and modified several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions, transit vehicle manufacturers, counting for trucking companies, and program administration.<sup>64</sup>

The new and revised forms include the U.S. DOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.<sup>65</sup>

Several of the areas revised include:

- the size standard on statutory gross receipts has been increased for inflation;
- the ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantage individual or firm a priority or superior right to a DBE's profits, and setting forth an assumption of control when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm;
- certification procedures and grounds for decertification are revised including the areas of prequalification, grounds for removal, summary suspension, and certification appeals;
- the overall goal setting obligations, including methodology and process, data sources to determine the relative availability of DBEs, and any step two adjustments by the recipient of federal funds to the base figure supported by evidence;
- the submission of good faith efforts as a matter of "responsiveness" or as a matter of "responsibility", including reduction in number of days as to when the information of good faith efforts must be submitted either at the time of bid or after bid opening;
- guidance on good faith efforts, including examples of the kinds of actions that recipients may consider when evaluating good faith efforts by bidders and offerors;
- provisions relating to the replacing of DBEs; and
- counting of DBE participation, including trucking services and expenditures with DBEs for materials and supplies and related matters.<sup>66</sup>

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<sup>64</sup> 79 F.R. 59566-59622 (October 2, 2014).

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

<sup>66</sup> 79 F.R. 59566-59622.

In terms of forms and data collection, the new Rule attempted to simplify the Uniform Certification Application; established a new U.S. DOT personal net worth form to be used by applicants; established a uniform report of DBE awards or commitments and payments; captured data on minority women-owned DBEs and actual payments to DBEs reporting; and provided for a new submission required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, and men.<sup>67</sup>

The new Rule made certain changes in connection with program administration, including: adding to the definitions of “immediate family members” and “spouse” domestic partnerships and civil unions; the retention of all records documenting a DBE’s compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to comply with the DBE Program regulations in the administration of the contract, and specifying that failure to do so may result in termination of the contract or other remedies.<sup>68</sup>

The Rule also provided changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.<sup>69</sup>

#### **USDOT Order 4220.1 (February 5, 2014).**

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

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

The Order sets forth specific programmatic responsibilities for the Departmental Office of Civil Rights, the rules and responsibilities of the General Counsel as Chief Legal officer of the USDOT, and the Office of Small and Disadvantaged Business Utilization within the Office of the Secretary. The Order clarified rules and responsibilities for the Operating Administrations in their overseeing of the day-to-day administration of the Federal DBE Program by recipients, providing training and technical assistance, maintaining current and up-to-date DBE websites and, taking appropriate actions to ensure program compliance.

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

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

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

The USDOT Order 4220.1 may be found at: [www.civilrights.dot.gov/disadvantaged-business-enterprise](http://www.civilrights.dot.gov/disadvantaged-business-enterprise).

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

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.<sup>70</sup> In MAP-21, Congress specifically finds as follows:

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

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

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

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

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”<sup>71</sup>

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<sup>70</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>71</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is “a compelling need for the continuation of the” Federal DBE Program.<sup>72</sup>

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

The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26. According to the United States DOT, the Rule increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, adjusted the personal net worth threshold for inflation to \$1.32 million dollars, provided for expedited interstate certification, added provisions to foster small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.<sup>73</sup>

In particular, the 2011 Final Rule provided that a recipient’s DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.<sup>74</sup>

In addition, the 2011 Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.<sup>75</sup> The recipient’s DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval.<sup>76</sup> The new 2011 Final Rule provided a list of “strategies” that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient’s overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.<sup>77</sup> The 2011 Final Rule provided that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient’s DBE program.<sup>78</sup>

The 2011 Final Rule also provided that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.<sup>79</sup> The 2011 Final Rule set out what action the recipient must take in order to be regarded as

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<sup>72</sup> *Id.*

<sup>73</sup> 76 F.R. 5083-5101.

<sup>74</sup> *See* 49 CFR § 26.37, 76 F.R. at 5097.

<sup>75</sup> 76 F.R. at 5097, January 28, 2011.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

<sup>78</sup> *Id.* at 5097, amending 49 CFR § 26.39(c).

<sup>79</sup> 76 F.R. at 5098, amending 49 CFR § 26.47(c).

implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.<sup>80</sup> The 2011 Final Rule provided a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.<sup>81</sup>

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”<sup>82</sup>

The United States DOT in the 2011 Final Rule stated that there is a continuing compelling need for the DBE program.<sup>83</sup> The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”<sup>84</sup> The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis...”, noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”<sup>85</sup> This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”<sup>86</sup>

## 2. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.<sup>87</sup> The implementation of the Federal DBE Program by recipients of federal funds are subject to and must follow the strict scrutiny analysis if they utilize race- and ethnicity-based measures.<sup>88</sup> The strict scrutiny analysis is comprised of two prongs:

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<sup>80</sup> *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

<sup>81</sup> *Id.*, amending 49 CFR § 26.47(c)(5).

<sup>82</sup> 76 F.R. at 5092.

<sup>83</sup> 76 F.R. at 5095.

<sup>84</sup> 76 F.R. at 5095.

<sup>85</sup> *Id.*

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

<sup>87</sup> *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe v. NCDOT*, 615 F.3d 233 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176.

<sup>88</sup> *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; see, also, *H. B. Rowe*, 615.3d 233, 241-242 (4th Cir. 2010); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.<sup>89</sup>

#### a. The Compelling Governmental Interest Requirement.

The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program.<sup>90</sup> 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.<sup>91</sup> Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.<sup>92</sup>

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.<sup>93</sup> The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).<sup>94</sup>

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(“*Drabik II*”), 214 F.3d 730 (6th Cir. 2000); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3d Cir. 1993).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

<sup>92</sup> See, e.g., *Concrete Works I*, 36 F.3d at 1520.

<sup>93</sup> *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376; *Mountain West Holding*, 2014 WL 666734, *appeal pending*.

<sup>94</sup> *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. *see, also*, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.



It is instructive to the study to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies. Specifically, the federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”<sup>95</sup> The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).<sup>96</sup> 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.<sup>97</sup>

- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.<sup>98</sup>

- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.<sup>99</sup>

- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.<sup>100</sup>

- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets,” and

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<sup>95</sup>- *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76); *Western States Paving*, 407 F.3d at 992-93.

<sup>96</sup>- See, *e.g.*, *Adarand VII*, 228 F.3d at 1167- 76; see, also, *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>97</sup>- *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237. -

<sup>98</sup>- *Adarand VII*. at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

<sup>99</sup>- *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>100</sup>- *Adarand VII*, 228 F.3d at 1174-75; see *H. B. Rowe*, 615 F.3d 233, 247-458 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4. -

that the continuing barriers “merit the continuation” of the Federal DBE Program.<sup>101</sup> Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.<sup>102</sup>

**Burden of proof.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.<sup>103</sup> If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.<sup>104</sup> The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”<sup>105</sup>

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.<sup>106</sup> It is well established that “remediating the effects of past or present racial discrimination” is a compelling interest.<sup>107</sup> In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”<sup>108</sup>

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”<sup>109</sup> “An inference of discrimination may be made with empirical evidence that demonstrates ‘a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’”<sup>110</sup> Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.<sup>111</sup>

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<sup>101</sup> Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>102</sup> *Id.* at § 1101(b)(1).

<sup>103</sup> - See *AGC, SDC v. Caltrans*, 713 F.3<sup>rd</sup> at 1195; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> 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 (7<sup>th</sup> Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9<sup>th</sup> Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8<sup>th</sup> Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1166 (10<sup>th</sup> 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 (9<sup>th</sup> Cir. 1997); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

<sup>104</sup> *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>105</sup> See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; see, also, *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>106</sup> *Id.*; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 990; See, also, *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7<sup>th</sup> Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>107</sup> *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

<sup>108</sup> *Croson*, 488 U.S. at 500; see, e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>109</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7<sup>th</sup> Cir. 2016); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3<sup>rd</sup> at 1195-1200; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10<sup>th</sup> Cir. 1994).

<sup>110</sup> *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 (7<sup>th</sup> Cir. 2016); see e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010).

<sup>111</sup> - *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at \*7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7<sup>th</sup> Cir. 2016); see, e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010).

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.<sup>112</sup> Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.<sup>113</sup> Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.<sup>114</sup>

To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence.<sup>115</sup> 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.<sup>116</sup> Conjecture and unsupported criticisms of the government’s methodology are insufficient.<sup>117</sup> The courts have held that mere speculation the government’s evidence is insufficient or methodologically flawed does not suffice to rebut a government’s showing.<sup>118</sup>

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”<sup>119</sup> It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.<sup>120</sup> Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>121</sup> It has been further held that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.<sup>122</sup>

**Statistical evidence.** Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental

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<sup>112</sup> *Adarand Constructors, Inc. v. Pena*, (“*Adarand III*”), 515 U.S. 200 at 235 (1995); see, e.g., *Majeske v. City of Chicago*, 218 F.3d at 820.

<sup>113</sup> *Majeske*, 218 F.3d at 820; see, e.g. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 2015 WL 1396376 \*7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>114</sup> *Id.*; *Adarand VII*, 228 F.3d at 1166.

<sup>115</sup> See, e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting, *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Midwest Fence*, 2015 W.L. 1396376 at \*7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>116</sup> *Id.*; See, e.g., *Engineering Contractors*, 122 F.3d at 916; *Contractors Association of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

<sup>117</sup> *Id.*; see, also, *Sherbrooke Turf*, 345 F.3d at 971-974.

<sup>118</sup> *H.B. Rowe*, 615 F.3d 233 at 242; see *Concrete Works*, 321 F.3d at 991; see, also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>119</sup> *H.B. Rowe*, 615 F.3d at 241, quoting, *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting, *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5<sup>th</sup> Cir. 1999)).

<sup>120</sup> *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Concrete Works*, 321 F.3d at 958.

<sup>121</sup> *Croson*, 488 U.S. 509, see, e.g., *H.B. Rowe*, 615 F.3d at 241.

<sup>122</sup> *H.B. Rowe*, 615 F.3d at 241, quoting, *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4<sup>th</sup> Cir. 1993); see, e.g., *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Kossman Contracting Co. Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.<sup>123</sup> “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”<sup>124</sup>

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.<sup>125</sup> The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.<sup>126</sup> However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>127</sup>

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.<sup>128</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,<sup>129</sup> “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”<sup>130</sup>
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.<sup>131</sup>

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<sup>123</sup> See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; see, also, *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5<sup>th</sup> Cir. 1999).

<sup>124</sup> *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); See *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *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 (5<sup>th</sup> Cir. 1999).

<sup>125</sup> *Croson*, 488 U.S. at 509; see *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4<sup>th</sup> 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 (10<sup>th</sup> 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 (5<sup>th</sup> Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>126</sup> See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4<sup>th</sup> Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see, also, *Western States Paving*, 407 F.3d at 1001; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5<sup>th</sup> Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>127</sup> *Western States Paving*, 407 F.3d at 1001.

<sup>128</sup> See, e.g., *Croson*, 488 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995. See, also *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5<sup>th</sup> Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>129</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3<sup>d</sup> 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 (4<sup>th</sup> Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5<sup>th</sup> Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>130</sup> - *Id.*

<sup>131</sup> - See *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4<sup>th</sup> Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

■ **Disparity index.** An important component of statistical evidence is the “disparity index.”<sup>132</sup> A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”<sup>133</sup>

■ **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.<sup>134</sup>

**Anecdotal evidence.** Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.<sup>135</sup> But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.<sup>136</sup> It has been held that anecdotal evidence of a local or state government’s institutional practices that exacerbate discriminatory market conditions are often particularly probative.<sup>137</sup>

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and

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<sup>132</sup> *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4<sup>th</sup> Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5<sup>th</sup> Cir. 1999); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3<sup>rd</sup> Cir. 1993).

<sup>133</sup> *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-245; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

<sup>134</sup> *See, e.g., H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct.; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11<sup>th</sup> Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7<sup>th</sup> Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

<sup>135</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 924-25; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9<sup>th</sup> Cir. 1991); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>136</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Eng’g Contractors Ass’n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass’n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9<sup>th</sup> Cir. 1991).

<sup>137</sup> *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.<sup>138</sup>

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.<sup>139</sup>

### **b. The Narrow Tailoring Requirement.**

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be “narrowly tailored” to reach that objective.

The narrow tailoring requirement has several components and the courts analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.<sup>140</sup>

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.<sup>141</sup> The narrow tailoring requirement has several components.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-,

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<sup>138</sup> - See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7<sup>th</sup> 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 (11<sup>th</sup> Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

<sup>139</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng’g Contractors Ass’n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Mountain West Holding*, 2014 WL 668734, *appeal pending*; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at \*21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff’d* 473 F.3d 715 (7<sup>th</sup> Cir. 2007).

<sup>140</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); see, also, *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>141</sup> *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

ethnicity-, or gender-conscious remedial action.<sup>142</sup> Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.<sup>143</sup>

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.<sup>144</sup>

It should be pointed out that in the *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."<sup>145</sup> The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.<sup>146</sup> The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.<sup>147</sup> The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).<sup>148</sup> Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.<sup>149</sup>

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.<sup>150</sup> The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.<sup>151</sup> The

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<sup>142</sup> *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>143</sup> *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

<sup>144</sup> 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>145</sup> 473 F.3d at 722.

<sup>146</sup> *Id.* at 722.

<sup>147</sup> *Id.* at 723-24.

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

<sup>149</sup> See, e.g., *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7<sup>th</sup> 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).

<sup>150</sup> *Midwest Fence*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at \*\*18-22 (7<sup>th</sup> Cir. 2015).

<sup>151</sup> *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at \*\*18-22.

court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.<sup>152</sup> In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.<sup>153</sup>

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, the federal courts, including the Ninth Circuit Court of Appeals, which evaluated state DOT DBE Programs and their implementation of the Federal DBE Program, have held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.<sup>154</sup>

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”<sup>155</sup> Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”<sup>156</sup>

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik (“Drabik II”)*, stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>157</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> 840 F.3d 932 (7<sup>th</sup> Cir. 2016).

<sup>154</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; see, also, *Geyer Signal, Inc.*, 2014 WL 1309092; see generally, *H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245, 252-254; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

<sup>155</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see, also, *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11<sup>th</sup> 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 (11<sup>th</sup> Cir. 2000).

<sup>156</sup> See *Gutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see, also, *Adarand I*, 515 U.S. at 237-38.

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



The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*<sup>158</sup> also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration.”<sup>159</sup> The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve DBEs and implementing the Federal DBE Program, or in connection with determining appropriate remedial measures to achieve legislative objectives.

**Race-, ethnicity-, and gender-neutral measures.** To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state’s implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.<sup>160</sup> And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.<sup>161</sup>

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”<sup>162</sup>

The federal regulations and the courts require that recipients of federal financial assistance governed by 49 CFR Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious

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

<sup>159</sup> 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; *see also*, *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

<sup>160</sup> *See, e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

<sup>161</sup> *See Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also*, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268.

<sup>162</sup> *Croson*, 488 U.S. at 509-510.

remedies.<sup>163</sup> The courts have also found “the regulations require a state to ‘meet the maximum feasible portion of [its] overall goal by using race neutral means.’<sup>164</sup>

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>165</sup>

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<sup>163</sup> - 49 CFR § 26.51(a) requires recipients of federal funds to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.” *See, e.g., Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the “Commission”) issued its report entitled “Federal Procurement After *Adarand*” setting forth its findings pertaining to federal agencies’ compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at <http://www.usccr.gov>. The Commission found that 10 years after the Court’s *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination.

<sup>164</sup> *See, e.g., Northern Contracting*, 473 F.3d at 723 – 724; *Western States Paving*, 407 F.3d at 993 (citing 49 CFR § 26.51(a)).

<sup>165</sup> *See* 49 CFR § 26.51(b); *see, e.g., Croson*, 488 U.S. at 509-510; *see, e.g., H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); *Eng’g Contractors Ass’n*, 122 F.3d at 927-29. -

49 CFR § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”<sup>166</sup>

In *AGC, SDC v. Caltrans*, the Ninth Circuit rejected the assertion that the state DOT’s DBE program was not narrowly tailored because it failed to evaluate race-neutral measures before implementing race-conscious goals, and said the law imposes no such requirement.<sup>167</sup> The court held states are not required to independently meet this aspect of narrow tailoring, and instead concluded *Western States Paving* focused on whether the federal statute sufficiently considered race-neutral alternatives.<sup>168</sup> In *AGC, SDC v. Caltrans*, the court found that narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.”<sup>169</sup>

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<sup>166</sup> - *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); see, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927..

<sup>167</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

<sup>168</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

<sup>169</sup> - *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

## Additional factors considered under narrow tailoring.

In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.<sup>170</sup> For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;<sup>171</sup> (2) good faith efforts provisions;<sup>172</sup> (3) waiver provisions;<sup>173</sup> (4) a rational basis for goals;<sup>174</sup> (5) graduation provisions;<sup>175</sup> (6) remedies only for groups for which there were findings of discrimination;<sup>176</sup> (7) sunset provisions;<sup>177</sup> and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.<sup>178</sup>

### 3. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.<sup>179</sup> The Ninth Circuit and other courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.<sup>180</sup>

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.<sup>181</sup>

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<sup>170</sup> See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

<sup>171</sup> See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9<sup>th</sup> Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9<sup>th</sup> Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11<sup>th</sup> Cir. 1990).

<sup>172</sup> See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

<sup>173</sup> See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *CAEP I*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

<sup>174</sup> *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973.

<sup>175</sup> *Id.*

<sup>176</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; see, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Sherbrooke Turf*, 201 WL 150284 (unpublished opinion), aff’d 345 F.3d 964.

<sup>177</sup> See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559.

<sup>178</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>179</sup> See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9<sup>th</sup> Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6<sup>th</sup> 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 (11<sup>th</sup> Cir. 1994); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7<sup>th</sup> Cir. 2001). The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

Intermediate scrutiny, as interpreted by the Ninth Circuit and other federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.<sup>182</sup> The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.<sup>183</sup>

The Eleventh Circuit has held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort .... Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”<sup>184</sup>

#### 4. Pending Cases (at the time of this report)

Pending cases on appeal at the time of this report, which may potentially impact and be instructive to the study, include:

- ***Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*** 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003. (See Section D below.)
- ***Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.***, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). *Petition for a Writ of Certiorari filed with the U.S. Supreme Court*, 2017 WL 511931 (Feb. 2, 2017), *pending*. (See Section E below.)
- ***Rothe Development Inc. v. United States Department of Defense, United States Small Business Administration, et al.***, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds, Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D. D.C., 2015). *Petition for Rehearing En Banc*, filed on October 19, 2016, in the U.S. Court of Appeals, District of Columbia Circuit, was denied on January 13, 2017. (See Section G below).

The U.S. Supreme Court recently denied certiorari in *Dunnet Bay Construction Co. V. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.*, 137 S. Ct. 31, 2016 WL 193809 (October 3, 2016), Docket No. 15-906 (See Section E below).

Although not involving the Federal DBE Program, it is instructive to the study to point out the recent decision in *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other*

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<sup>182</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9<sup>th</sup> Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6<sup>th</sup> 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 (11<sup>th</sup> Cir. 1994); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

<sup>183</sup> *Coral Constr. Co.*, 941 F.2d at 931-932; See *Eng'g Contractors Ass'n*, 122 F.3d at 910.

<sup>184</sup> 122 F.3d at 929 (internal citations omitted.)

*grounds, Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C., 2015).

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

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

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

Rothe appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal has just been decided as of the writing of this report. The majority of the three judge panel affirmed the district court's decision, but on other grounds.<sup>185</sup>

The Court of Appeals in *Rothe* found that the challenge was only to the Section 8(a) statute, not the implementing regulations, and thus held the Section 8(a) statute was race-neutral.<sup>186</sup> Therefore, the court held the rational basis test applied and not strict scrutiny.<sup>187</sup> The court affirmed the grant of summary judgment to the government defendants applying the rational basis standard, and upheld the validity of Section 8(a) based on the limited challenge by Rothe to the statute and not the regulations.

The Court of Appeals held that Section 8(a) of the Small Business Act does not warrant strict scrutiny because it does not on its face classify individuals by race.<sup>188</sup> Section 8(a), the Court said, unlike the implementing regulations, uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such.<sup>189</sup> See Section G below.

Rothe filed on October 19, 2016, a Petition for Rehearing and Rehearing En Banc to the full Court of Appeals. The court denied the Petition on January 13, 2017.

This list of pending cases is not exhaustive, but are cases that will be followed during the study, which may impact recipients of federal funds implementing the Federal DBE Program.

**Ongoing review.** The above represents a summary of the legal framework pertinent to the study, the Federal DBE Program, and implementation of the Federal DBE Program and DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs. Because this is a dynamic area

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<sup>185</sup> 2016 WL 4719049 (September 9, 2016)

<sup>186</sup> 2016 WL4719049, at \*1-2.

<sup>187</sup> *Id.*

<sup>188</sup> 2016 WL 4719049 at \*\*1-2.

<sup>189</sup> *Id.* -

of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

# SUMMARIES OF RECENT DECISIONS

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

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business Enterprise (“DBE”) program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans’ DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans’ DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans’ substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans’ program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans’ DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

**Court Applies *Western States Paving Co. v. Washington State DOT* decision.** In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9<sup>th</sup> Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT’s program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**A. Application of strict scrutiny standard articulated in *Western States Paving*.** The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

**1. Evidence of discrimination in California contracting industry.** The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at \*7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of

certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at \*9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC’s contention that Caltrans’ evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC’s early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans’ decision to include all women in its DBE program. *Id.* at 1195.

**2. Program tailored to groups who actually suffered discrimination.** The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state’s contracting industry. *Id.* at 1198. The Court found Caltrans’ DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans’ program “adheres precisely to the narrow tailoring requirements of *Western States*.” *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for

disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are “sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors.” *Id.*

**B. Consideration of race-neutral alternatives.** The Court rejected the AGC assertion that Caltrans’ program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans’ program, narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.” *Id.* at 1199, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC’s claim that Caltrans’ program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

**C. Certification affidavits for Disadvantaged Business Enterprises.** The Court rejected the AGC argument that Caltrans’ program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

**D. Application of program to mixed state- and federally-funded contracts.** The Court also rejected AGC’s challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

**Conclusion.** The Court concluded that the AGC did not have standing, and that further, Caltrans’ DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. (“AGC”) against the California Department of Transportation (“Caltrans”), to the

DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held “that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law.” Slip Opinion Transcript at 52.

The court rejected the plaintiff’s arguments that anecdotal evidence failed to identify specific acts of discrimination, finding “there are numerous instances of specific discrimination.” Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans’ program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an “extensive disparity study, anecdotal evidence, both of which is what was missing” in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans “did exactly what the Ninth Circuit required” and that Caltrans has gone “as far as is required.” Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, “clearly constitutional,” and “narrowly tailored.” Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans’ program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight “because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work.” Slip Opinion Transcript at 55. Whereas, the district court held the “disparity study used by Caltrans was much more comprehensive and accounted for this and other factors.” *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, “is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional.” *Id.* at 56.

The court held that because “Caltrans’ DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional.” Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans’ DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*



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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9<sup>th</sup> Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Equity Act for the 21<sup>st</sup> Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id.* at 989 (*citing* regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (*citing* regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (*citing* regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id.* (*citing* regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (*citing* regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id.* (*citing* regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (*citing* regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (*citing* regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

**Facial challenge (Federal Government).** The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, *citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, *citing* both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

**As-applied challenge (State of Washington).** Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States

intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id.* at 996; *see also* Br. for the United States at 28 (April 19, 2004) ("DOT's regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id.* The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id.* (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6<sup>th</sup> Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9<sup>th</sup> Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id.*, *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7<sup>th</sup> Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6<sup>th</sup> Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the

Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

#### **4. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion)**

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed *Western States Paving's* claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d *et seq.*) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court

found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the \$2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

**5. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) appeal pending in the U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003**

**Factual and procedural background.** *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit's decision in *Western States*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Mountain West alleged that the disparity study was flawed, and the State did not have a strong basis in evidence. The State of Montana commissioned a disparity study, which was completed in in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all "relevant" minority groups were underutilized in "professional services" and Asian Pacific Americans and Hispanic Americans were underutilized in "business categories combined," but it also concluded that all "relevant" minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are "significantly overrepresented" in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her

business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserted that there was no evidence that all relevant minority groups had suffered discrimination in Montana's transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

***Western States Paving Co. v. Washington DOT.*** The Court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The Court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at \*2 (D. Mont. November 26, 2014). The Court stated the Ninth Circuit held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Id.* at \*2, quoting *Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 998.

**MDT study.** The MDT obtained a firm to conduct a disparity study, which was completed in 2009. The Court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at \*2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The Court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at \*3. The Court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

**Montana's DBE utilization after ceasing the use of contract goals.** The Court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at \*3. The utilization rate dropped, according to the Court, to 5 percent in 2007, 3

percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the Court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

**Mountain West's claims for relief.** Mountain West seeks declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at \*3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

**The two-prong test to demonstrate that a DBE program is narrowly tailored.** The Court, citing *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, at \*5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. *Id.* at \*4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id.* at \*3, citing *Western States*, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, "the data shows substantial disparities in utilization of minority firms suggesting that public dollars are being poured into 'a system of racial exclusion practiced by elements of the local construction industry.'" *Mountain West*, at \*5, quoting *AGC, San Diego v. California DOT*, 713 F.3d at 1197. The Court in *Mountain West* said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. *Mountain West*, at \*5, citing *AGC, San Diego*, 713 F.3d at 1199.

The Court in *Mountain West*, following *AGC, San Diego*, concluded that a state's implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute "an impermissible collateral attack on the facial validity of the federal Act and regulations." *Mountain West*, at \*5, quoting *AGC, San Diego*, at 1200.

**Statistical evidence.** The Court held that Montana's DBE program passes strict scrutiny. The Court found that Mountain West could not create a genuine dispute about the fact that the 2009



disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana's transportation contracting market. *Mountain West*, at \*5. In addition, the Court found that Mountain West could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana's transportation contracting market. *Id.* Also, the Court found that Mountain West could not dispute that the study indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana's transportation contracting industry. *Id.*

The Court noted that Mountain West merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at \*6. The Court found that in mounting this attack on the study, Mountain West relied entirely on the expert report of Dr. George "Lanoué" (sic), and that Mountain West only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

Mountain West, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at \*6. In addition, the Court found contrary to the allegation by Mountain West, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

**Anecdotal evidence.** The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana's transportation contracting market, including evidence of a "good ole boy network." *Id.* at \*6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted "federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination." *Mountain West*, at \*6, quoting *AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue's report merely criticized the sample size of the responses obtained, and that Mountain West also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at \*6. Contrary to Mountain West's assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state's DBE program must be supported by affidavits. *Mountain West*, at \*6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana's transportation contracting industry. *Id.* at \*6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that "substantial statistical disparities alone would give rise to an inference of discrimination, and certainly... statistical evidence combined with anecdotal evidence passes constitutional muster." *Mountain West* at \*6, quoting *AGC, San Diego*, 713 F.3d at 1196.

**Precipitous drop in utilization.** The Court in *Mountain West* also found that neither Dr. LaNoue's report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana's transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at \*6. The

Court found that while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen “dramatically” to 0.8 percent. *Id.* at \*6. The Court held that this undisputed fact “strongly supports [Defendants’] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.” *Mountain West*, at \*6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

**Conclusion and holding.** In sum, the Court held that MDT presented sufficient evidence to demonstrate evidence of discrimination in Montana’s transportation contracting industry. *Id.* at \*7. The Court concluded that Montana’s DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state’s transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive “good ole boy network” within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at \*7.

Therefore, the Court held Montana’s DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana’s transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at \*7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana’s DBE program during 2012-2014 when Montana and MDT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West’s claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and MDT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097. The decision was cross appealed by Montana to the Ninth Circuit, Docket No. 15-35003.

#### **6. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*, 2013 WL 4774517 (D. Mont.) (September 4, 2013)**

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a

subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that it was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as if it were a non-DBE subcontractor. *Id.*

**Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith

exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

### **7. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)**

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

**Factual background.** ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id.* at 1182. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id.* at 1182.

**District Court rulings.** Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9<sup>th</sup> Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id.* at 1183.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

**Lack of standing.** The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual

employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185*. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

**Summary judgment granted to ADOT.** The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

### **8. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9<sup>th</sup> Cir. 1997)**

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9<sup>th</sup> Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme ‘[did] not involve racial or gender quotas, set-asides or preferences,’” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University’s trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff’s motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court’s finding, such a difference was not *de minimis*. *Id.*

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10<sup>th</sup> Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5<sup>th</sup> Cir. 1996). The court held that the statute violated the Equal Protection Clause.

### **9. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9th Cir. 1991)***

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city’s bid preference program. 950 F.2d 1401 (9<sup>th</sup> Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court

discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this subpart of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9<sup>th</sup> Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in



proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every

possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

### **10. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)**

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a "propelling government interest" for King County's adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-

minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE

participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

## **E. Recent Decisions Involving the Federal DBE Program and its Implementation in Other Jurisdictions**

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

## Recent Decisions in Federal Circuit Courts of Appeal

### **1. *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)**

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at \*1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at \*1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at \*1.

**Procedural history.** Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

*Id.* at \*3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at \*4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at \*4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at \*4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at \*4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at \*4.

**Standing to challenge the DBE Programs generally.** The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at \*5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at \*5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at \*5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at \*5.

**Standing to challenge the IDOT Target Market Program.** The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at \*6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at \*6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

**Facial versus as-applied challenge to the USDOT Program.** In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at \*6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to

IDOT. *Id.* at \*6 citing *Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at \*6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at \*6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

**Federal DBE Program: Narrow Tailoring.** The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at \*7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at \*7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under- inclusiveness. *Id.* at \*7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at \*7, citing 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at \*7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at \*7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at \*8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at \*8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at \*8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at \*8, citing § 26.45(b).



The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at \*8.

**Midwest Fence “mismatch” argument: burden on third parties.** Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at \*8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at \*8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at \*8, citing § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at \*8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “only on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, quoting § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at \*8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at \*8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at \*8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at \*9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting

and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at \*9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs' ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at \*9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at \*9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at \*9.

**Over-Inclusive argument.** Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at \*9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence's criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at \*9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at \*9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at \*10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

**Claims against IDOT and the Tollway: void for vagueness.** Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at \*11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at \*11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at \*12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal

or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at \*12.

**Equal Protection challenge: compelling interest with strong basis in evidence.** In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at \*12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

**IDOT program.** IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at \*13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at \*13. The study found that DBEs made up 25.55% of prime contractors in the construction field, received 9.13% of prime contracts valued below \$500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% of available subcontracting dollars. *Id.* at \*13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at \*13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5% of the total value of the contracts. *Id.* at \*13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

**Tollway program.** Tollway also relied on a disparity study limited to the Tollway’s contracting market area. The study used a “custom census” process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at \*13. The study examined the Tollway’s historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at \*14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector.” *Id.* at \*14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at \*14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at \*14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01% across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

**Midwest Fence’s criticisms.** Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at \*14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at \*14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at \*15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at \*15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at \*15.

The court stated Midwest Fence's expert similarly argued that the existence of the DBE program "may" cause an upward bias in availability, that any observations of the public sector in general "may" be affected by the DBE program's existence, and that data become less relevant as time passes. *Id.* at \*15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence's speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at \*15.

The court rejected Midwest Fence's argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at \*15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence's strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at \*15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at \*15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at \*15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at \*15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at \*15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at \*15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at \*16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at \*16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at \*16.

**Narrow Tailoring.** The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at \*16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor.

*Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at \*17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at \*17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at \*17. In addition, the Tollway granted at least some front-end waivers involving 1.02% of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at \*17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at \*17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at \*17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely “theoretical.” *Id.* at \*18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract’s DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence “had presented evidence rather than theory on this point, the result might be different.” *Id.* at \*18. “Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting.” *Id.* at \*18. The court concluded that Midwest Fence “has shown how the Illinois program *could* yield that result but not that it actually does so.” *Id.*

In light of the IDOT and Tollway programs’ mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at \*18. The court stated that the “theoretical possibility of a ‘mismatch’ could be a problem, but we have no evidence that it actually is.” *Id.* at \*18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at \*18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* “So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination”, according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact “on this point.” *Id.*

**Petition for a Writ of Certiorari.** Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court on February 2, 2017, which is pending.

**2. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 137 S. Ct. 31, 2016 WL 193809 (Oct. 3, 2016).***

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at 680. Under IDOT’s DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as “waivers.” *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* *Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at \*30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).



**Dunnet Bay lacks standing to raise an equal protection claim.** The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal

treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

**Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority.** The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any

part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

**Conclusion.** The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

**Petition for a Writ of Certiorari Denied.** Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7<sup>th</sup> Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-

21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on 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 (9<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government .... If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7<sup>th</sup> Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when

the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI’s collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26 ). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.



In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*.)

**5. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)**

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal

through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188.

## Recent District Court Decisions

### **6. *Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7<sup>th</sup> Cir. 2016).**

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

**Equal protection framework, strict scrutiny and burden of proof.** The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

**Standing.** The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

**Facial challenge to the Federal DBE Program.** The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727, citing *Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE

Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court quoting *Adarand VII*, 228 F.3d at 1173 (10<sup>th</sup> Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

**Federal DBE Program is narrowly tailored.** Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE

Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

**As-applied challenge to IDOT's implementation of the Federal DBE Program.** In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7<sup>th</sup> Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the

court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

**IDOT's evidence of discrimination and DBE availability in Illinois.** The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.*

According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

**Court rejected Midwest arguments as to the data and evidence.** The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

**Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations.** The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal



regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. *Id.* at 733, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT’s evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies’ result. *Id.*

The court pointed out that although Midwest’s expert’s reports “cast doubt on the validity of IDOT’s methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias.” *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT’s availability calculations. *Id.*

**Burden on non-DBE subcontractors; overconcentration.** The court addressed the narrow tailoring factor concerning whether a program’s burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT’s determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

**Use of race-neutral alternatives.** The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and

training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

**Duration and flexibility.** The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

**Facial and as-applied challenges to the Tollway program.** The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

The study employed a “custom census” approach to calculate DBE availability, and examined the Tollway’s contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an “economy-wide analysis” examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person’s race or sex and their earning power and ability to form a business. *Id.*

**Midwest’s challenges to the Tollway evidence insufficient and speculative.** In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an “economy-wide analysis” similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

**Tollway Program is narrowly tailored.** As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway’s method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program’s burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program’s burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway’s race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT’s, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

### **7. *Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)***

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

**Procedural background.** Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at \*10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* \*10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

**Constitutional claims.** The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at \*11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the

DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

**A. Strict scrutiny.** It is undisputed that strict scrutiny applied to the Court's evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at \*12. Under strict scrutiny, a "statute's race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* at \*12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at \*12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

**B. Facial challenge based on overconcentration.** The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at \*12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at \*.

**1. Compelling governmental interest.** The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* \*13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

**Congressional evidence of discrimination: disparity studies and barriers.** Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at \*13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* \*14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* \*14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at \*14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at \*6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* \*6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at \*5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at \*14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at \*14.

The Court, *citing* again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at \*14, *quoting*, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at \*14.

**Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.** The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at \*14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at \*14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at \*15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at \*15, *quoting* *Sherbrooke Turf, Inc.*, 345 F.3d at 971-73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at \*15.

**2. Narrowly tailored.** The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at \*15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

**Overconcentration.** Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at \*15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at \*16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at \*16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at \*16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*



The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at \*16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at \*16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at \*16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at \*17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at \*17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

**C. Facial challenged based on vagueness.** The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at \*17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

**D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored.** Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at \*17.

**1. Alleged failure to find evidence of discrimination.** The Court held that a state’s implementation of the Federal DBE Program must be narrowly tailored. *Id.* at \*18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that “better data was available” and the recipient of federal funds “was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results.” *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs’ expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at \*18. Plaintiffs’ expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

**Plaintiffs present no affirmative evidence that discrimination does not exist.** The Court held that plaintiffs’ disputes with MnDOT’s conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT’s implementation of the Federal DBE Program is not narrowly tailored. *Id.* at \*18. First, the Court found that it is insufficient to show that “data was susceptible to multiple interpretations,” instead, plaintiffs must “present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.” *Id.* at \*18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs’ expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota’s public contracting. *Id.* at \*18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at \*18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient’s calculation of success in meeting the overall goal. *Id.* at \*18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT’s compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at \*18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at \*18. Accordingly, the Court granted the State defendants’ motion for summary judgment with respect to this claim.

**2. Alleged inappropriate goal setting.** Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at \*19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs’ challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT’s finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at \*19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants’ studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT’s narrow tailoring as it relates to goal setting. *Id.*

**3. Alleged overconcentration in the traffic control market.** Plaintiffs’ final argument was that MnDOT’s implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at \*20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs’ work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs’ type of work.

Plaintiffs’ expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at \*20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business’ self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at \*20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT’s reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at \*20. Therefore, the Court granted the State defendants’ motion for summary judgment with respect to this claim.

**III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000.** Because the Court concluded that MnDOT’s actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at \*21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants’ motions for summary judgment on the 42 U.S.C. § 2000d claim.

**Holding.** Therefore, the Court granted the Federal Defendants’ motion for summary judgment and the States’ defendants’ motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

**8. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7<sup>th</sup> Cir. 2015).***

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.

**Motion to Dismiss certain claims granted.** IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

**Motions for Summary Judgment.** Subsequent to the Court’s Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at \* 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

**Factual background.** Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at \*3. IDOT normally achieved

somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at \*4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at \*4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at \*9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at \*23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at \*23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at \*25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

**IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority.** The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of pass discrimination in the national construction market." *Id.* at \*26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7<sup>th</sup> Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at \*26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at \*26. The Court also concluded “because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*.” *Id.* at \*26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at \*27.

**The “no-waiver” policy.** The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at \*27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at \*27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

**IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law.** The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at \*28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT’s decision rejecting Dunnet Bay’s bid was consistent with the regulations and did not exceed IDOT’s authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay’s argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay’s bid and efforts as required by the federal regulations. *Id.* at \*29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at \*24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT’s authority under federal law, the Court held Dunnet Bay’s claim failed under the *Northern Contracting* decision. *Id.*

**Dunnet Bay lacked standing to raise an equal protection claim.** The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT’s rejection of Dunnet Bay’s bid nor the decision to rebid was based on the race of Dunnet Bay’s owners or any class-based animus. *Id.* at \*29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE

goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at \*30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at \*30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at \*30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at \*30.

**Dunnet Bay did not establish equal protection violation even if it had standing.** The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the “injury in fact” in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at \*31. Dunnet Bay, the Court said, implied that but for the alleged “no-waiver” policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a “no-waiver” policy. *Id.* at \*31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at \*31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at \*31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at \*51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at \*31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

**Conclusion.** The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at \*32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

**Appeal.** Dunnet Bay Construction Company filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court decision. *See* above at E2. Dunnet Bay submitted a Petition for a Writ of Certiorari to the U.S. Supreme Court in January 2016, which was denied in October 2016.

**9. *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)**

Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

**New Jersey Transit Program and Disparity Study.** NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.



The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion

of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7<sup>th</sup> Cir. 2007).

**Applying *Northern Contracting v. Illinois*.** The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6<sup>th</sup> Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8<sup>th</sup> Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception

of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on

these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

**Applying *Western States Paving*.** The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

**10. *Geod Corporation v. New Jersey Transit Corporation, et seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)**

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5<sup>th</sup> and 14<sup>th</sup> Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at \*4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v.*

*Washington State DOT*, 407 F.3d 983(9<sup>th</sup> Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at \*5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at \*5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at \*5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at \*6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative

availability of DBEs. *Id.* at \*6, *citing* 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at \*6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at \*6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at \*6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at \*6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at \*7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at \*7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at \*7. The court quoted the disparity study as stating that it

found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at \*8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff’s Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff’s claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT’s Motion for Summary Judgment was granted as to that claim.

### **11. *South Florida Chapter of the Associated General Contractors v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008)**

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County’s implementation of the Federal DBE Program and Broward County’s issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005) should govern the Court’s consideration of the merits of plaintiffs’ claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, “whether compliance with the federal regulations is all that is required of Defendant Broward County.” *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County’s implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7<sup>th</sup> Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington’s DBE program is narrowly tailored to further



Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in *Broward County* pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing* *Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting* *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in *Broward County* next considered the Seventh Circuit approach. The Defendants in *Broward County* agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7<sup>th</sup> Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, *quoting* *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth

Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6<sup>th</sup> Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10<sup>th</sup> Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

## **12. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), *aff'd* 473 F.3d 715 (7<sup>th</sup> Cir. 2007)**

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"),

the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at \*1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the “maximum feasible portion” of its DBE goal through race-neutral means. *Id.* at \*4 (*citing* regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (*citing* regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

**Statistical evidence.** To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at \*6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder’s list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet’s *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at \*6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at \*7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at \*8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at \*9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm

hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at \*11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at \*12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

*Id.* (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at \*13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

**Anecdotal evidence.** A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at \*13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at \*14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at \*15.

**Strict scrutiny.** The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at \*16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at \*17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at \*16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at \*17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at \*18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at \*19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at \*21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by

the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at \*21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at \*21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.’

*Id.* at \*21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at \*22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “plausible lower-bound estimate’ of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

*Id.* at \*23. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff’d* 256 F.3d 642 (7<sup>th</sup> Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at \*23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at \*24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly

after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at \*25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10<sup>th</sup> Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

### **13. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004)**

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal government’s compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT’s implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants’ Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) (“*Adarand VII*”), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at \*34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at \*36, citing and quoting *Sherbrooke Turf*, 345 F.3d at 972, quoting *Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.



Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

**14. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), *aff'd* 345 F.3d 964 (8<sup>th</sup> Cir. 2003)**

*Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at \*1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the

local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

*Sherbrooke*, 2001 WL 1502841 at \*10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at \*11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id.* at \*11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

**15. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), *aff'd* 345 F.3d 964 (8<sup>th</sup> Cir. 2003)**

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

## **16. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002)**

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation (“DOT”) from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT’s implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants’ (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

## **F. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions**

### **Recent Decisions in Federal Circuit Courts of Appeal**

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

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation (“NCDOT”). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to "establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects." *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set "contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization" based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of "minority" to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining "minority" as "only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department." *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

**Strict scrutiny.** The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact." 615 F.3d 233 at 241. The Court pointed out that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 241 *quoting Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." *Id.*, *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4<sup>th</sup> Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

**Intermediate scrutiny.** The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.*, *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id.* at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id.* at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 *quoting Hogan*, 458 U.S. at 726.

**Plaintiff's burden.** The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

**Statistical evidence.** The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability

better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff’s expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study’s availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state’s evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8<sup>th</sup> Cir. 2003).

The Court also rejected the plaintiff’s argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state’s response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT’s subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program’s suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff’s argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, citing *Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.



**Anecdotal evidence.** The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot- be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

**Strong basis in evidence that the minority participation goals were necessary to remedy discrimination.** The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination

against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State’s evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State’s anecdotal evidence of discrimination against these two groups sufficiently supplemented the State’s statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by “disturbing” anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

**Narrowly tailored.** The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State’s compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

**Neutral measures.** The Court held that narrowly tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” but a state need not “exhaust [ ] ... every conceivable race-neutral alternative.” 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

**Duration.** The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

**Program’s goals related to percentage of minority subcontractors.** The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

**Flexibility.** The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

**Burden on non-MWBE/DBEs.** The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

**Overinclusive.** The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

**Women-owned businesses overutilized.** The study's public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id.* at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id.*

**Holding.** The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is

constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

**Concurring opinions.** It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

## **2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development*, 438 F.3d 195 (2d Cir. 2006)**

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror

the federal definition of “Hispanic,” finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the “federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

### **3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7<sup>th</sup> Cir. 2006)**

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties’ dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that “§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate.”

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

#### **4. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11<sup>th</sup> Cir. 2005) (unpublished opinion)**

Although it is an unpublished opinion, *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 (11<sup>th</sup> 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 (5<sup>th</sup> Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to 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 Viridi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Viridi. *Id.* at 270.

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

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

**Case history.** Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

**The studies.** Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at

962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver's efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the "1995 Study"). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the "1997 Study"). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate

MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single

exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

**The legal framework applied by the court.** The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at

97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, *citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area." *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that "we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination. *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver's disparity studies should not have been

discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

### **The Court's rejection of CWC's arguments and the district court findings.**

**Use of marketplace data.** The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, "'public or private, with some specificity.'" *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*" (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination." *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*" was relevant to Denver's burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court's mandate in *Concrete Works II*, the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id.* The City can demonstrate that it is a "passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the



construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

**Variables.** CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of

MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

**Specialization.** The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

**Utilization of MBE/WBEs on City projects.** CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

**Anecdotal evidence.** The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver's initial burden. *Id.* at 989-90, citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

**Summary.** The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id.* at 991, quoting *Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id.*, quoting *Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC hypothesized that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed

variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

**Narrow tailoring.** Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (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.

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

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7<sup>th</sup> Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia (“VMI”)*, 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11<sup>th</sup> Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more *soliciting* of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 *quoting* the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

#### **8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)**

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

**Strict scrutiny.** The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, citing *Croson*, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling

government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, *quoting Croson*, 488 U.S. at 497.

**Statistical evidence: compelling interest.** The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group's percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio's most “compelling” statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio's statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id.* at 736. “If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.” *Id.* at 736.

The Court stated the only cases found to present the necessary “compelling interest” sufficient to justify a narrowly tailored race-based remedy, are those that expose “pervasive, systematic, and obstinate discriminatory conduct. ...” *Id.* at 737, *quoting Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

**Narrow tailoring.** A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ....” *Id.* at 737, *quoting Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last



longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from “overinclusiveness.” *Id.* at 737, quoting *Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. *Id.*

In addition, the Court found that Ohio’s own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state’s 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state’s existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court’s hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute *in advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was “not

reconcilable” with the Ohio Supreme Court’s decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

### **9. *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999)**

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5% of all city contracts. 199 F.3d at 208. *Id.* The 5% goal was not based on any objective data. *Id.* at 209. Instead, it was a “guess” that was adopted by the City. *Id.* The goal was later increased to 15% because it was found that 10% of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program’s adoption, the City’s Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15% participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5% participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20% of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City’s adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15%. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15% MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5% WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1%. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City’s Financial Legal Departments, approved Scott’s bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15% minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id.* at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15% DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15% of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id.* at 218, n.11. The sufficiency of a municipality's findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study's findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City's Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City's construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City's construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City's 15% DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott's low bid because Scott failed to meet the Special Notice's DBE-participation goal, not because Scott's bid exceeded the City's budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

#### **10. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997)**

*Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association* is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs

administered by Engineering Contractors Association, Florida, (the “County”) as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11<sup>th</sup> Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

*Id.* at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a

‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

*Id.* (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11<sup>th</sup> Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

**The statistical evidence.** The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

**County contracting statistics.** The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993):

(1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”

*Id.* at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10<sup>th</sup> Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial

action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'

*Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a "neutral explanation" by: "(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced "sufficient evidence to establish a neutral explanation for the disparities." *Id.*

The plaintiffs alleged that the disparities were "better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id.*

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id.* (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id.*

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in



County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

**County subcontracting statistics.** The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group

that filed a subcontractor's release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period." *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor's release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

*Id.* The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id.*

**Marketplace data statistics.** The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

**The Wainwright Study.** The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons

working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

**The Brimmer Study.** The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and

“complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

**Anecdotal evidence.** In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

*Id.* at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh

Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

**Narrow tailoring.** “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit

flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

*Id.* at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in

the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County's own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County's own processes and procedures, including: "the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information." *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were "institutional barriers" to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the "institutional youth" of black- and Hispanic-owned construction firms. *Id.* "It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part." *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in *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.

## **Recent District Court Decisions**

### **11. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 2016).**

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at \*1. Kossman brought this action as an equal protection challenge to the City of Houston's Minority and Women Owned Business Enterprise ("MWBE") program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston's construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at \*1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at \*1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at \*2.

### **District court order adopting Memorandum & Recommendation of Magistrate Judge.**

#### **Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded.**

The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the

Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at \*2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at \*2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

**Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic.** The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at \*3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at \*3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at \*3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

**The anecdotal evidence is valid and reliable.** The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at \*3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at \*3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the



incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

**The data relied upon by the study was not stale.** The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at \*4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

**The Houston MWBE program is narrowly tailored.** The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at \*4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at \*4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

**Native-American-owned businesses.** The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at \*4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at \*5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the

utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at \*5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at \*5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at \*5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id.* at \*5.

**Conclusion.** The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at \*5.

**Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.**

**Kossman's proposed expert excluded and not admissible.** Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.*

Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

**Relevant geographic market area.** The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

**Availability of MWBEs.** The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

**Disparity analysis.** The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

**Anecdotal evidence.** Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The

court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

**Regression analyses.** Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

**Narrow Tailoring factors.** The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

**Holding.** The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

**12. *H.B. Rowe Corp., Inc. v. W. Lyndo 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 Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on several motions, including the defendants’ Motion to Dismiss or for Partial Summary Judgment, defendants’ Motion to Dismiss the Claim for Mootness and plaintiff’s Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants’ Motion to Dismiss or for partial summary judgment; denied defendants’ Motion to

Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

**September 28, 2007 Order of the District Court.** On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program.

Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina's MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*



A firm could be certified as a MBE or WBE by showing NCDOT that it is “owner controlled by one or more socially and economically disadvantaged individuals.” NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather “encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT.” 589 F.Supp.2d 587. In determining whether the lowest bidder is “responsible,” NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

**Compelling interest.** The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that

NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

**Narrowly tailored.** The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4<sup>th</sup> Cir. 2010), discussed above.

**13. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)**

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United

States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

**The VOP.** Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

**Analysis and Order of the Court.** The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus

necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

**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 (8<sup>th</sup> Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

**14. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)**

This case considered the validity of the City of Augusta’s local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at \*9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined “Georgia’s racist history” in contracting and procurement, and examined certain data related to Augusta’s contracting and procurement. *Id.* at \*1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City’s implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a “good faith effort” to ensure DBE participation. *Id.* at \*6. The court rejected this argument noting that bidders were required to submit a “Proposed DBE Participation” form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: “Because a person’s business can qualify for the favorable treatment based on that person’s race, while a similarly situated person of another race would not qualify, the program contains a racial classification.” *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing to Croson*), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at \*7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at \*7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at \*8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving

that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at \*9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

### **15. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)**

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The

County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

*Id.* The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. *Id.* Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." *Id.* Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the firm's gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." *Id.* Dr. Carvajal's results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id.*

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id.* at 1325 (internal citations omitted).



The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id.* (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

#### **16. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)**

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 928, quoting *Crososon*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

### **17. *The Builders Ass’n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003)**

This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ...” *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of

bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

**18. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002)**

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and

does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

### **19. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001)**

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10<sup>th</sup> Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, citing *Adarand VII*, 228 F.3d 1147, 1174.

**Compelling state interest.** The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court

found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6<sup>th</sup> Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by 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.

## **20. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)**

Plaintiff Associated Utility Contractors of Maryland, Inc. (“AUC”) filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance (“the Ordinance”). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. (“MMCA”) opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment (“the December injunction”). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City’s 1999 numerical set-aside goals for Minority- and Women-Owned Business Enterprises (“MWBES”), which had been established at 20% and 3%, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff’s facial attack on the constitutionality of the Ordinance, concluding that there existed “a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action.” *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

**Facts and Procedural History.** In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20% of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3% to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It

held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises....” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20% MBE and 3% WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20% MBE and 3% WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20% and 3% goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

**AUC has associational standing.** AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “ ‘injury in fact’ is the inability to compete on an equal footing in the bidding process ...” *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on

contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 quoting, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City’s set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

**Strict scrutiny analysis.** AUC complained that since their initial promulgation in 1990, the City’s set-aside goals required AUC members to “select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors” in order to bid successfully on City public works contracts for work exceeding \$25,000 (“City public works contracts”). *Id.* at 618. AUC claimed, therefore, that the City’s set-aside goals violated the Fourteenth Amendment’s guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 619, quoting *Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id.* citing *Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

*Id.* at 619, quoting *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, citing *Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 619, quoting *Croson*, 488 U.S. at 492. Thus, the court

found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a “two step analysis for evaluating a race-conscious remedy.” *Id.* at 619 *citing Maryland Troopers Ass’n*, 993 F.2d at 1076. “First, the [government] must have a ‘strong basis in evidence for its conclusion that remedial action [is] necessary....’ ‘Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’” *Id.* at 619, *quoting Maryland Troopers Ass’n*, 993 F.2d at 1076 (*citing Croson* ).

The second step in the *Croson* analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

*Id.* at 620, *quoting Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

**Intermediate scrutiny analysis.** The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, *quoting Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 *quoting Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[ ] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, *quoting Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, *quoting Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[I]logically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying *Croson*’s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, *quoting Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, *quoting Metro Broadcasting, Inc. v. F.C.C.*, 497

U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

**Preenactment versus postenactment evidence.** In evaluating the first step of the Croson test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, quoting *Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE participation in City construction subcontracts, and for analogous reasons, the 3% WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* “strong basis in evidence.” *Id.* at 621, n.6, citing *Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), cert. denied, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), cert. denied, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

**City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established.** In this case. the court found that the City considered

no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20% for MBEs and 3% for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20% preference is not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3% preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20% MBE and 3% WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

**Holding.** The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

**21. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *a’ffd per curiam* 218 F.3d 1267 (11th Cir. 2000)**

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government



MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11<sup>th</sup> Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the

earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

*Id.* The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County’s standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that “[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity .... *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11<sup>th</sup> Cir. 2000).

## **21. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)**

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

**Strict Scrutiny.** The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

(1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

(2) a program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. *Id.*

(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." *Id.* at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

**Narrow Tailoring.** The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to “race-based quotas”. *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas”. *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

**Conclusion.** The court thus denied the motion of the state defendants to stay the court's prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court's order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

## **22. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)**

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

## **G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs**

**1. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), affirming on other grounds, *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 107 F.Supp. 3d 183 (D.D.C. 2015)**

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at \*1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* \*1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, quoting 15 U.S.C. § 627(a)(5).

**The Section 8(a) statute is race-neutral.** The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* \*1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* \*2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id.* at \*2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id.* \*2. The court, therefore, affirmed the judgment of the district court

granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id.* \*2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id.* \*2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id.* \*3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id.* \*3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id.* \*3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id.* \*4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id.* \*4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id.* \*5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id.* \*6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court’s discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id.* \*8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id.* at \*7.

**The SBA statute does not trigger strict scrutiny.** The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id.* \*10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id.* \*9. In the absence of such a



claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id.* \*10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id.* \*10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id.* \*11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

**Other issues.** The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id.* \*11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

**Dissenting Opinion.** There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id.* \*12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id.* \*13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id.* \*16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id.* \*22.

## **2. *Rothe Development Corp. v. U.S. Dept. of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)**

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it

underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (*Rothe*) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

**2007 Order of the District Court (499 F.Supp.2d 775).** In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff *Rothe* did not qualify as an SDB because it was owned by a Caucasian female. Although *Rothe* was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* *Rothe* claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, *Rothe*’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, *Rothe* must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, *Rothe* may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut

the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

*Id.* The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress’ adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only “serious, good faith consideration of workable race-neutral alternatives.” *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

**November 4, 2008 decision by the Federal Circuit Court of Appeals.** On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

**Strict scrutiny framework.** The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

**Compelling interest – strong basis in evidence.** The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

**Six state and local disparity studies.** The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

**Staleness.** The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

**Before Congress.** The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit *cited* the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of

discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 quoting *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5<sup>th</sup> Cir. 2006).

**Methodology.** The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11<sup>th</sup> Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by *Rothe*, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts



awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

**Geographic coverage.** The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

**Anecdotal evidence.** The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The

court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

**Narrowly tailoring.** The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

**3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016).**

Plaintiff *Rothe Development, Inc.* is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that *Rothe* brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic*'s holding in the context of this case. 2015 WL 3536271 at \*1. Both the plaintiff *Rothe* and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff *Rothe*'s motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

*DynaLantic Corp. v. Department of Defense.* The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. See 2015 WL 3536271 at \*4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at \*5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at \*5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at \*5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that *DynaLantic* had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at \*5, citing *DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that *DynaLantic* had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

**Defendants' expert evidence.** One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at \*9.

The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at \*10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at \*11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at \*12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The

court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

**Plaintiff's expert's testimony rejected.** The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at \*13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at \*14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

**The Section 8(a) Program is constitutional on its face.** The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at \*15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at \*17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at \*17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at \*17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at \*17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at \*17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at \*18.

The court found, *citing* agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at \*18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at \*18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at \*18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at \*18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at \*19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at \*19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

**Conclusion.** The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at \*20.

**Appeal.** Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit, which decision was affirmed on other grounds. *See* decision in *Rothe*, 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), above.

**4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)**

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at \*1, \*37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at \*1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at \*1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

**The Section 8(a) Program.** The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at \*2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at \*2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at \*3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at \*3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at \*3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at \*3-4; 13 CFR 124.501(b).

**Plaintiff’s business and the simulation and training industry.** *DynaLantic* performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at \*5.

**Compelling interest.** The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at \*9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at \*9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to *DynaLantic* to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at \*10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10<sup>th</sup> Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at \*10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at \*11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at \*11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at \*11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of



private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at \*11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10<sup>th</sup> Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at \*11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at \*11, citing *Concrete Works IV*, 321 F.3d at 958.

**Evidence before Congress.** The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at \*16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at \*17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10<sup>th</sup> Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at \*17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at \*17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at \*21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

**State and local disparity studies.** Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at \*25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices

calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at \*26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at \*26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at \*26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at \*26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at \*26, n. 10.

**Analysis: Strong basis in evidence.** Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at \*29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at \*29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at \*31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at \*31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at \*31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at \*31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at \*31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at \*31, n. 13.

**Rejection of DynaLantic’s rebuttal arguments.** The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at \*32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority

utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at \*32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at \*34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at \*35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at \*35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at \*35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at \*35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at \*35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at \*35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at \*36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at \*36.

**Facial challenge: Conclusion.** The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided

extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at \*37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

**As-applied challenge.** *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at \*37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at \*38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at \*38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at \*38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at \*38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at \*38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at \*39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at \*40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at \*40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at \*40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at \*40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O’Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at \*40, n. 17. The Court noted that the

government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at \*40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at \*40.

**Narrowly tailoring.** In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at \*41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at \*41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at \*42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at \*43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at \*44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at \*44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at \*44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at \*45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at \*46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at \*46-47. The evidence, the Court noted, established that minority firms are ready, willing, and

able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at \*47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at \*48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at \*51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

**Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court.** A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

### **5. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)**

*DynaLantic Corp.* involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its

2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

# **APPENDIX C.**

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## **Quantitative Marketplace Analysis**



# APPENDIX C.

## Quantitative Information

**Figure C-1.**  
**Percentage of all workers**  
**25 and older with at least a**  
**four-year degree, Los**  
**Angeles County and the**  
**United States, 2011-2015**

Note:

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

Source:

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

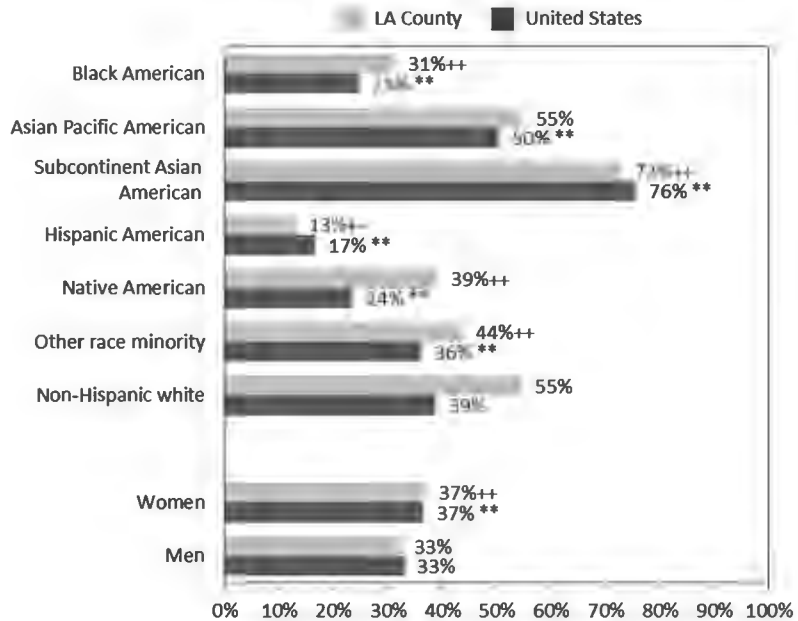
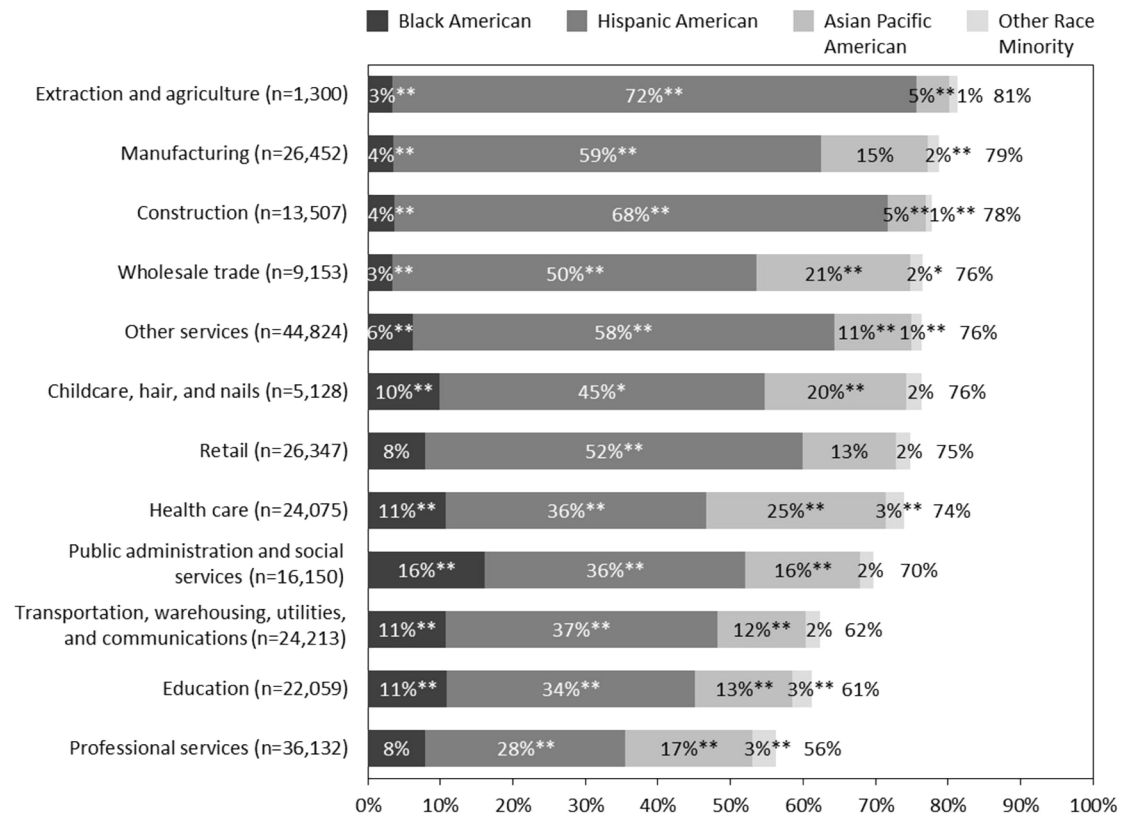


Figure C-1 indicates that, compared to non-Hispanic white Americans working in Los Angeles County, smaller percentages of Black Americans, Hispanic Americans, Native Americans, and other race minorities have four-year college degrees. In addition, a larger percentage of women than men working in Los Angeles County have four-year college degrees.

**Figure C-2.**  
**Percent representation of minorities in various industries in Los Angeles County, 2011-2015**



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

The representation of minorities among all Los Angeles County workers is 8% for Black Americans, 46% for Hispanic Americans, 14% for Asian Pacific Americans, 2% for other race minorities and 71% for all minorities considered together.

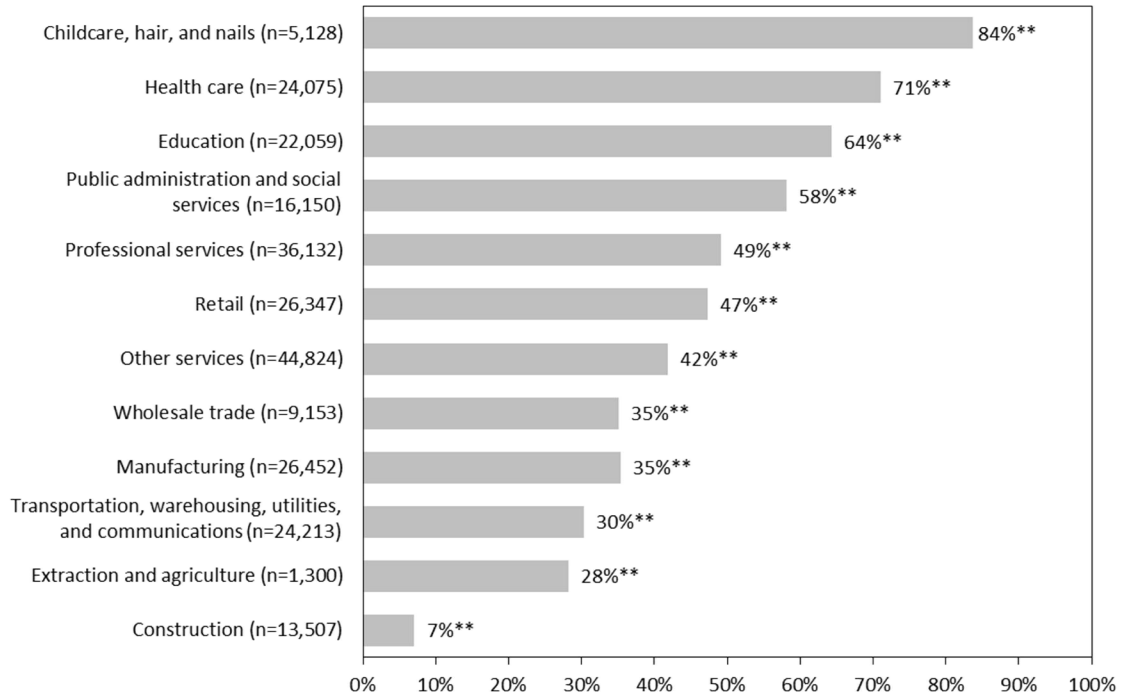
"Other race minority" includes Subcontinent Asian Americans, Native Americans, and other races.

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

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

Figure C-2 indicates that the Los Angeles County industries with the highest representations of minority workers are extraction and agriculture; manufacturing; and construction. Los Angeles County industries with the lowest representations of minority workers are transportation, warehousing, utilities, and communications; education; and professional services.

**Figure C-3.**  
**Percent representation of women in various industries in the Los Angeles County, 2011-2015**



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 Los Angeles County workers is 46%.

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

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

Figure C-3 indicates that the Los Angeles County industries with the highest representations of women workers are childcare, hair, and nails; healthcare; and education. The Los Angeles County industries with the lowest representations of women workers are transportation, warehousing, utilities, and communications; extraction and agriculture; and construction.

**Figure C-4.**  
**Demographic characteristics of workers in study-related industries and all industries, Los Angeles County and the United States, 2000**

LA County	All Industries (n=210,015)	Construction (n=10,810)	Professional Services (n=1,672)	Goods and Services (n=15,747)
<b>Race/ethnicity</b>				
Black American	9.5 %	4.9 % **	4.9 % **	11.2 % **
Asian Pacific American	12.7	4.6 **	18.8 **	11.6 **
Subcontinent Asian American	0.8	0.3 *	1.8	0.9
Hispanic American	38.6	54.0 **	17.1 **	44.3 **
Native American	0.7	0.9	0.7	0.8
Other race minority	1.1	1.2	1.1	1.3
<b>Total minority</b>	<b>63.3 %</b>	<b>65.9 %</b>	<b>44.3 %</b>	<b>70.0 %</b>
Non-Hispanic white	36.7 %	34.1 % **	55.7 % **	30.0 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>				
Women	45.3 %	8.6 % **	25.4 % **	35.4 % **
Men	54.7	91.4 **	74.6 **	64.6 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
United States	All Industries (n=6,832,970)	Construction (n=480,280)	Professional Services (n=58,221)	Goods and Services (n=501,905)
<b>Race/ethnicity</b>				
Black American	10.9 %	6.2 % **	4.2 % **	11.8 % **
Asian Pacific American	3.4	1.2 **	4.6 **	3.2 **
Subcontinent Asian American	0.7	0.2 **	1.3 **	0.7
Hispanic American	10.7	15.0 **	5.5 **	11.1 **
Native American	1.2	1.6 **	0.8 **	1.1 **
Other race minority	0.4	0.4	0.4	0.5
<b>Total minority</b>	<b>27.3 %</b>	<b>24.5 %</b>	<b>16.7 %</b>	<b>28.4 %</b>
Non-Hispanic white	72.7 %	75.5 % **	83.3 % **	71.6 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>				
Women	46.5 %	9.9 % **	26.0 % **	36.0 % **
Men	53.5	90.1 **	74.0 **	64.0 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

Note: \*, \*\* Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 90% and 95% confidence levels, respectively.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that in 2000 there were smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and women working in the Los Angeles County construction industry than in all industries considered together. There were smaller percentages of Black Americans, Hispanic Americans, and women working in the Los Angeles County professional services industry than in all industries considered together. There were smaller percentages of Asian Pacific Americans and women working in the Los Angeles County goods and services industry than in all industries considered together.

**Figure C-5.**  
**Demographic characteristics of workers in study-related industries and all industries,**  
**Los Angeles County and the United States, 2011-2015**

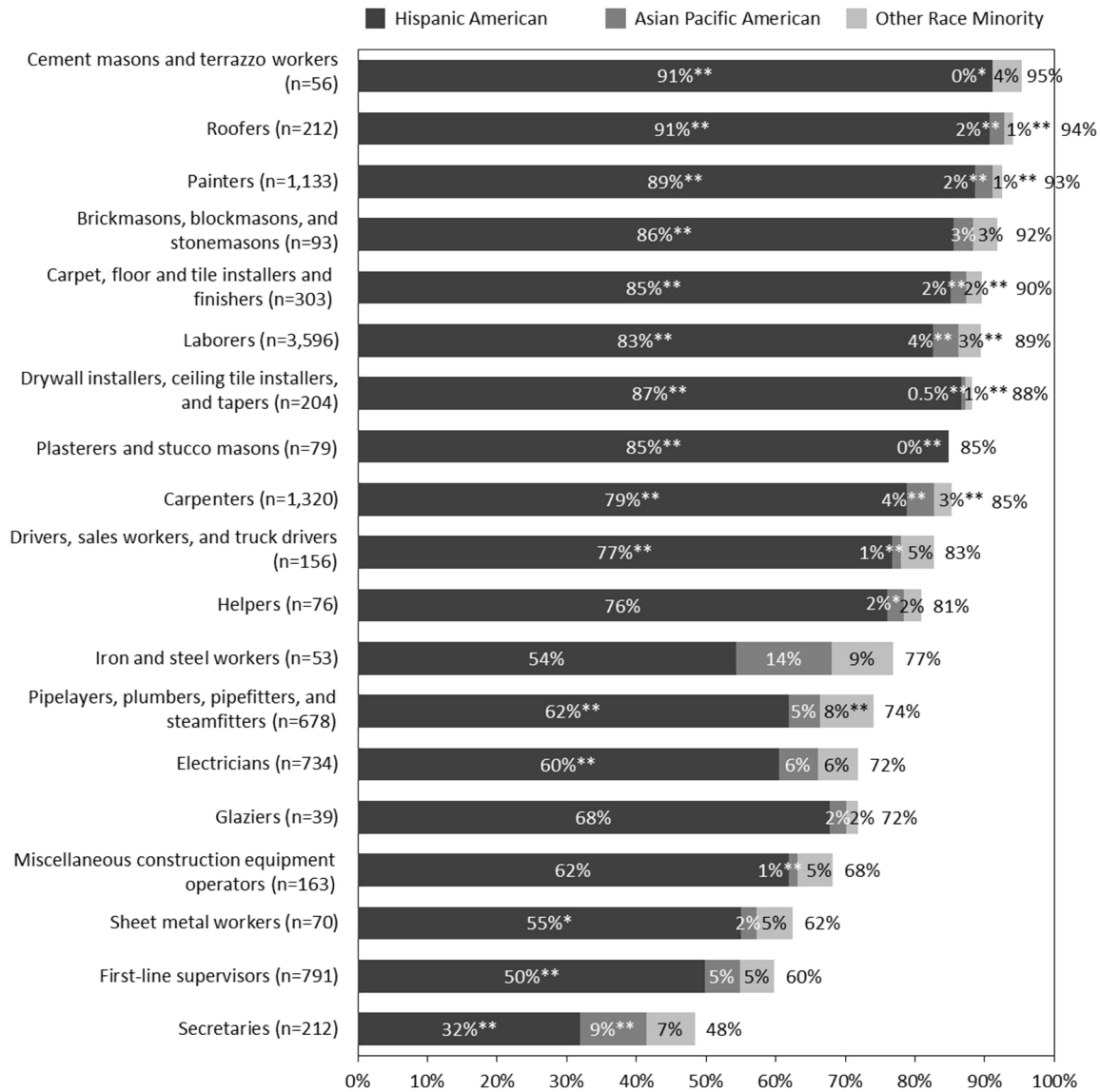
LA County	All Industries (n=255,646)	Construction (n=13,507)	Professional Services (n=2,193)	Goods and Services (n=19,903)
<b>Race/ethnicity</b>				
Black American	8.2 %	3.6 % **	5.3 % **	9.3 %**
Asian Pacific American	14.4	5.2 **	21.6 **	12.5 **
Subcontinent Asian American	1.1	0.2 **	1.8	0.9
Hispanic American	46.2	68.0 **	19.7 **	54.4 **
Native American	0.6	0.4	0.6	0.5
Other race minority	0.3	0.2	0.3	0.4
<b>Total minority</b>	<b>70.8 %</b>	<b>77.7 %</b>	<b>49.3 %</b>	<b>77.9 %</b>
Non-Hispanic white	29.2 %	22.3 % **	50.7 % **	22.1 %**
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>				
Women	45.9 %	7.0 % **	27.1 % **	38.8 %**
Men	54.1	93.0 **	72.9 **	61.2 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
United States	All Industries (n=7,612,247)	Construction (n=461,366)	Professional Services (n=75,966)	Goods and Services (n=539,088)
<b>Race/ethnicity</b>				
Black American	12.2 %	6.0 % **	5.2 % **	13.6 %**
Asian Pacific American	4.6	1.6 **	6.0 **	4.4 **
Subcontinent Asian American	1.3	0.3 **	1.9 **	1.3
Hispanic American	16.1	25.5 **	7.9 **	18.2 **
Native American	1.1	1.3 **	0.8 **	1.0 **
Other race minority	0.2	0.2	0.2	0.3
<b>Total minority</b>	<b>35.6 %</b>	<b>34.9 %</b>	<b>22.0 %</b>	<b>38.8 %</b>
Non-Hispanic white	64.4 %	65.1 % **	78.0 % **	61.2 %**
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>				
Women	47.2 %	8.9 % **	25.4 % **	38.3 %**
Men	52.8	91.1 **	74.6 **	61.7 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

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

Figure C-5 indicates that there are smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and women working in the Los Angeles County construction industry than in all industries considered together. There are smaller percentages of Black Americans, Hispanic Americans, and women working in the Los Angeles County professional services industry than in all industries considered together. There are smaller percentages of Asian Pacific Americans and women working in the Los Angeles County goods and services industry than in all industries considered together.

**Figure C-6.**  
**Percent representation of minorities in selected construction occupations in the Los Angeles County, 2011-2015**



Note: \*, \*\* Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence levels, respectively.

The representation of minorities among all Los Angeles County construction workers is 68% for Hispanic Americans, 5% for Asian Pacific Americans, 4% for other race minorities, and 78% for all minorities considered together.

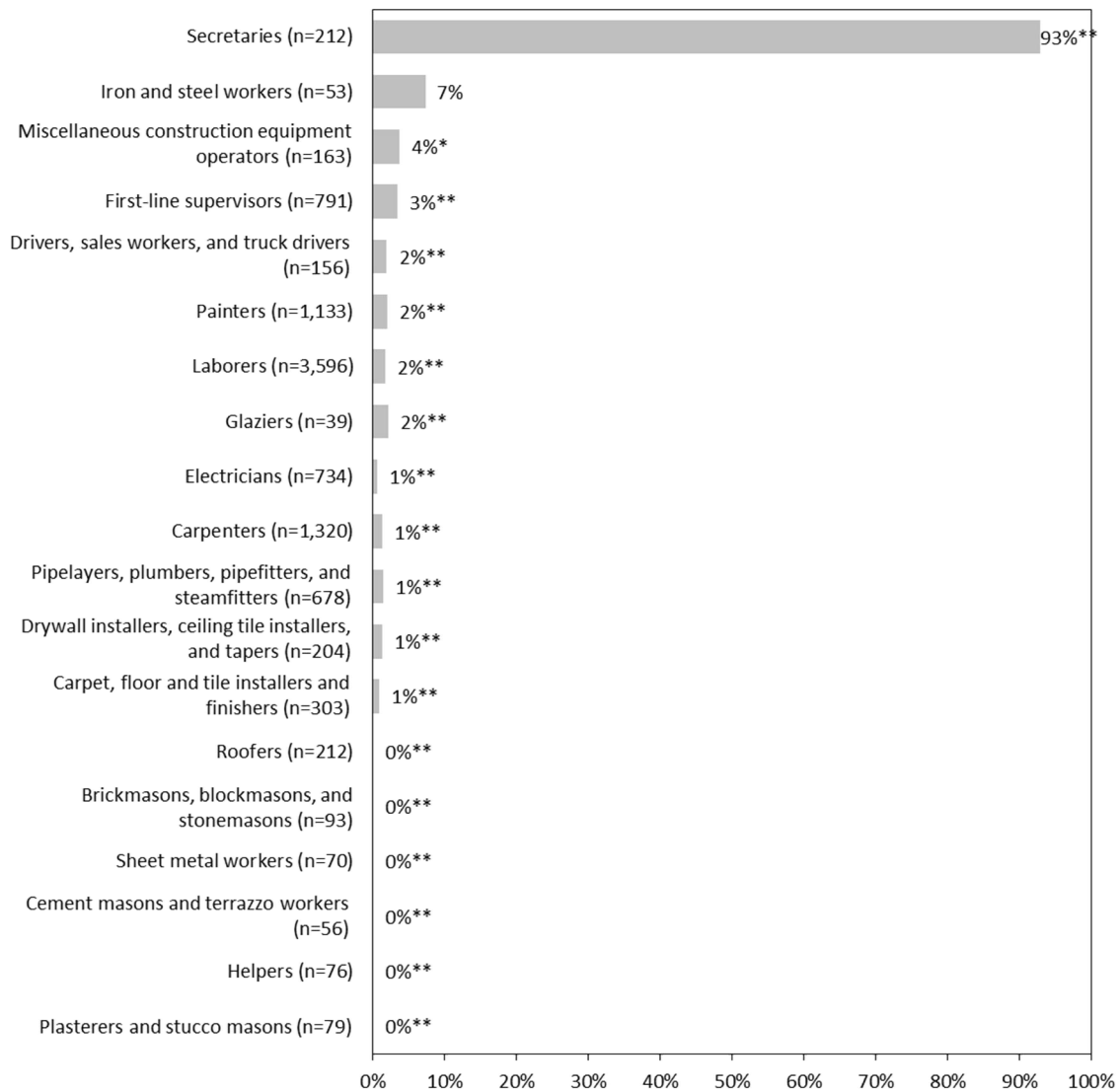
"Other race minority" includes Black Americans, Subcontinent Asian Americans, Native Americans, and other races.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

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

Figure C-6 indicates that the Los Angeles County construction occupations with the highest representations of minority workers are cement masons and terrazzo workers; roofers; and painters. The Los Angeles County construction occupations with the lowest representations of minority workers are sheet metal workers; first-line supervisors; and secretaries.

**Figure C-7.**  
**Percent representation of women in selected construction occupations in the Los Angeles County, 2011-2015**



Note: \*, \*\* Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence levels, respectively.

The representation of women among all Los Angeles County construction workers is 7%.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

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

Figure C-7 indicates that the Los Angeles County construction occupations with the highest representations of women workers are secretaries; iron and steel workers; and miscellaneous construction equipment operators. The Los Angeles County construction occupations with the lowest representations of women workers are roofers; brickmasons, blockmasons, and stonemasons; Sheet metal workers; cement masons and terrazzo workers; helpers; and plasterers and stucco masons.

**Figure C-8.**  
**Percentage of workers**  
**who worked as a**  
**manager in each study-**  
**related industry,**  
**Los Angeles County**  
**and the United States,**  
**2011-2015**

Note:

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

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

Source:

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

LA County	Construction	Professional Services	Goods and Services
<b>Race/ethnicity</b>			
Black American	8.1 % **	5.6 %	0.7 % **
Asian Pacific American	11.6 **	2.1 **	3.1 **
Subcontinent Asian American	19.1	0.0	4.7
Hispanic American	2.5 **	3.7	0.8 **
Native American	4.1 **	0.0 †	6.2
Other Race Minority	12.4	0.0 †	0.0 *
Non-Hispanic white	15.6	4.1	4.9
<b>Gender</b>			
Women	7.1 %	1.7 % **	1.3 % **
Men	<u>6.1</u>	<u>4.2</u>	<u>2.5</u>
<b>All individuals</b>	<b>6.2 %</b>	<b>3.6 %</b>	<b>2.1 %</b>
<b>United States</b>			
<b>Race/ethnicity</b>			
Black American	4.4 % **	2.3 % **	1.0 % **
Asian Pacific American	8.7	2.1 **	2.6 **
Subcontinent Asian American	13.1 **	4.9	2.8 **
Hispanic American	2.8 **	2.4 **	1.3 **
Native American	5.1 **	4.2	1.6 **
Other Race Minority	6.2 **	3.1	1.9 **
Non-Hispanic white	9.3	4.0	3.3
<b>Gender</b>			
Women	6.3 % **	1.8 % **	1.5 % **
Men	<u>7.4</u>	<u>4.4</u>	<u>3.3</u>
<b>All individuals</b>	<b>7.3 %</b>	<b>3.7 %</b>	<b>2.6 %</b>

Figure C-8 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Hispanic Americans, and Native Americans work as managers in the Los Angeles County construction industry. Compared to non-Hispanic white Americans, smaller percentages of Asian Pacific Americans work as managers in the Los Angeles County professional services industry. Compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Hispanic Americans, and other race minorities work as managers in the Los Angeles County goods and services industry. In addition, compared to men, a smaller percentage of women work as managers in both the Los Angeles County professional services industry and the goods and services industry.



**Figure C-9.**  
**Mean annual wages,**  
**Los Angeles County**  
**and the United**  
**States, 2011-2015**

Note:

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

\*\* , ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and the Los Angeles County, respectively.

Source:

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

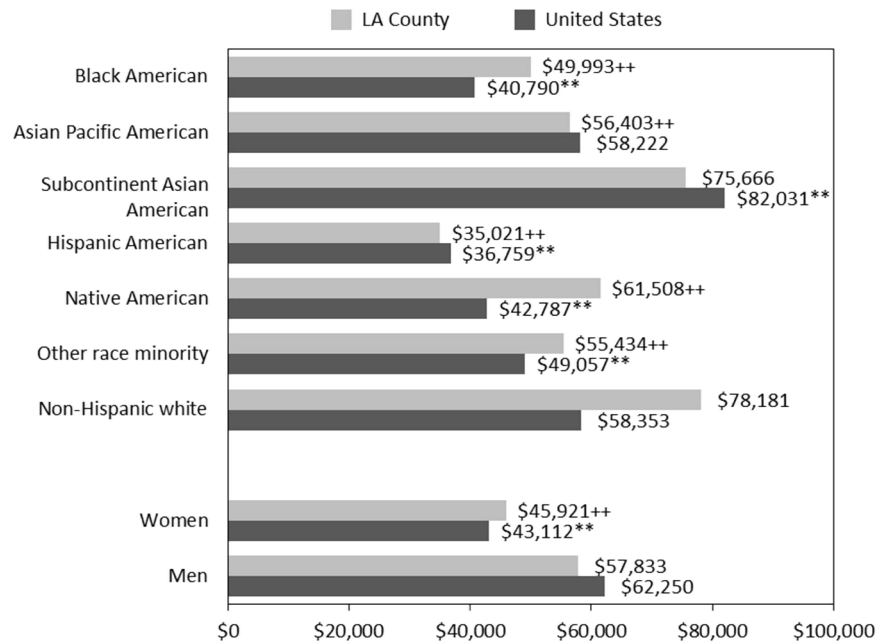


Figure C-9 indicates that, compared to non-Hispanic white Americans, Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities in Los Angeles County exhibit lower mean annual wages. In addition, women in Los Angeles County exhibit lower mean annual wages than men.

**Figure C-10.  
Predictors of annual wages  
(regression), Los Angeles County, 2011-  
2015**

Note:

The regression includes 121,851 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, and manufacturing for industry variables.

Source:

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

Variable	Exponentiated Coefficient
Constant	6022.117 **
Black American	0.816 **
Asian Pacific American	0.827 **
Subcontinent Asian American	0.842 **
Hispanic American	0.822 **
Native American	0.957
Other minority group	0.841 **
Women	0.844 **
Less than high school education	0.873 **
Some college	1.214 **
Four-year degree	1.646 **
Advanced degree	2.227 **
Disabled	0.824 **
Military experience	1.058 **
Speaks English well	1.454 **
Age	1.067 **
Age-squared	0.999 **
Married	1.104 **
Children	1.008 **
Number of people over 65 in household	0.912 **
Public sector worker	1.178 **
Manager	1.291 **
Part time worker	0.397 **
Extraction and agriculture	0.858 **
Construction	0.945 **
Wholesale trade	0.940 **
Retail trade	0.823 **
Transportation, warehouse, & information	1.119 **
Professional services	1.094 **
Education	0.762 **
Health care	1.026 **
Other services	0.801 **
Public administration and social services	0.828 **

Figure C-10 indicates that, compared to being a non-Hispanic white American in Los Angeles County, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic 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 \$0.82 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man in Los Angeles County, even after accounting for various other personal characteristics.

**Figure C-11.  
Predictors of annual wages  
(regression), United States, 2011-2015**

Note:

The regression includes 3,998,383 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

\*\* Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables, Northeast for region variables.

Source:

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

Variable	Exponentiated Coefficient
Constant	7677.789 **
Black American	0.860 **
Asian Pacific American	0.958 **
Subcontinent Asian American	0.963 **
Hispanic American	0.911 **
Native American	0.875 **
Other minority group	0.913 **
Women	0.783 **
Less than high school education	0.851 **
Some college	1.199 **
Four-year degree	1.668 **
Advanced degree	2.308 **
Disabled	0.793 **
Military experience	1.001
Speaks English well	1.344 **
Age	1.059 **
Age-squared	0.999 **
Married	1.116 **
Children	1.013 **
Number of people over 65 in household	0.906 **
Midwest	0.879 **
South	0.894 **
West	0.983 **
Public sector worker	1.114 **
Manager	1.308 **
Part time worker	0.364 **
Extraction and agriculture	0.948 **
Construction	0.921 **
Wholesale trade	0.965 **
Retail trade	0.751 **
Transportation, warehouse, & information	1.030 **
Professional services	1.056 **
Education	0.658 **
Health care	1.003
Other services	0.707 **
Public administration and social services	0.827 **

Figure C-11 indicates that, compared to being a non-Hispanic white American in the United States, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.86 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man, even after accounting for various other personal characteristics.

**Figure C-12.**  
**Home Ownership Rates,**  
**Los Angeles County and**  
**the United States, 2011-**  
**2015**

Note:

The sample universe is all households.

**\*\***, **++** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for the United States as a whole and the Los Angeles County, respectively.

Source:

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

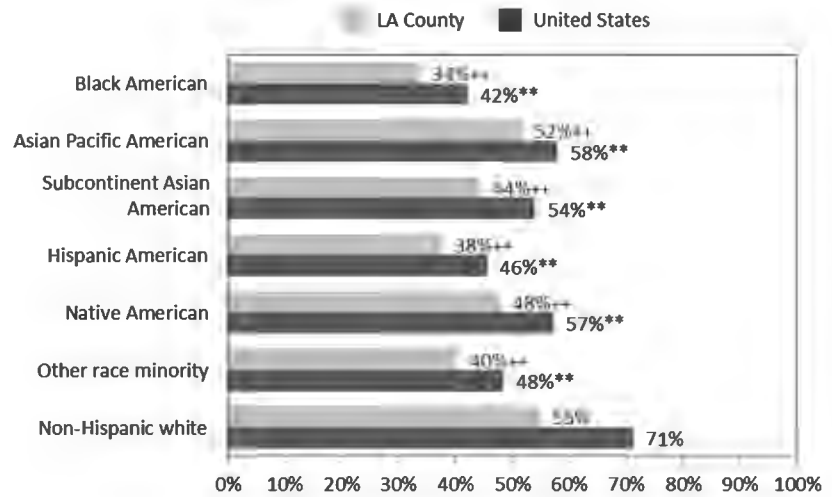


Figure C-12 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and other race minorities in Los Angeles County own homes.

**Figure C-13.**  
**Median home values, Los Angeles County and the United States, 2011-2015**

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

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

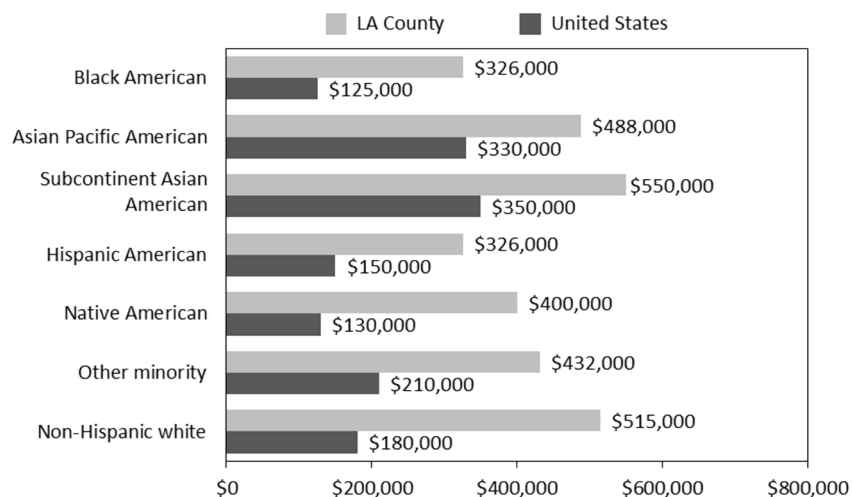


Figure C-13 indicates that Black American, Asian Pacific American, Hispanic American, Native American, and other race minority homeowners in Los Angeles County own homes of lower median values than non-Hispanic white American homeowners.

**Figure C-14.**  
**Denial rates of**  
**conventional purchase**  
**loans for high-income**  
**households, Los Angeles**  
**County and the United**  
**States, 2007 and 2015**

Note:

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

Source:

FFIEC HMDA data 2007 and 2015. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.

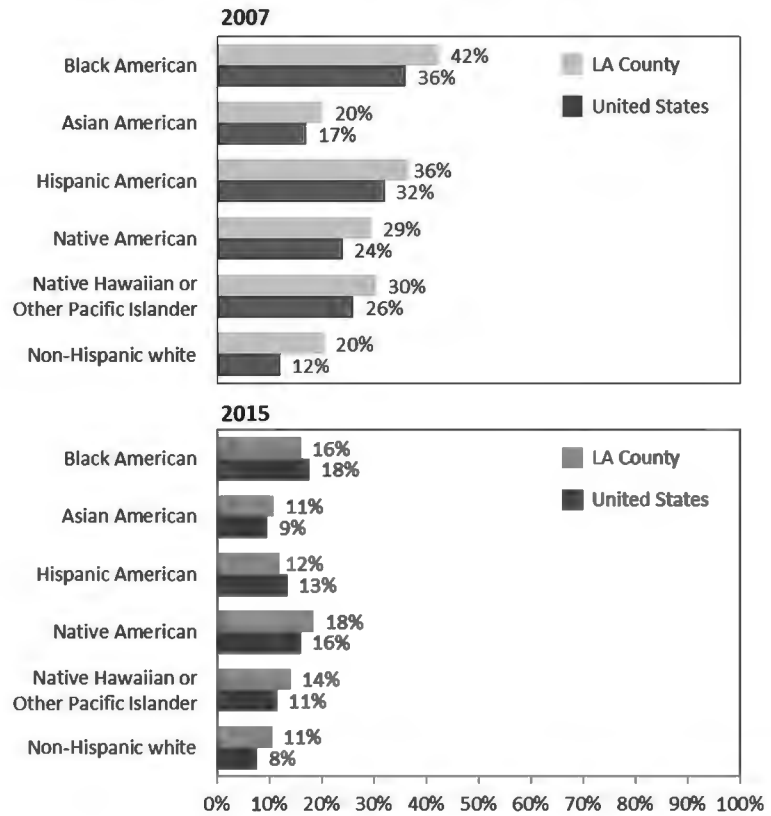


Figure C-14 indicates that in 2015 Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in Los Angeles County were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.

**Figure C-15.**  
**Percent of conventional home purchase loans that were subprime, Los Angeles County and the United States, 2007 and 2015**

Note:

Percent of conventional home purchase loans that were subprime, Los Angeles County and the United States, 2007 and 2015.

Source:

FFIEC HMDA data 2007 and 2015. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.

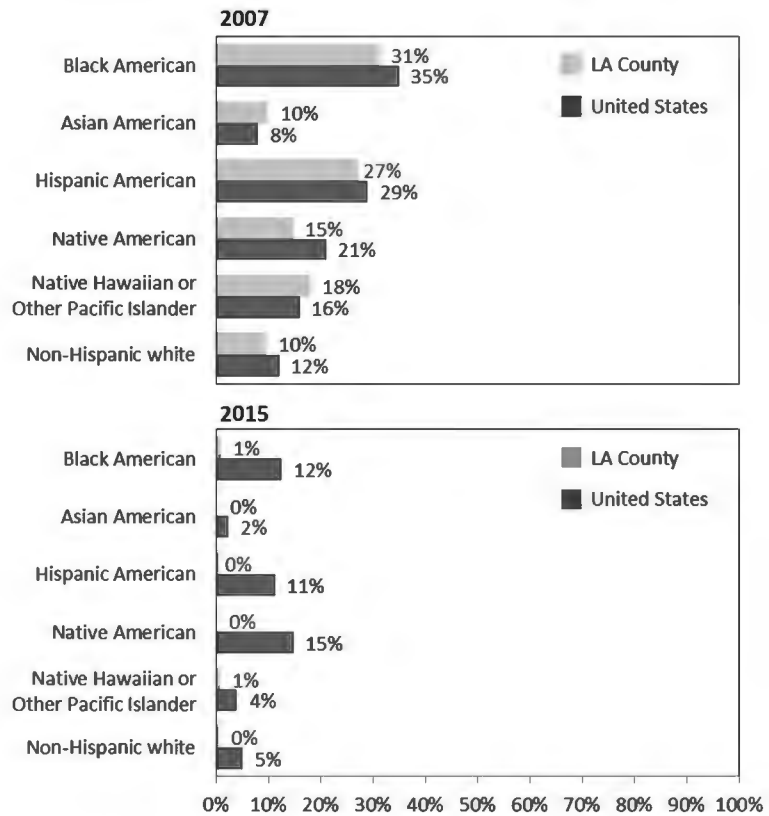


Figure C-15 indicates that in 2015 Black Americans and Native Americans in Los Angeles County were awarded conventional home purchase loans that were subprime at a greater rate than non-Hispanic white Americans.

**Figure C-16.  
Business loan denial  
rates, Pacific Division  
and the United States,  
2003**

Note:

\*\* Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Census Division consists of California, Alaska, Washington, Oregon, and Hawaii.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

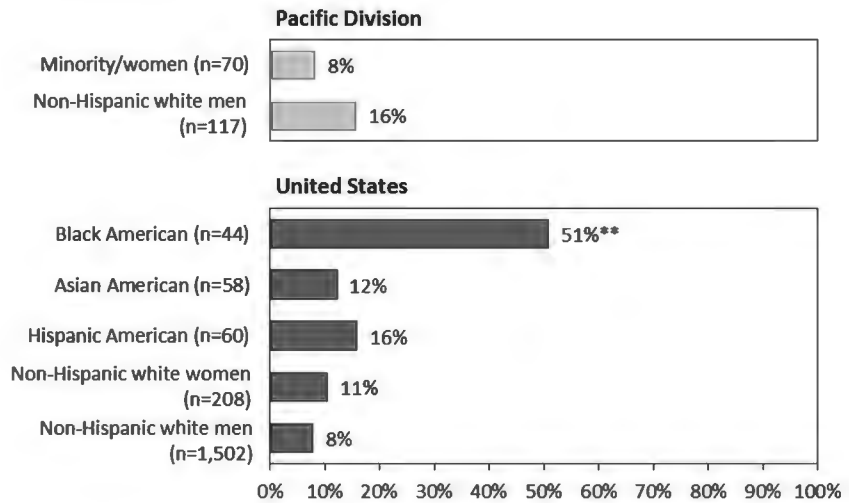


Figure C-16 indicates that in 2003, Black American owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men.



**Figure C-17.**  
**Businesses that did not**  
**apply for loans due to**  
**fear of denial, Pacific**  
**Division and the United**  
**States, 2003**

Note:

\*\* Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Census Division consists of California, Alaska, Washington, Oregon, and Hawaii.

Source:

BBC Research & Consulting from  
 2003 Survey of Small Business  
 Finance.

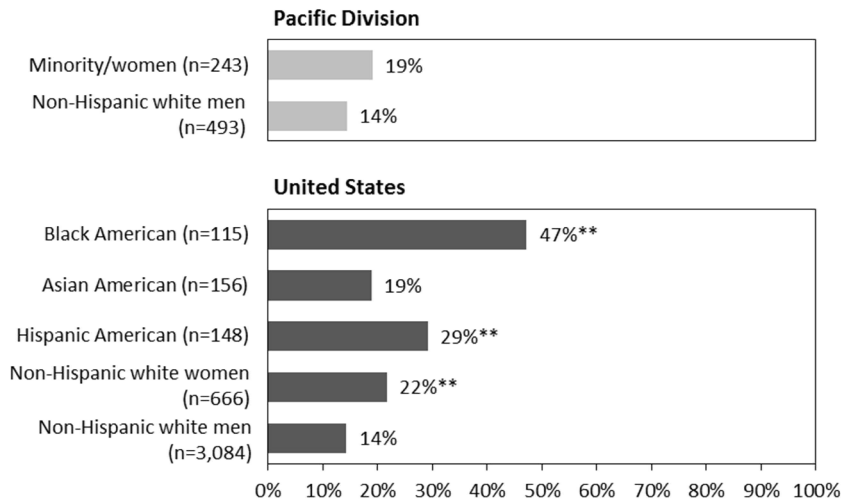


Figure C-17 indicates that in 2003, Black American, Hispanic American, and Non-Hispanic white women-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

**Figure C-18.**  
**Mean values of**  
**approved business loans,**  
**Pacific 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.

The Pacific Census Division consists of California, Alaska, Washington, Oregon, and Hawaii.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

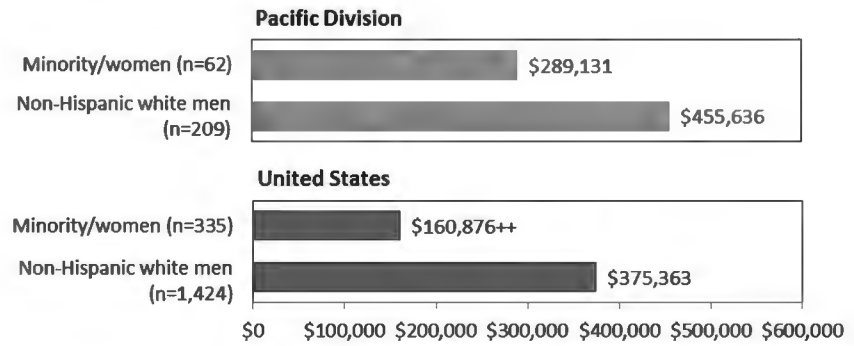


Figure C-18 indicates that in 2003, minority- and woman-owned businesses in the United States who received business loans were approved for loans that were worth less than those that businesses owned by non-Hispanic white men received.

**Figure C-19.**  
**Self-employment rates in**  
**study-related industries,**  
**Los Angeles County**  
**and the United States,**  
**2000**

Note:

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

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

Source:

BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

LA County	Construction	Professional Services	Goods and Services
<b>Race/ethnicity</b>			
Black American	22.2 % **	10.2 % *	3.9 % **
Asian Pacific American	31.2	11.9 **	14.0
Subcontinent Asian American	21.2	22.5	8.2
Hispanic American	16.2 **	7.4 **	7.7 **
Native American	21.8	0.0 †	8.6
Other Race Minority	33.1	0.0 †	18.4
Non-Hispanic white	32.8	24.5	14.0
<b>Gender</b>			
Women	13.0 % **	10.5 % **	8.8 % **
Men	<u>24.1</u>	<u>21.1</u>	<u>10.8</u>
<b>All individuals</b>	<b>23.1 %</b>	<b>18.4 %</b>	<b>10.1 %</b>
<b>United States</b>			
<b>Race/ethnicity</b>			
Black American	15.2 % **	5.2 % **	3.7 % **
Asian Pacific American	21.3 **	8.5 **	8.8
Subcontinent Asian American	17.9 **	6.2 **	8.5
Hispanic American	12.2 **	8.9 **	6.8 **
Native American	19.2 **	11.8	7.2 **
Other Race Minority	23.9	11.6	11.2
Non-Hispanic white	25.4	14.2	9.0
<b>Gender</b>			
Women	16.8 % **	7.5 % **	7.9 % **
Men	<u>23.3</u>	<u>15.1</u>	<u>8.2</u>
<b>All individuals</b>	<b>22.6 %</b>	<b>13.2 %</b>	<b>8.1 %</b>

Figure C-19 indicates that in 2000, Black Americans and Hispanic Americans working in the Los Angeles County construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Los Angeles County construction industry exhibited lower rates of self-employment than men. Black Americans, Asian Pacific Americans, and Hispanic Americans working in the Los Angeles County professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Los Angeles County professional services industry exhibited lower rates of self-employment than men. Black Americans and Hispanic Americans working in the Los Angeles County goods and services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Los Angeles County goods and services industry exhibited lower rates of self-employment than men.

**Figure C-20.**  
**Self-employment**  
**rates in study-related**  
**industries, Los**  
**Angeles County**  
**and the United**  
**States, 2011-2015**

Note:

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

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

Source:

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

LA County	Construction	Professional Services	Goods and Services
<b>Race/ethnicity</b>			
Black American	20.2 % **	10.1 % **	4.3 % **
Asian Pacific American	33.7	12.4 **	12.8 **
Subcontinent Asian American	25.7	20.3	8.1 **
Hispanic American	25.7 **	10.9 **	10.1 **
Native American	29.1	0.0 †	11.2
Other Race Minority	28.2	0.0 †	21.6
Non-Hispanic white	34.5	17.5	15.4
<b>Gender</b>			
Women	13.9 % **	10.8 % **	10.2 % **
Men	29.0	16.1	11.7
<b>All individuals</b>	<b>27.9 %</b>	<b>14.6 %</b>	<b>11.1 %</b>
<b>United States</b>			
<b>Race/ethnicity</b>			
Black American	18.0 % **	7.0 % **	4.0 % **
Asian Pacific American	23.2 **	7.5 **	8.7 **
Subcontinent Asian American	23.3 **	8.6 **	11.1 **
Hispanic American	17.7 **	8.9 **	8.9 **
Native American	18.5 **	11.0	8.2 **
Other Race Minority	21.0 **	10.9	11.6 *
Non-Hispanic white	26.4	13.0	9.4
<b>Gender</b>			
Women	16.1 % **	7.3 % **	8.7 % **
Men	24.2	13.5	8.4
<b>All individuals</b>	<b>23.5 %</b>	<b>11.9 %</b>	<b>8.6 %</b>

Figure C-20 indicates that Black Americans and Hispanic Americans working in the Los Angeles County construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Los Angeles County construction industry exhibited lower rates of self-employment than men. Black Americans, Asian Pacific Americans, and Hispanic Americans working in the Los Angeles County professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Los Angeles County professional services industry exhibited lower rates of self-employment than men. Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and Hispanic Americans working in the Los Angeles County goods and services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Los Angeles County goods and services industry exhibited lower rates of self-employment than men.

**Figure C-21.  
Predictors of business ownership in  
construction (probit regression), Los  
Angeles County, 2011-2015**

Note:

The regression includes 11,951 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient
Constant	-1.6389 **
Age	0.0405 **
Age-squared	-0.0002 **
Married	-0.0208
Disabled	0.0343
Number of children in household	-0.0017
Number of people over 65 in household	0.0417
Owns home	-0.3566 **
Home value (\$000s)	0.0003 **
Monthly mortgage payment (\$000s)	0.0833 **
Interest and dividend income (\$000s)	0.0023
Income of spouse or partner (\$0000s)	0.0006
Speaks English well	-0.1115 **
Less than high school education	0.1581 **
Some college	0.0100
Four-year degree	-0.0294
Advanced degree	-0.2070 *
Black American	-0.3482 **
Asian Pacific American	-0.0589
Subcontinent Asian American	-0.4739
Hispanic American	-0.2485 **
Native American	-0.0485
Other minority group	-0.0084
Women	-0.5989 **

Figure C-21 indicates that being a Black American or Hispanic American minority is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics. In addition, compared to being a man in Los Angeles County, being a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.

**Figure C-22.**  
**Disparities in business ownership rates among Los Angeles County construction workers, 2011-2015**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	21.8%	31.0%	70
Hispanic American	26.0%	29.4%	88
Non-Hispanic white women	16.5%	37.6%	44

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-22 indicates that Black Americans own construction businesses in Los Angeles County at a rate that is 70 percent that of similarly-situated non-Hispanic white men. Hispanic Americans own construction businesses in Los Angeles County at a rate that is 88 percent that of similarly-situated non-Hispanic white men. Additionally, non-Hispanic white women own construction businesses in Los Angeles County at a rate that is 44 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

**Figure C-23.  
Predictors of business ownership in  
professional services (regression), Los  
Angeles County, 2011-2015**

Note:

The regression includes 1,998 observations.

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

Native American and Other race minority omitted from the regression due to perfectly predicting business ownership.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient
Constant	-3.1266 **
Age	0.0462 **
Age-squared	-0.0002
Married	-0.1965 *
Disabled	0.1510
Number of children in household	0.0742
Number of people over 65 in household	0.0062
Owns home	-0.4194 **
Home value (\$000s)	0.0003 **
Monthly mortgage payment (\$000s)	0.0201
Interest and dividend income (\$000s)	-0.0010
Income of spouse or partner (\$0000s)	-0.0003
Speaks English well	0.1171
Less than high school education	-0.4844
Some college	0.4899 **
Four-year degree	0.4136 *
Advanced degree	0.5425 **
Black American	-0.4572 **
Asian Pacific American	-0.1452
Subcontinent Asian American	0.1777
Hispanic American	-0.0229
Women	-0.2128 **

Figure C-23 indicates that compared to being a non-Hispanic white American, being a Black American is related to a lower likelihood of owning a professional services business, even after accounting for various other personal characteristics. In addition, being a woman is associated with a lower likelihood of owning a professional services business after accounting for other personal characteristics.

**Figure C-24.**  
**Disparities in business ownership rates among Los Angeles County professional services workers, 2011-2015**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	9.3%	16.3%	57
Non-Hispanic white women	13.5%	15.5%	87

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-24 indicates that Black Americans own construction businesses in Los Angeles County at a rate that is 57 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics). Additionally, non-Hispanic white women own professional services businesses in Los Angeles County at a rate that is 87 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).



**Figure C-25.**  
**Predictors of business ownership in goods and other services (probit regression), Los Angeles County, 2011-2015**

Note:

The regression includes 17,580 observations.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient
Constant	-2.3214 **
Age	0.0443 **
Age-squared	-0.0002 **
Married	0.0986 **
Disabled	-0.0249
Number of children in household	0.0225
Number of people over 65 in household	-0.0865 **
Owens home	-0.2008 **
Home value (\$000s)	0.0002 **
Monthly mortgage payment (\$000s)	0.0637 **
Interest and dividend income (\$000s)	0.0039 **
Income of spouse or partner (\$0000s)	-0.0002
Speaks English well	-0.2350 **
Less than high school education	0.0440
Some college	-0.0597
Four-year degree	-0.0736
Advanced degree	-0.1171
Black American	-0.5830 **
Asian Pacific American	-0.1556 **
Subcontinent Asian American	-0.3726 *
Hispanic American	-0.2388 **
Native American	-0.2473
Other minority group	0.5115
Women	-0.0383

Figure C-25 indicates that, compared to being a non-Hispanic white American in Los Angeles County, being Black American, Asian Pacific American, Subcontinent Asian American, or Hispanic American is related to a lower likelihood of owning a goods and other services business, even after accounting for various other personal characteristics.

**Figure C-26.**  
**Disparities in business ownership rates among Los Angeles County goods and other services workers, 2011-2015**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	4.4%	12.7%	35
Asian Pacific American	13.5%	15.4%	88
Subcontinent Asian American	8.7%	16.4%	53
Hispanic American	10.3%	14.1%	73

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-26 indicates that Black Americans own goods and other services businesses in Los Angeles County at a rate that is 35 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Asian Pacific Americans own goods and services businesses in Los Angeles County at a rate that is 88 percent that of similarly-situated non-Hispanic white Americans. Subcontinent Asian Americans own goods and other services businesses in Los Angeles County at a rate that is 53 percent that of similarly-situated non-Hispanic white Americans. Finally, Hispanic Americans own goods and other services businesses in Los Angeles County at a rate that is 73 percent that of similarly-situated non-Hispanic white Americans.

**Figure C-27.**  
**Rates of business closure, expansion, and contraction, California and the United States, 2002-2006**

Note:

Data include only non-publicly held businesses  
 Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

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

Source:

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

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

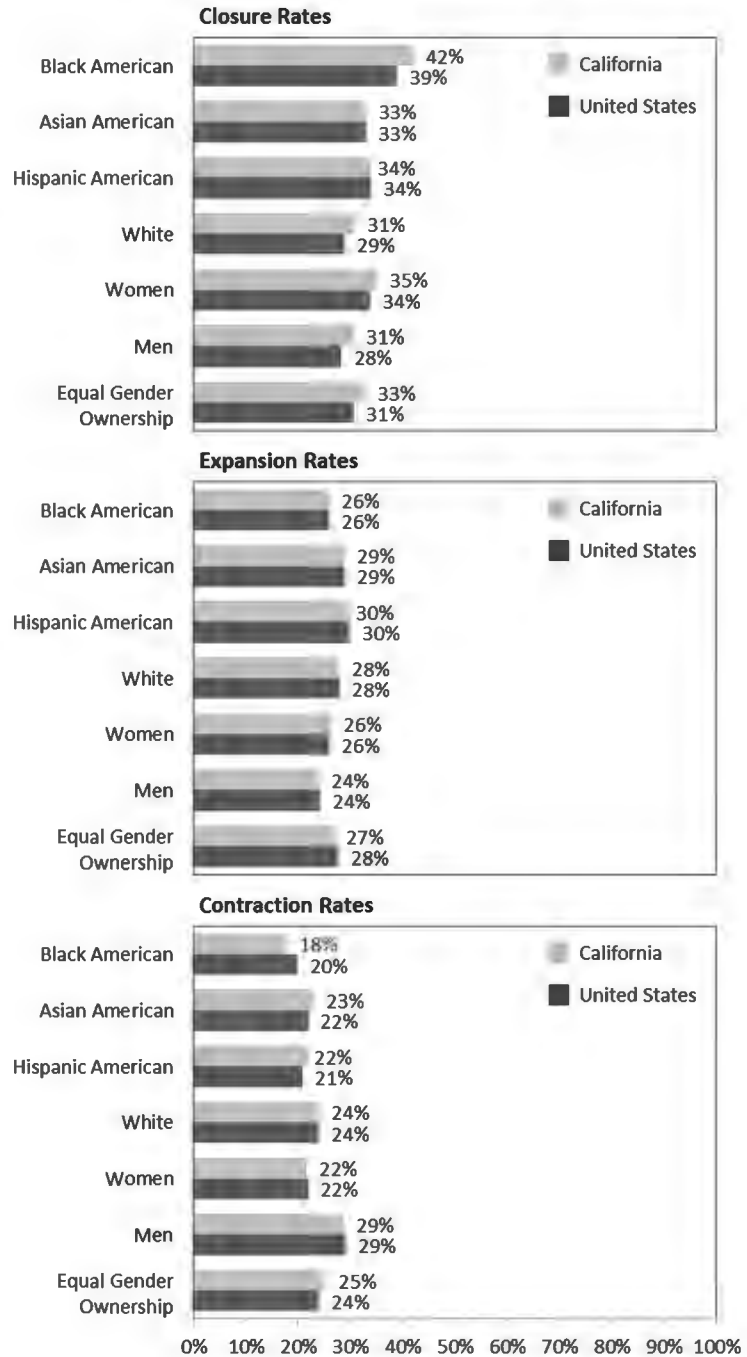


Figure C-27 indicates that Black American-, Asian American-, and Hispanic American-owned businesses in California show higher closure rates than white American-owned businesses. Woman-owned businesses in California show higher closure rates than businesses owned by men. Black American-owned businesses in California also show lower expansion rates than white American-owned businesses.

**Figure C-28.**  
**Mean annual business**  
**receipts (in thousands), Los**  
**Angeles County 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.

All race/ethnicity and gender categories include Hispanic Americans.

**Source:**

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

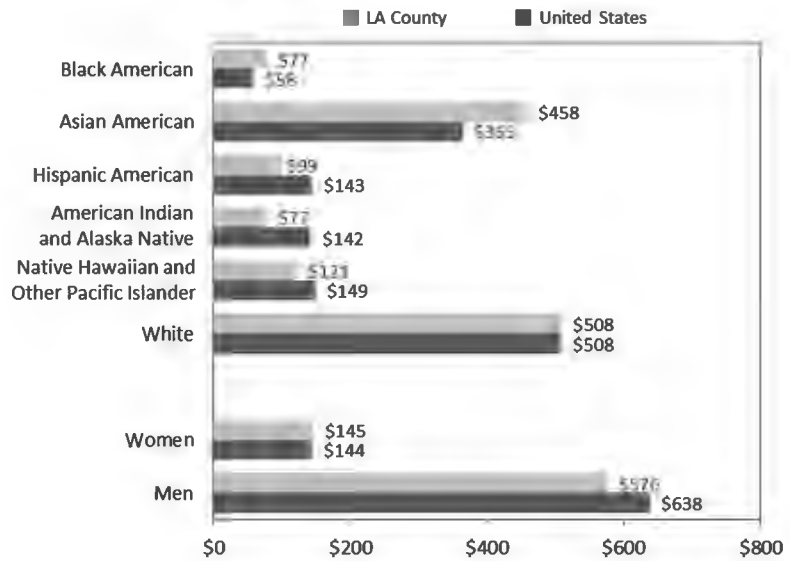


Figure C-28 indicates that in 2012 Black American-; Asian American-; Hispanic American-; American Indian and Alaskan Native-; and Native Hawaiian and Other Pacific Islander-owned businesses in Los Angeles County showed lower mean annual business receipts than White American-owned businesses.

**Figure C-29.**  
**Mean annual business**  
**owner earnings, Los**  
**Angeles County and the**  
**United States, 2011-2015**

Note:

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

\*\* , ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and the Los Angeles County, respectively.

Source:

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

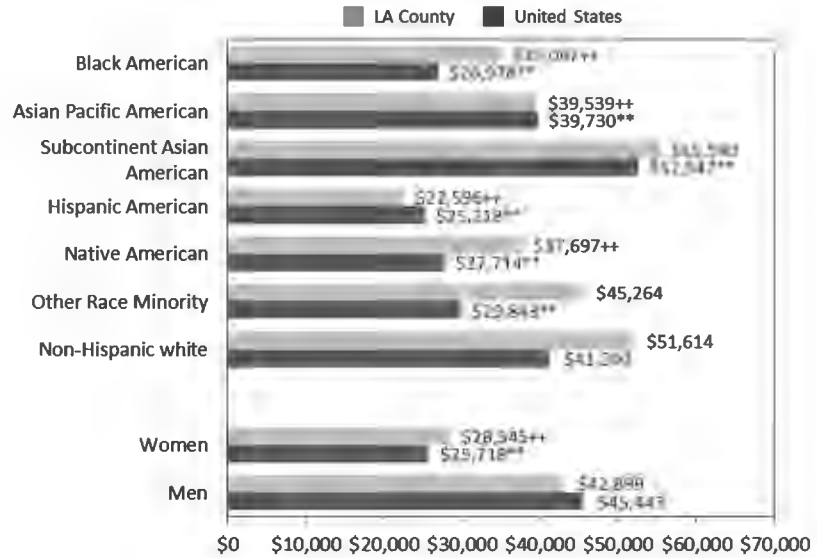


Figure C-29 indicates that the owners of Black American, Asian Pacific American, Hispanic American-, and Native American-owned businesses in Los Angeles County earned less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Los Angeles County earn less on average than the owners of businesses owned by men.

**Figure C-30.  
Predictors of business owner earnings  
(regression), Los Angeles County, 2011-  
2015**

Note:

The regression includes 18,909 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

\*\* Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Exponentiated Coefficient
Constant	869.083 **
Age	1.125 **
Age-squared	0.999 **
Married	1.190 **
Speaks English well	1.253 **
Disabled	0.547 **
Less than high school	0.857 **
Some college	1.136 **
Four-year degree	1.360 **
Advanced degree	1.837 **
Black American	0.740 **
Asian Pacific American	0.869 **
Subcontinent Asian American	0.925
Hispanic American	0.869 **
Native American	0.878
Other race minority	1.160
Women	0.651 **

Figure C-30 indicates that, compared to being a male business owner in Los Angeles County, woman business owners report lower earnings, even after accounting for various other personal characteristics. Additionally, compared to being an owner of a non-Hispanic white American-owned business in Los Angeles County, being the owner of a Black American-, Asian Pacific American-, or Hispanic American-owned business is related to significantly lower earnings, even after accounting for various other personal characteristics.

**Figure C-31.  
Predictors of business owner earnings  
(regression), United States, 2011-2015**

Note:

The regression includes 433,808 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure

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

\*\* Denotes statistical significance at the 95% confidence level.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Exponentiated Coefficient
Constant	470.029 **
Age	1.153 **
Age-squared	0.999 **
Married	1.244 **
Speaks English well	1.158 **
Disabled	0.579 **
Less than high school	0.749 **
Some college	1.049 **
Four-year degree	1.320 **
Advanced degree	1.929 **
Black American	0.823 **
Asian Pacific American	1.111 **
Subcontinent Asian American	1.157 **
Hispanic American	1.049 **
Native American	0.679 **
Other race minority	1.152 **
Women	0.530 **

Figure C-31 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being an owner of a Black American- or Native American-owned business is related to lower owner earnings, even after accounting for various other personal characteristics. In addition, compared to being a male business owner in the United States, women business owners report lower owner earnings, even after accounting for various other personal characteristics.

# **APPENDIX D.**

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## **Qualitative Information about Marketplace Conditions**



# APPENDIX D.

## Qualitative Information about Marketplace Conditions

Appendix D describes the public engagement process used for the Los Angeles County Metropolitan Transportation Authority (LACMTA or “Metro”) disparity study, and presents the qualitative information that the study team collected and analyzed as part of the public engagement process. In total, more than 250 business and trade association representatives provided written or spoken comments for Appendix D. Appendix D summarizes the key themes that emerged from these narrative responses. This chapter is divided into the following twelve sections:

**A. Introduction** describes the public engagement process for gathering and analyzing the qualitative information summarized in Appendix D. *(page 2)*

**B. Background on the Construction; Professional Services; and Goods and Other Services Industries** summarizes information about how businesses become established, the types of contracts they work on, and what products and services they provide. *(page 4)*

**C. Marketplace Conditions** presents information about business owners’ current perceptions of Metro marketplace economic conditions and what it takes for firms to be successful. *(page 21)*

**D. Doing Business as a Prime Contractor or as a Subcontractor** summarizes information about the mix of businesses’ prime contract and subcontract work and how they obtain that work. Section D also describes business owners’ experiences working with DBE certified subcontractors. *(page 30)*

**E. Experiences in the Public Sector and Private Sector** presents business owners’ experiences pursuing public and private sector work. *(page 45)*

**F. Doing Business with Public Agencies** describes business owners’ experiences working with or attempting to work with public agencies in the Los Angeles area, including Metro, and identifies potential barriers to doing work for public agencies. *(page 57)*

**G. Barriers to Doing Business in the Metro Marketplace** describes the barriers and challenges firms face in the local marketplace, and details if and how race-/ethnicity- or gender-based discrimination may be contributing to these issues. *(page 68)*

**H. Additional Information Regarding whether any Race/Ethnicity or Gender Discrimination Affects Business Opportunities** presents information about any experiences business owners or managers have with discrimination in the local marketplace, and how this behavior affects minority- or woman-owned firms. *(page 85)*

**I. Insights Regarding Business Assistance Programs or Other Neutral Measures** describes business owners' awareness of and opinions about business assistance programs, and other steps to remove barriers for all businesses or small businesses in the Los Angeles metropolitan area. *(page 90)*

**J. DBE and Other Certification Programs** presents information about firms' experiences with DBE and other certification processes, and describes the advantages and disadvantages of holding a DBE or other certification. It also summarizes business owners' experiences with the Federal Disadvantaged Business Enterprise (DBE) Program and its implementation by Metro, including any impacts of DBE contract goals on other businesses. *(page 100)*

**K. Insights Regarding Any Other Race-/Ethnicity- or Gender-based Measures** includes business owners' comments about other current or potential race/ethnicity/gender-based programs. *(page 109)*

**L. Any Other Insights and Recommendations** presents additional comments and suggestions for Metro to consider. *(page 114)*

## **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 Los Angeles metropolitan area, and provide public testimony. Those qualitative data were collected through a number of channels:

- Participating in an in-depth interview (n=35);
- Participating in an availability survey (n=204);
- Participating in a focus group (n=5);
- Providing oral or written testimony during a public forum (n=5); and
- Submitting written testimony via fax or email (n=11).

From November 2016 through July 2017, the study team used a variety of public engagement methods to gather these comments, and participated in several public engagement events. The study team's public engagement strategy consisted of the following:

**TBAC engagement.** In addition to the community engagement events where BBC staff collected public testimony, study team members also met with the Transportation Business Advisory Council (TBAC) board and membership to provide informational updates on study progress, and to solicit study feedback. TBAC is a business advisory group to Metro, and an important stakeholder group comprised of professional business associations representing a wide array of industries and trades in the Los Angeles marketplace. Specifically, TBAC represents the interests of the small business community and advocates for increased access to Metro contacting opportunities. BBC staff attended TBAC meetings, and gave informational presentations about the disparity study, on the following dates: November 3, 2016, February 2, 2017, April 6, 2017 and July 6, 2017.

**Public forums.** Metro and the study team solicited written and verbal testimony at three public forums for the disparity study held at Metro headquarters. The meetings were held on January 25, 2017; December 7, 2017; and December 11, 2017. The study team reviewed and analyzed all public comments from the three meetings and included many of those comments in Appendix D. The comments chosen for Appendix D highlight key themes from the public testimony. Public forum comments are denoted by the prefix “PT” throughout Appendix D.

**Written testimony.** Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or email. All written testimony received by email or fax (11 responses) was then analyzed by the study team and exemplary quotes are included in Appendix D. Written testimony is indicated by the prefix “WT” throughout Appendix D.

**In-depth interviews.** From March through July 2017, the study team conducted 28 unique in-depth interviews with representatives of 28 businesses and one trade association in the Los Angeles metropolitan area. The interviews included discussions about interviewees’ perceptions of and experiences with the local contracting industry; Metro’s DBE Program; the Federal DBE Program; and businesses’ experiences working or attempting to work with other public agencies in the Los Angeles metropolitan area. Interviews were conducted by PDA Consulting Group—an Inglewood-based DBE-certified consulting firm—and GCAP Services—a Costa Mesa-based DBE-certified consulting firm.

In addition, the study team included seven in-depth interviews completed by the BBC team in Los Angeles and Ventura Counties for the 2016 California Department of Transportation (Caltrans) Disparity Study. These business owners discussed experiences in the Los Angeles marketplace directly relevant to the current study.

Interviewees included individuals representing construction businesses, professional services firms, goods and services suppliers, and trade associations. The study team identified interview participants primarily from a random sample of businesses stratified by business type; location; and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner, president, chief executive officer, or another high-level manager of the business or association. Some of the businesses that the study team interviewed indicated that they work exclusively (or, at least primarily) as prime contractors or subcontractors, and some indicated that they work as both. All of the businesses that participated in the interviews conduct work in the greater Los Angeles metropolitan area.

All interviewees are identified in Appendix D by random interviewee numbers (i.e., #1, #2, #3, etc.). Interviews conducted as part of the CALTRANS disparity study are denoted by the prefix “CT” in front of the interview number (i.e., CT #61). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a small business enterprise- (SBE-), DBE-, MBE-, WBE- or other certified business and reports the race/ethnicity and gender of the business owner.

**Availability surveys.** The study team conducted availability surveys for the disparity study from March through July 2017. 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 Los Angeles marketplace. A total of 204 businesses provided comments. The study team then analyzed those responses, and included illustrative examples of the different comment types and themes in Appendix D. Availability survey comments are indicated throughout Appendix D by the prefix “AV.”

**TBAC focus group.** In July 2017, BBC convened a focus group with five Transportation Business Advisory Council (TBAC) members. As discussed above, TBAC is a business advisory group to Metro, and an important stakeholder group comprised of professional business associations representing a wide array of industries and trades in the Los Angeles marketplace. The study team asked TBAC participants to share their individual experiences, and their members’ experiences, with doing business in the Los Angeles marketplace and working with Metro. Comments from the focus group are included in Appendix D, and denoted by the prefix “FG.”

## **B. Background on Construction, Professional Services, and Goods and Services Industries in the Los Angeles Metropolitan Area**

Part B describes the firms interviewed and includes the following information:

- Business characteristics including the types of work that businesses perform and the number of years in business (*page 4*);
- Business formation and establishment (*page 10*);
- Types, locations, and sizes of contracts (*page 14*);
- Employment size of businesses (*page 19*);

**Business characteristics.** The business owners interviewed for the study represented a variety of different business types and business histories, were from more newly established and well-established firms, and worked on small-to-large contracts in the Los Angeles marketplace.

**Types of work.** Interviewees described the types of work that their firm performs. The study team interviewed 15 construction firms, 16 firms providing professional services, and three firms supplying goods and services. In addition, one interview was conducted with the representative of a business association that supports disadvantaged firms across different industries.

**Fifteen firms worked in the construction industry.** [#1, #4, #8, #10, #20, #21, #22, #23, #24, #30, #31, CT#37, CT#46, CT#56, CT#61] For example:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm stated that the firm is a general contractor that coordinates and

directs construction work. It performs interior work, improvements, and horizontal construction. [#1]

- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm explained that the firm is a construction and construction management firm that performs metal stud framing, installation of drywall systems, fireproofing, and construction of interior and exterior walls for industrial and commercial building. The firm is not a subsidiary to or affiliated with another firm. [#8]
- The Subcontinent Asian American male owner of a specialty supplier firm described his firm as a specialty manufacturer that sells their product to various factories and distributors. He added, “we only sell the products and occasionally we do R&D [Research and Development] for some customers.” [#10]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated that her firm provides wholesale pipe valves and fitting supplies to oil refineries, city governments, contractors, and water-treatment plants. [#30]
- The female representative of a non-Hispanic white female-owned specialty construction firm stated that the firm provides everything that is needed to upkeep and maintain a parking lot which can include asphalt, traffic paint, signage, concrete wheel stops, and truncated domes. [#31]
- The Black American male owner of a DBE- and SBE-certified contracting firm said that his firm began with residential construction in the private sector, but after a few years moved into public works construction contracting. [CT#61]

***Six of the 15 construction firms interviewed worked in the trucking and hauling business.*** [#4, #20, #21, #22, #23, #24] For example:

- The Black American male owner of a trucking firm stated that the firm offers transportation services including end dump service or hauling material from construction sites. The firm hauls dirt, sand, gravel, rock and asphalt. The firm is not a subsidiary to or affiliated with another firm. [#4]
- The Asian American male owner of a trucking firm stated that his firm performs heavy duty transportation for big retail stores. [#20]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm hauls hazardous waste from work sites, performs non-hazardous waste water pumping, and picks up used oil from generators. She indicated that the firm is independently owned and operated. [#21]
- The non-Hispanic white male owner of a specialty trucking firm stated that his firm provides same-day exclusive use vehicles and same-day expedited transport using cargo vans, bobtail straight trucks, and sprinter vans. [#24]

**Sixteen firms worked in the engineering and professional services industry.** [#2, #3, #5, #6, #7, #11, #12, #13, #15, #25, #27, #28, #29, CT#2, CT#14, CT#49] For example:

- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm explained that the firm is a transportation planning, traffic engineering, and civil engineering firm that provides engineering and traffic related consulting services, and is not a subsidiary to or affiliated with another firm. He explained that he is only affiliated with the transportation planning and traffic engineering division of the firm and does not do work with the civil engineering division. The firm provides services including traffic signal design, traffic safety studies, and transportation intelligent technical systems implementation. [#2]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated that the firm provides landscape architecture, site planning, and urban design services. He also added that the firm is not a subsidiary to or affiliated with another firm. [#5]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm stated that the firm provides services including civil engineering, utilities research, surveying and mapping, planning and development services for private and public construction projects. The firm is not a subsidiary to or affiliated with another firm. [#6]
- The non-Hispanic white male owner of an SBE-certified engineering firm described the firm as a structural engineering firm that provides design services for architects, developers, and contractors. The firm's services range from small renovation projects to large office, retail, hotel, and specialized structures. The firm is not a subsidiary to or affiliated with another firm. [#7]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm stated that the firm's environmental consulting services range from storm water and dust mitigation to air quality, noise, and vibration monitoring. [#11]
- The Asian American male manager of an international architectural, planning, and engineering services firm explained that the firm provides "consulting services, design work, engineers, architects, planners. We provide technology products in the form of software applications and system, toll revenue collection systems, and custom software." [#12]
- When asked to describe the services offered by the firm, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, "We provide consulting – construction management, quality assurance – all related to construction. Specifically, our expertise is public works. We work with public agencies and [the firm] is not a subsidiary to or affiliated with another firm." [#13]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated that the firm's services include architectural, urban planning, and civil engineering. Within individual sectors, the firm works on transportation projects (light rail, bus, and

aviation), schools, civic facilities, streetscape improvements, and performs urban economic studies. The firm is not a subsidiary to or affiliated with another firm. [#15]

- The Asian American male owner of an MBE- and SBE-certified engineering firm stated that his firm provides engineering services related to underground tunneling. [#25]
- The Asian American male owner of a structural and civil engineering firm stated that his firm provides both civil and structural engineering services for residential buildings, minor structures, and commercial structures such as mini malls and apartments. [#27]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated that his firm provides consulting and engineering services for mechanical, electrical, plumbing, technology, and fire life safety design. He indicated that the corporation is independently owned and operated. [#28]
- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm stated that her firm provides consulting services, drafts environmental documents, provides construction monitoring, and provides archeology and paleontology services for lead agencies in both the public and the private sector. [#29]
- The Subcontinent Asian American male owner of an MBE-certified professional services firm reported that his firm has not changed. He said, “No, not changed because basically, I’ve been working as [a] Caltrans consultant [for several decades]... I’ve been doing the same kind of work. It is my advantage because I am doing the same kind of work, that is where my strength and forte is, right? So I’ll be able to survive because of that.” [CT#14]

**Three firms worked in the goods and services industry.** [#9, #14, #26] For example:

- The non-Hispanic white male owner of a janitorial services firm explained that the firm provides complete janitorial services, including carpet cleaning, pressure washing, and window cleaning. The firm is not a subsidiary to or affiliated with another firm. [#9]
- The non-Hispanic white male owner of a pest control firm explained that the firm provides pest control services for apartments and property management companies and is not a subsidiary to or affiliated with another firm. He explained, “We offer treatment for general pest control, agricultural pest control, maintenance pest control including removal of weeds for fire clearance, gopher and bee relocation, and environmentally-conscious work.” [#14]
- The Black American female owner of a janitorial services firm stated that her firm provides cleaning and janitorial services to commercial buildings, medical offices, universities, dental offices, and stadiums. She explained that her firm works in places where large numbers of people congregate and there is an increased chance of illness spreading. [#26]

**Years in business.** 28 businesses reported their date of establishment. The majority of firms (16 out of 28) reported that they were well-established businesses; they had been in business for more than ten years. Eight out of the 28 businesses had been in business for between five and ten years. Four firms were newly established, having been in business for less than five years.

**Four firms reported they had been in business for fewer than five years.** [#7, #11, #13, #14] For example:

- The non-Hispanic white male owner of an SBE-certified engineering firm stated that the company is an independent firm that has been in business for four years. [#7]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm stated that the company is an independent firm that has been in business for approximately two years. [#11]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated that the company was founded in 2013. [#13]
- The non-Hispanic white male owner of a pest control firm stated that the company was founded in 2014. [#14]

**Eight firms reported they had been in business for five to ten years.** [#4, #8, #10, #20, #22, #24, #25, #26] For example:

- The Black American female owner of a janitorial services firm stated she founded her business in 2012. Her company is an S-Corp. She noted that her business is fairly new but growing at an average rate. [#26]
- The Hispanic American male owner of a demolition and trucking firm stated he has been running his business for ten years. [#22]
- The non-Hispanic white male owner of a specialty trucking firm stated he has been running his business for ten years. [#24]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated he has been running his business for ten years but has been in the engineering field for over thirty years. [#25]
- The Black American male owner of a trucking firm stated that the company has been in business since 2009. [#4]
- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm, stated that the company is an independent firm that has been in business for five years. [#8]
- The Subcontinent Asian American male owner of a specialty supplier firm stated that the company is an independent firm that has been in business since 2008 [#10].
- The Asian American male owner of a trucking firm stated he has been running his business for seven years. [#20]



**Sixteen firms reported they had been in business for more than ten years.** [#1, #2, #3, #5, #6, #9, #12, #15, #21, #23, #27, #28, #29, #30, #31, WT#3] For example:

- The Asian American male owner of a structural and civil engineering firm stated he has been running his business since 1982. [#27]
- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm explained that she has been running her business for thirteen years. [#29]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained that the firm was founded by an African-American female approximately 20 years ago. The firm's owner had previously worked as a construction laborer and was a member of the Laborer Union. [#1]
- The non-Hispanic white male owner of a trucking firm stated he has been running his business for forty years. [#23]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm stated that the company is an independent firm that has been in business since 1997, and currently has 18 permanent full-time employees, two of whom are interns. [#2]
- The Hispanic American male owner of a DBE- and SBE-certified professional service firm stated that the company is an independent firm that has been in business since 1998. The firm has no employees and only hires consultants on project-by-project basis. [#3]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated that the company has been in business since 1978. [#5]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm stated that the company is an independent firm that has been in business since 1983. [#6]
- The non-Hispanic white male owner of a janitorial services firm stated that the company has been in business since 1988. [#9]
- The Senior Vice President of a DBE-certified Hispanic woman owned engineering firm stated that the firm has been in business for more than 23 years. [WT#3]
- The Asian American male manager of an international architectural, planning, and engineering services firm explained the firm was "founded in 1974 by two partners in the Toronto area. [They] blended land use planning and transportation, which back in the 70's was a big move." [#12]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated that the company is an independent firm that has been in business for approximately 14 years. [#15]

- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm stated she has been with the business for 13 years. [#21]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated she has been running her business for 21 years. [#30]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated he has been with the company for one year but the company has been running since 1969. [#28]
- The female representative of a non-Hispanic white female-owned specialty construction firm stated she has been with the business for ten years but the business has been running since 1993. [#31]

**Business formation and establishment.** Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

**The majority of business owners and founders had worked in the industry or a related industry before starting their own businesses.** [#1, #2, #3, #4, #5, #7, #8, #10, #11, #14, #15, #21, #23, #24, #25, #27, #30, CT#2, CT#49, CT#61] This experience helped founders build up industry contacts and expertise. Business people were often motivated to start their own firms by the prospects of self-sufficiency and business improvement. Here are some of the founder stories from interviews:

- The Asian American male owner of a structural and civil engineering firm indicated that opening his own engineering firm had always been a childhood dream. He explained how he first began working for small government and private companies inspecting cement bridges and buildings abroad in the 1960s. After migrating to the U.S., he matriculated to a university in Los Angeles where he studied earthquake engineering. After gaining experience working for small engineering firms in the U.S., he decided to open his own business in 1982. He stated: “With all the resources like the savings and the experiences, including the clients of my original employers, I was able to have those former clients of my employers to be the ones I should start looking for project or projects that might help in this newly formed office of mine.”[#27]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained that the firm was founded by an African-American female approximately 20 years ago. The firm’s owner had previously worked as a construction laborer and was a member of the Laborer Union. [#1]
- The non-Hispanic white male owner of a specialty trucking firm indicated he first began doing courier work when he was younger, and took it upon himself to get his license to transport goods and start his own business in 2007. He noted that it was his deep desire of wanting to be self-sufficient that spurred him to start his own business. He added, “Also not being treated correctly... not being happy... a combination of doing it yourself.” He has been the company president since the firm’s inception. [#24]

- The Asian American male owner of an MBE- and SBE-certified engineering firm stated that he has been running his business for ten years but had been in the engineering field for over thirty years. He decided he wanted to open up his own engineering firm because he wanted better opportunities and to be self-sufficient. He founded his firm following the completion of a contract with a big engineering firm. At that moment, while trying to determine the next contract that he should pick up, he decided to go into business on his own. [#25]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm explained that the firm was founded by an Asian American male in 1997. The firm's owner had previously worked a traffic engineer for a civil engineering firm. [#2]
- The Hispanic American male owner of a DBE- and SBE-certified professional services firm began working as an independent consultant after working for various government agencies. He has worked as an independent consultant for 35 years. He explained that prior to starting the firm in 1998, he worked as a director for a similar firm. [#3]
- The Black American male owner of a trucking firm explained that he started the firm eight years ago. He explained that he had previously been a driver for different trucking companies and wanted to start his own business. He stated, "I don't like driving other people's [trucks] because nobody takes care of their equipment like you would take care of your equipment." He decided to start his own business so he does not have to "worry about stuff breaking down, or if they fix their equipment the way it should be fixed, so there won't be any mishaps. If anything goes wrong, I know what's wrong, I can fix it or get it fixed and go from there." [#4]
- When asked about the formation of the firm, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm explained the firm was "founded in 1978 by a landscape architect who had been a partner in a larger landscape architecture firm that started in the early fifties. When that firm dissolved, [he] started the current firm." [#5]
- The non-Hispanic white male owner of an SBE-certified engineering firm explained that he is a licensed engineer who worked for 12 years as a structural engineer with another engineering firm. He noted that he started his own firm four years ago. [#7]
- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm explained that the firm was founded five years ago by a Hispanic male. The firm's owner had previously worked as a Vice President for another construction company. The owner decided to start his own firm because he believed there were no opportunities for growth at his previous place of employment. [#8]
- The Subcontinent Asian American male owner of a specialty supplier firm explained that he had been in the industry before he decided to purchase and operate his own firm. In 2008, he purchased his current firm and its assets from another owner, and changed the name of the firm. [#10]

- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm explained that he has worked as an environmental engineer since 1999. Prior to starting his own firm, he worked for large engineering companies. He stated, “During the time I was in those big firms, I moved up from field engineer to senior project manager. I was always faced with the challenge of finding suitable MBE firms to help us meet our goals. I thought: ‘if I’m spending time and effort training and helping these folks, I might as well start my own business.’” [#11]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm previously worked for other large architecture firms before starting his own company. When asked what prompted him to start his own architecture firm, he explained, “One, at that time, there were only four African-American architecture firms in Los Angeles County, and it’s a big county; two, I had relationships with large companies where I thought I could penetrate a business market; and three, my goal was to move into developing inner city communities through real estate projects.” [#15]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm explained that her father (who is her business partner) had been working in this industry for twenty years. In 2004, her father decided to partner up with her to run their own hazardous and non-hazardous waste removal firm. [#21]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm indicated her husband, the firm’s founder, was previously employed by another supply firm. When that supply firm closed down after the death of its owner, her husband decided to open his own supply firm. [#30]
- The Native American male owner of a DBE-certified construction-related firm stated that he started his business by obtaining the license required in his industry. He said that he was working for other companies for two years and then saw a Request for Proposal for a local school district, submitted a proposal, and won the project. He noted that he has been “on his own since then.” [CT#49]
- The Black American female owner of a construction-related firm reported that she worked in the industry for a number of years prior to starting her own firm and loved the work. She eventually left the company she worked at to start her own firm saying that she “thought she could do it better.” [CT#2]
- The Black American male owner of a DBE- and SBE-certified contracting firm reported that he worked in the industry for a number of years before starting his firm. He stated that after working for several union firms, he decided to go out on his own. [CT#61]
- When asked about the formation of the firm, the non-Hispanic white male owner of a pest control firm explained, “I had previously worked in Sacramento and for other companies doing agricultural work. When I started working for other companies in Los Angeles, I saw that there was greater intensity of business. Interacting with property management, I saw the opportunity [for residential pest control] and started a business. There were a lot of

problems with bed bugs. There was a shortage of pest control companies. I had the license and knew it would be advantageous.” [#14]

- The non-Hispanic white male owner of a trucking firm stated that his grandfather founded the business in 1944. His grandfather first started as a truck salesman and then was given an opportunity to haul brick and clay products for LA Brick and Clay. He explained that the firm has always been a family-owned business, and was passed down to him. [#23]

**Other motivations.** There were also other reasons and motivations for the establishment of interviewees’ businesses. [#6, #9, #20, #22, #26, #31] For example:

- The Black American female owner of a janitorial cleaning services firm explained that she noticed a need in the community for a business to help prevent diseases and illnesses from spreading. This realization focused her attention on finding a way to make a positive impact on public health. So she took it upon herself to be the first line of defense to eliminate the spread of germs that might affect her community and founded a janitorial services company. [#26]
- The Hispanic American male owner of a demolition and trucking firm explained that he worked in a stockroom for a retail store for ten years and later went on to become its assistant manager before starting in his line of work as a truck driver. He shared, “I always wanted to be a truck driver.” He subsequently went to truck driving school where he learned how to drive them. Upon receiving his truck driving license, he attempted to get work and began driving a dump truck as his first truck driving job. Eventually he purchased his own truck. After two years, he met someone who gave him the opportunity to demolish their house. Two months after that initial opportunity, he met another person who solicited his services to demolish his house, and, from there, he started his own business. [#22]
- When asked to describe the formation of the firm, the non-Hispanic white male owner of a janitorial services firm explained that “It was just an idea in my mind. I thought I can have a business, like janitorial services. My idea was it’s a mop, a bucket and a broom, but I got to find out that it’s much more than that. I attended a lot of seminars and classes. I have a very good knowledge about the business.”[#9]
- The female representative of a non-Hispanic white female-owned specialty construction firm stated that the current Vice President of the firm bought the company from his father and his brothers in 1993, and set it up as a division of a larger construction firm. [#31]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm explained that the firm was formed by the current non-Hispanic white male owner and another man. They started the firm as a partnership. In 1983, the non-Hispanic white male owner bought out his partner’s interest, at which time the owner’s wife, a non-Hispanic white female, assumed a 51 percent ownership interest in the firm. [#6]
- The Asian American male owner of a trucking firm explained that, prior to starting his own company, he was a college student. During those years, he sought out employment to support himself and have some kind of financial income. He heard rumors that Class-A

drivers made a decent amount of money so got hired as a truck driver. After he graduated from a university in the Los Angeles region, he was not having much luck finding employment with his degree. It was then that he realized that his main area of expertise and hands on experience, aside from his degree, was still trucking. At that point, he began his own trucking firm. [#20]

**Types, locations, and sizes of contracts.** Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

**Businesses reported working on contracts as small as several hundred dollars to contracts approaching one billion dollars.** [#2, #3, #5, #6, #7, #8, #9, #11, #12, #13, #14, #15, #22, #23, #24, #25, #28, #30, #31, CT#37, CT#61] However, most firms reported an upper threshold for contracts at around \$2 million or less. For example:

- The Hispanic American male owner of a demolition and trucking firm stated that his firm has bid on projects as low as \$800 and on projects upwards of \$1 million. [#22]
- The non-Hispanic white male owner of a trucking firm stated that his firm bids on a load-by-load basis in the hopes that the customer or client will provide a year-long contract. [#23]
- The non-Hispanic white male owner of a specialty trucking firm stated his firm performs between five to ten hauls per day. [#24]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated his firm performs anywhere between \$50,000 to \$300,000 contracts. [#25]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm explained that the typical size of the firm's contracts can vary from \$2,000 to \$2.4 million, but averages around just under \$100,000. [#2]
- The Hispanic American male owner of a DBE- and SBE-certified professional services firm explained that the typical size of the firm's contracts is between \$50,000 and \$100,000. [#3]
- When asked what sizes of contracts the firm bids on or performs, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm explained, "We do everything from small contracts for single family residential to large contracts for consulting teams on large public sector projects. We are also sub-consultants to other teams." [#5]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm explained that the typical size of the firm's contracts ranges from \$2,500 to \$900,000. She noted that the value of the firm's contracts does not exceed \$1 million. [#6]
- The non-Hispanic white male owner of an SBE-certified engineering firm explained that the size of the firm's contracts ranges from \$10,000 up to \$20 million. [#7]

- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm explained that the typical size of the firm’s contracts is approximately \$2 million. [#8]
- The non-Hispanic white male owner of a janitorial services firm stated that the firm offers janitorial services to private and public agencies. The size of the firm’s contracts range from about \$395 to \$35,000. [#9]
- With regard to contract size, the Asian American male owner of a DBE, MBE, and SBE-certified environmental engineering firm stated, “The smallest [contract] would be \$20,000 to \$30,000, all the way to the biggest task order we have had so far for \$583,000 - or one full fiscal year of services.” [#11]
- The Asian American male manager of an international architectural, planning, and engineering services firm explained that the sizes of contracts his firm performs range from small thousand dollar studies to contracts approaching a billion dollars. [#12]
- When asked what sizes of contracts the firm bids on or performs, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm explained that the firm bids on any sized contract, but the size of contracts typically range from about \$5,000 to \$150,000 or more. [#13]
- Regarding contract size, the Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated “Somewhere between the largest, which is \$4.8M, some as small as \$15,000 the average is about \$2M.” [#15]
- When asked what sizes of contracts the firm bids on or performs, the non-Hispanic white male owner of a pest control firm explained that the firm performs on contracts totaling about \$20,000 per month. [#14]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated her firm currently bids on hundred thousand dollar contracts. [#30]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm explained that the corporation bids on contracts as small as a few thousand dollars all the way up to multi-million dollar contracts. [#28]
- The female representative of a non-Hispanic white female-owned specialty construction firm stated her firm currently bids on \$100,000 to \$150,000 contracts. [#31]
- When asked if his company has grown over time, the non-Hispanic white male owner of a specialty construction firm said that he would take on bigger jobs, but in California contracting it takes 60 to 100 days to be paid and that makes it difficult to survive and grow. His firm only does residential work now because residential property owners will pay in a timely manner.

The same business owner stated that when he was younger he was full of “gumption,” and he would not say no to anything. He went on to say that he was a “little naïve,” and

sometimes he would not know what he was getting himself into when bidding on bigger contracts. He added that growing too fast in the beginning is sometimes bad because you do not know what you are getting yourself into with the scope of work or the insurance involved. He added that, after those early experiences, his firm made the decision not to bid on big contracts anymore. [CT#37]

- When asked if the size of available contracts poses a challenge for his firm, the Black American male owner of a DBE- and SBE-certified contracting firm answered, “Where I’m at now is a comfortable place.” He indicated that \$1 million dollars is the contract threshold that he pursues as a prime. [CT#61]

**Most firms reporting working on contracts in California.** [#1, #3, #4, #5, #6, #8, #9, #10, #14, #20, #22, #25, #31, #41] Some firms worked only in Los Angeles County, while others focused on southern California, or did business state-wide.

- When asked where the firm is headquartered and if they have multiple locations, the representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm, responded that their headquarters are in Los Angeles, California, and that they are currently working to open another office in Encino, California. The firm works primarily in the Los Angeles area, but also performs work in Orange County and the Inland Empire (San Bernardino and Riverside, California). [#8]
- When asked where the firm is headquartered and if they have multiple locations, the non-Hispanic white male owner of a janitorial services firm responded that the firm’s headquarters are located in Los Angeles, California and that the firm has another location in Woodland Hills, California. He stated that the firm works in Los Angeles and Orange Counties. [#9]
- The Subcontinent Asian American male owner of a specialty supplier firm responded that the firm is headquartered in Los Angeles. [#10]
- When asked about the geographic location of the firm’s work, the manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm said the firm has done work as far north as Santa Barbara and Goleta, California; and as far east as Barstow and Riverside, California. [#1]
- The Hispanic American male owner of a demolition and trucking firm indicated that his business is headquartered in his home office in Pico Rivera, California (Los Angeles County) but that he will travel as far as 125 miles to get business. [#22]
- The Asian American male owner of an MBE- and SBE-certified engineering firm indicated his business is headquartered in the city of Monterey Park, California. He indicated that the firm mainly operates anywhere in southern California. [#25]
- When asked about the geographic location of the firm’s work, the Hispanic American male owner of a DBE- and SBE-certified professional services firm said that most of his projects



are in the Los Angeles area, but that his firm has worked on projects throughout the state of California. His firm is headquartered in LA County. [#3]

- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm said that the firm works primarily in the Los Angeles area, but has performed work in Bakersfield and San Diego, California. She confirmed that their headquarters are located Los Angeles, California and that LA is the firm's only location. [#6]
- When asked about the geographic location of the firm's work, the Black American male owner of a trucking firm stated that the firm works in Los Angeles County. The firm's headquarters are located in Inglewood, California and that the firm has no other locations. [#4]
- When asked about the geographic location of the firm's work, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated that the firm usually works in the Southern California area including Los Angeles, Ventura, San Bernardino, Orange and San Diego counties. Their headquarters are located in Glendale, CA and that the firm also has an office location in Torrance, CA. [#5]
- When asked where the firm is headquartered and if they have multiple locations, the non-Hispanic white male owner of a pest control firm responded that their headquarters are in Mission Hills, CA and also has locations in Victorville, CA. The firm seeks and obtains business in San Bernardino and Los Angeles Counties. [#14]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that the organization is based in Chino Hills in Los Angeles County, along with the national organization, which plans to relocate to Sacramento. [#41]
- The Asian American male owner of a trucking firm stated that his business is headquartered in the city of San Gabriel Valley, California and does not have any other locations. [#20]
- The female representative of a non-Hispanic white female-owned specialty construction firm indicated the business is headquartered in the city of Downey, California and does have multiple locations in the city of Norwalk and Whittier. The firm mainly operates within all of the southern California area. [#31]

**Several firms reported working in the California marketplace and with clients outside of California.** [#2, #7, #11, #13, #15, #23] For example:

- When asked about the geographic location of the firm's work, the Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm explained, "We have a small office in Philly [Philadelphia] where we perform some work and in San Diego. We serve all of the Los Angeles area, Los Angeles is our headquarters." [#15]
- The non-Hispanic white male owner of a trucking firm stated that his business is headquartered in the city of Maywood, California and does not have any other locations. He

indicated that the firm performs most of its services in southern California. However, his firm will travel as far as northern California, Arizona, and, on occasion, Mexico, to get business. [#23]

- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm responded that their headquarters are located in Diamond Bar, California and that they also have locations in Tustin and San Diego, California. He said that the firm works primarily in southern California, but has performed work from Fresno, California to Salt Lake City, Utah. [#2]
- When asked where the firm is headquartered and if they have multiple locations, the non-Hispanic white male owner of an SBE-certified engineering firm responded that the firm is headquartered in Encino, California and also has an office in Portland, Oregon. Most of his projects are in the Los Angeles and San Diego area, but his firm is working on projects in Connecticut, Hawaii, and Oregon. [#7]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded that his firm is headquartered in Carson, California and has no other locations. When asked about the geographic location of the firm's work, he said that most of the firm's work is performed in the Los Angeles area. He added, "We are willing to work anywhere [within a] reasonable [distance]. I have worked as far as Chicago, for reporting projects. If it's field work, then we are limited to Los Angeles and nearby counties." [#11]
- When asked where the firm is headquartered and if they have multiple locations, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded that their headquarters are located in Glendale, CA and there are no other locations. The firm seeks and obtains business primarily in California including Riverside, San Bernardino, Santa Barbara, Madera, Kern, Ventura, Los Angeles, San Diego counties, but has also done work on the East Coast in New York. [#13]

**Four firms indicated that they engage in national and international work. [#12, #24, #28, #30]**

For example:

- The non-Hispanic white male owner of a specialty trucking firm indicated that the firm has both international and national clients but that he mostly serves the western United States. His business is headquartered in his home office located in the city of View Park, California. [#24]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm indicated her business is headquartered in the city of Paramount, California and does not have multiple locations. She explained that the firm mainly operates within Los Angeles, Orange, and San Diego counties but does ship supply orders out-of-country from time to time. [#30]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm indicated the business is headquartered in Portland, Oregon but has other office locations in San Francisco, Honolulu, Washington D.C., Chicago, and Los Angeles. He

indicated that the corporation has performed work in forty-two states and sixty countries. [#28]

- When asked about the geographic location of the firm's work, the Asian American male manager of an international architectural, planning, and engineering services firm stated that the firm seeks and obtains business globally. He noted that the firm is headquartered in Toronto and their main office in southern California is located in Los Angeles. [#12]

**Employment size of businesses.** The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (25 of 28 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses, but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

**The majority of businesses had 1-10 employees.** [#3, #4, #5, #8, #10, #13, #14, #21, #22, #24, #25, #26, #28, #29, #30, #31]

- The Black American female owner of a janitorial services firm stated that she currently has two full-time employees and four part time employees. She noted that her firm is growing in a slow but steady manner. [#26]
- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm explained that she began her business with 39 employees, but since doing business with Metro, it has gone down to six part-time employees. [#29]
- The Hispanic American male owner of a demolition and trucking firm stated that his firm is independently owned and operated, and currently has two employees. He first began running his business by himself as a truck driver. Then, when he got into the demolition industry, he hired another person. He indicated that as his firm undertook more projects he had to bring on another person to assist. [#22]
- The non-Hispanic white male owner of a specialty trucking firm stated that the firm currently has three full-time employees. [#24]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated that he currently is the only full-time employee and has no part time employees. [#25]
- The Hispanic American male owner of a DBE- and SBE-certified professional service firm stated that the firm does not have any employees. He explained that the nature of the work requires highly skilled individuals with an extensive experience and education, so he hires specialized consultants as needed. [#3]
- The Black American male owner of a trucking firm stated that the firm currently employs one permanent full time employee, and has no part time employees. [#4]

- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated that the firm currently employs four permanent full-time employees and one part-time employee. [#5]
- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm stated that the firm currently employs 10 permanent full time employees and has no part time employees. He added that the number of employees can vary, stating, “Last year we had 120 employees, this year we have ten, it depends on project activity.” [#8]
- The Subcontinent Asian American male owner of a specialty supplier firm stated that the firm has three full time employees. [#10]
- When asked how many full and part-time employees the firm has, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated the firm has two full-time employees and two part-time employees. [#13]
- When asked how many full and part-time employees the firm has, the non-Hispanic white male owner of a pest control firm stated the firm has seven full-time employees. [#14]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm stated that she currently only has six full-time employees. [#21]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated that the firm currently has only three full-time employees. [#30]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated that the Los Angeles branch currently only has five full-time employees. [#28]
- The female representative of a non-Hispanic white female-owned specialty construction firm stated that the firm currently has four full-time employees and no part-time employees. [#31]

**Seven interviewees reported that their businesses had 11-25 employees.** [#2,#6, #7, #11, #15, #20, #23] For example:

- The non-Hispanic white male owner of a trucking firm explained that he is the primary owner of the business. He noted that the firm is independently owned and operated, and currently has 14 full-time employees. [#23]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm stated that the firm currently employs 18 permanent full time employees, and has no part time employees. [#2]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm stated that the firm currently employs 11 permanent full time employees, and one permanent part time employee. [#6]

- The non-Hispanic white male owner of an SBE-certified engineering firm stated that the firm has 11 full time employees. [#7]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm stated that the firm has 11 employees: four full time employees and some part time consultants. [#11]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated that the firm currently has 13 full time employees and two-part time employees. [#15]
- The Asian American male owner of a trucking firm stated that the firm currently has 15 full-time employees. [#20]

**One business had 26-50 employees.** The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm stated that the firm currently employs 30 permanent full time employees, and has no part time employees. [#1]

**One business had 51-100 employees.** The non-Hispanic white male owner of a janitorial services firm stated that the firm currently employs 50 permanent full-time employees, and seven to eight part-time employees. [#9]

**One interviewee indicated that their firm had more than 100 employees.** The Asian American male manager of an international architectural, planning, and engineering services firm stated that the company has approximately 660 employees in the United States and 2,500 employees globally. [#12]

## C. Marketplace Conditions

Part C summarizes business owners and managers' perceptions of the Los Angeles marketplace. It focuses on the following three topics:

- Trends in business growth (*page 21*);
- Current marketplace conditions (*page 25*); and
- Keys to business success (*page 28*).

**Trends in business growth.** Many interviewees spoke about how the growth of their business compares to their industry at-large, and how the current economy affects their business.

**Most interviewees commented that their firms are doing well and growing faster than average.** [#1, #2, #7, #8, #12, #14, #24, #41, CT #2]. For example:

- When asked to compare the growth of his firm to the industry average, the manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained that his firm's growth would be considered above average for the industry. When he started at the firm, it only had one Metro project. In the last four years, the firm has completed nine projects with Metro as well as projects for the Los Angeles

Community Colleges District and Southern California Gas. He noted that he was asked to join the firm to provide business development services and to help the firm expand its public sector client base. [#1]

- When asked to describe the growth of his firm, the non-Hispanic white male owner of a pest control firm stated that the firm has been growing at a rate of about 20-30 percent per year since 2014, adding, “I think the growth rate has been faster.” He elaborated on why it has been different than other firms and stated, “I advertise in both Spanish and English, and I speak both Spanish and English, so we’re able to hit a large swath of the community.” [#14]
- The non-Hispanic white male owner of a specialty trucking firm stated that his firm has gradually grown at a slow pace. He noted that his firm has done well for itself. He explained, “We’ve done well. Business has been steady. There has not been any decline. If anything, it has gone up. I’ve been fortunate.” He indicated the reason for his firm’s growth is due to his firm working with direct shippers, where many other firms work with brokers. [#24]
- When asked to compare the growth of the firm to the industry average, the non-Hispanic white male owner of an SBE-certified engineering firm responded, “Our firm has more aggressive growth than the average [structural engineering firm].” He explained that the firm’s growth is likely attributed to the variety of structures they work on (residential, retail, hospital), and the fact that they also offer consulting services, such as building information modeling. [#7]
- When asked to compare the growth of the firm to the industry average, the representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm described the firm’s growth as “premier in terms of revenue for a DBE company.” He explained that their growth is more aggressive than other similar size construction firms, stating, “We handle bigger projects and I don’t know of other small DBE companies that do stud framing.”[#8]
- When asked to describe the growth of the firm, the Asian American male manager of an international architectural, planning, and engineering services firm observed that the growth of the firm has been “Quite tremendous. We were about 500 people back in 2004 when we became public. After we became public, we went from 500 up to 2,500 in a short span of time.” The same interviewee elaborated, “[Our growth is] faster than the industry. Depending on the year and economy. [We’re] well above 10 percent, sometimes 20 percent or greater.” He explained why the firm’s growth has been different than other firms, stating, “Because we are diverse. Both geographically, so we’re not just in one country, and also diversity in the type of work that we do. Technology being one piece, architecture being another piece, engineering and land planning being the others. That diversity gives us flexibility. We’re not all in one market, and markets tend to speed up and slow down. We tend to have a steady path.” [#12]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that local/regional market conditions “are improving dramatically.” Ninety percent of the organization’s members work as subcontractors to primes, which are getting major contracts, particularly on public transit projects, and the organization has been successful “in getting members ‘contract-ready.’” However, he observed, “a lot of

barriers are internal. The opportunities are there but it is incumbent on members to take advantage of them.”[#41]

- The Black American female owner of a construction-related business said she believes that economic conditions are generally favorable to her industry, given that public construction projects and private commercial development require her support services. [CT #2]

**Six interviewees described their businesses as experiencing average growth.** [#2, #6, #11, #30, #31, CT #37]. For example:

- When asked to compare the growth of the firm to the industry average, the executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm described the firm’s growth as “average for their industry.” When asked what his assessment was based upon, he responded that it was based upon his experience and knowledge of the industry, but is not an official assessment. [#2]
- When asked to compare the growth of the firm to the industry average, the representative of a DBE-certified non-Hispanic white female-owned civil engineering firm described the firm’s growth as “average for the type of services [they] provide.” She added that most of the firm’s competition is larger in size, so this is not a realistic comparison. She explained “Although our firm is small, our projects are large.” She explained that working large projects is likely to make the firm more profitable than other small civil engineering firms. [#6]
- The non-Hispanic white male owner of a specialty construction firm stated that he feels that the economy is “steady, not great, but steady.” [CT #37]
- When asked to compare the growth of the firm to the industry average, the Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded “It’s abnormal to measure, because we went from zero to several contracts between year one and year two. But, I would say our growth is average for this type of business.” He added that the type of work he performs is somewhat specialized. [#11]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm indicated her firm is grossing around two million dollars annually and its business has been pretty stable. She explained that her business is fairly small in comparison to other large firms, but that what sets her firm apart from these larger firms is the fact that they are local and a short driving distance from their customers. She explained that if a refinery needs their product, her firm can have the shipment delivered in three hours in comparison to large firms that might take a couple of days. [#30]
- The female representative of a non-Hispanic white female-owned specialty construction firm indicated that when the firm first began, the business was growing substantially. As a result, there began a conscious effort to reduce overhead, so the firm began to compact itself to where it is now employing four full time employees. She believes their firm’s growth and decline could be considered average in the industry. [#31]

**Three interviewees described how their businesses are in decline or not growing.** [#23, #29, CT #61] For example:

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm explained, “Because of the recession and the reluctance of some lead agencies not to pay on time for our primes, we lost it all. Like I said, we had thirty-nine employees. We were doing really well and then what happened was a combination between Metro and the High Speed Rail that didn’t pay on time. They weren’t paying attention to the prime contractors. So, like on the High Speed Rail, we got three checks in four years... I do have small, little contracts with Metro for writing environmental documents with other clients, with another firm. Mostly the engineering part. But it’s nothing like before.” [#29]
- The non-Hispanic white male owner of a trucking firm stated that his firm is on the decline. He explained that small trucking companies are far less competitive than large trucking companies. He noted that small trucking companies do not typically last long in his line of business. [#23]
- The Black American male owner of a DBE- and SBE-certified contracting firm reported that his firm has not grown. He said, “I would have to say no, unfortunately.” [CT #61]

**One interviewee described how his firm’s business model is intentionally stable.** When asked to compare the growth of the firm to the industry average, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated, “Landscape architecture is a business that is sometimes a one-person business, and is sometimes a large firm, [which] would be considered 15-30 people. We’re small to medium. There is always growth and there are always some firms that have the philosophy that they want to get bigger, or they want to be multi-disciplinary. Our philosophy has been that we’re very stable, we’ve been this size for 25 years, and we provide the kind of a service that we feel is qualitative and personable.” [#5]

**One interviewee described his firm’s growth as slower than that of DBE-certified firms, expressing frustration.** When asked to compare the growth of the firm to the industry average, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, “I see a lot of firms that grow much faster than us because they have DBE certification.” He elaborated, “That is one of my biggest challenges. From day one, nobody gave me a job because we are not DBE. If you compare to DBE-specific firms, we are much less. Compared to small businesses, I think we are pretty standard or a little better than them. DBE firms grow at a much faster rate than we do.” [#13]

**Several businesses commented on the effects of the economic downturn on their firms, and described the ongoing recovery of the business community.** [#3, #5, #6, CT #14, CT #37, CT #49, CT #56] For example:

- The Hispanic American male owner of a DBE- and SBE-certified professional service firm responded, “That is a hard question to answer because my growth depends on the type of services that are currently in demand. The last several years have probably been lower than the average, but the opportunities are now increasing, so I am probably recovering at the same pace as other firms that provide similar services.” He explained that his recovery over



of the last couple of years is likely attributed to the overall economic recovery in California and the Los Angeles area. [#3]

- The Subcontinent Asian American female representative of a minority woman owned DBE-certified supply firm said, “The economy did hit us pretty hard....There were a couple of firms that got really far behind in paying.” She added that friends helped the firm so they were able to stay in business. She said, “...It’s 2016 now; it took about five years to pay those people [back].” [CT #56]
- The Subcontinent Asian American male owner of a MBE-certified professional services firm commented that his firm experienced effects of the economic downturn. He said, “In a way, because...our job depends on Caltrans budget.” He stated, “Like these two years...Caltrans cut down on projects so they do not need consultants. Then, besides Caltrans... [there’s] not enough work to go around, so they do not need the main consultants. So when [Caltrans] cuts [funding for] the consultants...we suffer.” [CT #14]
- The non-Hispanic white male owner of a specialty construction firm stated that during the economic downturn, he maintained his contracting license but had to work for another company. [CT #37]
- The Native American male owner of a DBE-certified construction-related firm reported that he was “hit so hard I had to go on unemployment.” He also stated that he had to use his equity line of credit and other assets to stay afloat during this time. He noted that his firm diminished in size following the economic downturn. The same interviewee said that over the past two years he has been “able to get his business back on track.” He added that his salary is low, but business income and profits are good. He said that he is not optimistic about the future of the economy, but reported that he is looking to broaden his client base. [CT #49]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm observed, “When the economy really went south with the private sector, the competition even got worse [for public sector projects], because people were willing to dive in terms of fees. That’s probably not the case as much now, but it certainly was six or seven years ago.”[#5]
- When asked if and how marketplace conditions impact the firm’s opportunities, the representative of a DBE-certified non-Hispanic white female-owned civil engineering firm stated that marketplace conditions had the greatest impact during the recession in 2007 and 2008, when privately funded projects were very limited. She added that the firm has since recovered and has had consistent work since “those lean years.”[#6]

**Current marketplace conditions.** Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the Los Angeles marketplace that they have observed over time.

**Three interviewees described the current marketplace as increasingly competitive.** [#5, #26, #30] For example:

- The Black American female owner of a janitorial services firm noted that her local marketplace is “extremely saturated” with janitorial services companies and very competitive. [#26]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm noted, “It’s very difficult for us to get work directly from a public agency.” He continued, “I think there’s probably more competition for [public sector] work. There’s more firms out there that are either landscape architecture firms or site planning firms or architecture firms. So as the population increases in LA, the number of [public] agencies don’t necessarily increase.” [#5]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm noted that local marketplace conditions are constantly changing and are now more competitive. [#30]

**Three interviewees commented on price as a determining factor in the current competitive marketplace.** [#23, #24, #28] For example:

- When asked about changes in Metro marketplace conditions over time, the non-Hispanic white male owner of a trucking firm indicated that he has seen service go out the window and price become the determining factor. He explained, “Services don’t account for anything anymore. When I first started, that’s exactly all it was but we were regulated by the state as to what we can charge. Everybody was going to be charged the same dollar amount but it came to down to who did the better job and that is how we built the business back then. However, when they deregulated, it went from being service-oriented to who had the lowest price whether the job was done correctly or not. Quality went out the window.” He added, “A firm has to be able to run on the cheap in order to be competitive in this line of work.” The same interviewee also noted that “capacity is tight and finding qualified help is even tighter” in the Los Angeles marketplace. [#23]
- The non-Hispanic white male owner of a specialty trucking firm explained that the current marketplace is competitive. He noted that marketplace competition does not differ between the private and public sectors. He clarified, “Whoever gives the best service at the best price wins.” [#24]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated that a firm needs to provide the right quality of service at the right price. He explained, “Right now, there are people that are performing substandard, subpar and getting away with it but it’s not just about being competitive, it’s about being successful and delivering. The price has to be right, you just can’t throw any price.” [#28]

**Several business owners commented on the rising cost of supplies and the difficulty of finding qualified labor.** [#9, #23, #28, Avail#31, Avail#32] For example:

- When surveyed, a business owner responded, “We abide by rules, but there are not a lot of jobs. The bidding process and supplies are at cutthroat prices, we have had couple of rough years.” [Avail#31]
- When asked about changes in the local marketplace, the non-Hispanic white male owner of a janitorial services firm responded, “The price of the chemicals is rising up, the labor and worker’s compensation. Those are the things that make it very hard for us.” [#9]
- The non-Hispanic white male owner of a trucking firm observed, “Capacity is tight and finding qualified help is even tighter” in the Los Angeles marketplace. [#23]
- When surveyed, a business owner responded, “As a contractor, one thing that’s a stumbling block is bonding capacity. Making programs available to jump start a company...would give an agency like [Metro] more [choice among contractors].” [Avail#32]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated, “There is a lot of work...It’s very diverse, it’s very difficult to hire staff, and the volume of work has changed. [#28]

**Two interviewees observed that marketplace conditions are generally improving, especially for small and disadvantaged businesses.** [#28, #41] For example:

- The non-Hispanic white male representative of a regional disadvantaged business association stated that the market is “resurging now as the economy has continued to improve in recent years. The public sector is becoming less competitive as more members look for private sector work in the improving economy. Private sector work is more profitable even though it is more about who you know than your qualifications. The public sector has also benefited from the improving economy with ‘pent-up demand’ for infrastructure projects at Metro and LA World Airports, among other agencies.”[#41]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated, “There is a lot of work so it’s a very buoyant market right now.” [#28]

**One business owner felt there that Hispanic business owners were severely underrepresented in certain professional services sectors.** The Hispanic American male SBE-certified contractor stated, “Based on my observation and activity in this marketplace, there are very few Hispanics competing in the [Urban Planning, Urban Economics, Real Estate Development, Financial, transportation planning, and other related] disciplines. It really appears to be extreme underrepresentation in these areas.” [WT#8]

**Business owners and managers offered mixed sentiments about whether there was greater business opportunity in the public or the private sector.** [#9, #12, #14, #22, #25]. Most business

owners felt the private sector held more promise than the public sector. Their comments included:

- The Asian American male manager of an international architectural, planning, and engineering services firm observed, “Right now the private sector is on fire. There seems to be great optimism. In the private side, it’s all about optimism and how good you feel about the economy. So, there’s a lot of opportunities that are coming out, and they’re coming out fairly quickly.”

The same interviewee noted, “On the public side, with respect to Metro, it seems like things are slowing down. We have heard some feedback that it’s because the contract/procurement process needs additional staffing or there’s not enough people working. So the great promise of Measure M renewal being this wonderful opportunity for all these new projects to come out...we’ve actually seen the opposite happen. Projects are slowing down and less projects are coming out...From that standpoint, it is a bit disappointing.” [#12]

- The non-Hispanic white male owner of a pest control firm stated “I think in the private sector, there’s going to be a lot more variety of jobs. I think it’s generally skewed to private [sector work] in this area in my industry. I’ve seen a lot of changes with the invasive pests that come [into LA County]... [They] have caused a huge growth in the market.” [#14]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated that throughout the last three years, the marketplace conditions have improved substantially, but that he has not seen that much solicitation by public agencies. He explained, “So you do hear of a project coming out but you do not see the same amount of solicitation coming out.” [#25]
- When asked to describe the conditions in the local marketplace for his firm and if they differ in the private and public sectors, the non-Hispanic white male owner of a janitorial services firm responded, “There is no difference. Work is work. It’s the same thing.” [#9]
- The Hispanic American male owner of a demolition and trucking firm stated that his firm has seen private sector jobs increase in the last two years. [#22]

**Keys to business success.** Business owners and managers also discussed what it takes to be competitive in the Los Angeles marketplace, in their respective industries, and in general.

**Several business owners commented on the importance of building relationships and rapport with customers and business partners.** [#14, #20, CT #37, CT #2, CT #61] For example:

- The Black American male owner of a DBE- and SBE-certified contracting firm indicated that relationships with customers and others are very important for businesses. He stated, “...when you work for someone on a contract, good or indifferent, they make decisions. A good relationship can make it easy for you to get things done. For the future, a good relationship with the decision maker can position you for things that are not even being talked about on the table.”

The same business owner indicated, “Time and knowing your market will be key [to success]. Knowing what is best for you as to where you spend most of your time so that you don’t waste your time.” [CT #61]

- The Black American female owner of a new construction-related business reported that relationships with future customers will be “very significant” in her success. [CT #2]
- The non-Hispanic white male owner of a pest control firm responded, “There are some places where if you’re not culturally sensitive – to speak Spanish or not. If people can learn a bit and reach across the aisle, then it could help a lot. For example, in my case, if a person goes in and they don’t speak Spanish, and they’re going to work in someone’s Spanish home, and the customer is like ‘What are they putting in my house?’ They’re scared. I don’t think it’s an insurmountable barrier.” He added, “You have to be able to culturally be aware because we have a 65 percent Hispanic [population]. You also have to be [familiar] with technology...I know people that have businesses that had dinosaur systems where they do everything the old-fashion way and they had a problem. You’ve got to be quick because things change fast. You have to be good with customer service.” [#14]
- The non-Hispanic white male owner of a specialty construction firm stated that customers come first. He said that you have to realize that “they know what they want, but sometimes they don’t know what they want.” He clarified by saying that customers may have a big picture idea, and they are looking to the contractor to fill it in; you have to meet their needs. [CT #37]
- The Asian American male owner of a trucking firm stated that relationships with customers and others are key. He said 70 percent of his clientele are pre-existing clients that the firm has performed work for in the past. He explained that good communication from the firm has been the key to maintaining good standing relationships with his customers and clients. Interviewee #20 then added, “The customers have their demands and we try to meet every single one of their demands. Sometimes we can do it, sometimes we can’t. Sometimes, if we happen to fall short of the customer’s expectations, we have to communicate that.” [#20]

**Some business owners commented on the importance of competitive pricing and cost management.** [#14, #22, #30, CT #14, CT #37] For example:

- The Hispanic American male owner of a demolition and trucking firm stated that price is the most important factor for a firm to be competitive in his line of business. Then he added, “knowledge and experience matter.” [#22]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated that in order to be successful a firm must have capital. [#30]
- The Subcontinent Asian American male owner of a MBE-certified professional services firm said that having low overhead costs is a factor in his firm’s success. He said, “For me, I cut the overhead...so in my company, I do my accounting, I do my invoices.” He stated, “I operate from home...with all the low overheads, I can afford to pay my employees well.” [CT #14]

- The non-Hispanic white male owner of a specialty construction firm stated that hiring the right people and training them is important. He said that a firm can hire low-level employees with low-level skills, but then the firm must train them. He added that if the firm wants those employees to stick around, it must pay them appropriately. [CT #37]

**Other business owners and managers commented on other factors - including expertise, professional performance, and being technologically savvy - that they believe to be critical to business success in their industry.** [#9, #25, #26, #31, CT #37] For example:

- The Asian American male owner of an MBE- and SBE-certified engineering firm emphasized that a firm in his line of business “needs to be able to market themselves very well and have knowledge in this line of work.” [#25]
- The female representative of a non-Hispanic white female-owned specialty construction firm observed that a business needs to have a great reputation and pricing to be competitive in the construction industry. [#31]
- The Black American female owner of a janitorial cleaning services firm explained that in order to succeed in her line of work, a firm needs to be creative, innovative, able to sell themselves well, and have a certain degree of savviness. [#26]
- When asked in his view what it takes for a firm to be competitive in his line of business, the non-Hispanic white male owner of a janitorial services firm responded, “The quality of our work.”[#9]
- The non-Hispanic white male owner of a specialty construction firm stated that he doesn’t think that minority- or woman-owned firms will have problems getting jobs “if they’re driven and self-starters, they shouldn’t have a challenge...” He spoke about a successful minority, female colleague in the construction industry, who is “all about the work.... She’s had to be a woman in a man’s world.” He went on to say that one thing he really likes about construction is that “if you can do the work, that speaks volumes.... Performance speaks volumes.”

The same business owner reported, “You should know your trade... know your line of work and pricing.” He added, “...communication is most important, because things are time sensitive; you just can’t walk away.” [CT #37]

## **D. Doing Business as a Prime Contractor or as a Subcontractor**

Part D summarizes business owners’ and managers’ comments related to the:

- Mix of prime contract and subcontract work (*page 31*);
- Prime contractors’ decisions to subcontract work (*page 35*);
- Prime contractors’ preferences for working with certain subcontractors over others (*page 37*);

- Subcontractors' experiences with and methods for obtaining work from prime contractors (*page 38*); and
- Subcontractors preferences to work with certain prime contractors (*page 42*).

**Mix of prime contract and subcontract work.** Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

**The majority of firms (n=18) reported that they primarily work as subcontractors but on occasion have served as prime contractors.** [#1, #2, #3, #4, #5, #7, #8, #11, #13, #21, #22, #24, #25, #27, #29, #41, CT #2, CT #37] Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise.

- The non-Hispanic white male representative of a regional disadvantaged business association explained, "Most of the work [our members do], public and private sector, is as subcontractors." [#41]
- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm responded stated that her firm focuses the majority of its work around subcontracting, and never serves as a prime.

The same interviewee responded that her firm always acts a subcontractor due to the enormous amount of work that comes with bidding as a prime on a project. She summarized, "it is just too much for a small business to handle." She also commented, "We rarely bid on anything ourselves because Metro and other agencies don't want to have stand-alone contracts for small specialty companies, which I understand because that's a lot of work for them. So, what they do is they hire larger environmental firms that may have five or ten sub-consultants that work for them. So, my lead or my prime will hire us." [#29]

- The Asian American male owner of a structural and civil engineering firm stated that his firm performs the majority of its work as a subcontractor but noted that the firm has performed some work as a prime contractor. When asked why his firm primarily works as a subcontractor, he explained, "[For] most projects, the prime contractors are the architects, and we just subcontract for the engineering part..." [#27]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm indicated that there are opportunities for the firm to pursue work as a prime, but that is the firm benefits more as a subcontractor. He stated that insurance and bonding can be cost prohibitive for a small prime contractor, and explained that when the firm works as a subcontractor it benefits from pairing up with a prime with higher policy limits. [#1]
- The non-Hispanic white male owner of a specialty trucking firm explained that the only time his firm works as a subcontractor is when its services are solicited as a pre-qualified courier for a major national network. He explained that if another courier needs assistance

in a different part of the country, and that firm does not have enough vehicles to fulfill their contract, they will contact his firm and subcontract his firm to complete the contract. [#24]

- The Hispanic American male owner of a demolition and trucking firm stated that his firm works primarily as a subcontractor. The firm's role as a subcontractor is related to its specializations of demolition and trucking. [#22]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated that his firm is always a subcontractor. He explained, "[Due to] the nature of public work, being a prime - the reportorial requirements to me is overbearing for small firm. The time and effort to try to get a prime contract with these agencies on even small contracts is not possible. All the paperwork required trying to comply with the requirements of the contract is not feasible [for us]." [#25]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm stated that most of the firm's work is as a subcontractor to civil engineering firms who serve as primes. He added that the only time the firm will work as a prime is for small private projects. He explained, "It is more cost effective to be a subconsultant than to bid on a large project as a prime." He added that working predominantly as a subcontractor "allows us to be on more than one [project] team." [#2]
- The Hispanic American male owner of a DBE- and SBE-certified professional service firm stated that the firm works primarily as a subconsultant. He explained that the type of services he provides are better suited to sub-consulting, than to prime consulting work. There are more opportunities for his firm as a subconsultant. [#3]
- The Black American male owner of a trucking firm explained, "We never work as a prime contractor. We always [are] subcontracted through someone else." When asked why the firm only works as a subcontractor, he stated "I just haven't ventured off into being a [prime] contractor yet because it's a lot of work." [#4]
- When asked to describe how often the firm works as a prime contractor or a subcontractor, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated that the firm works as a subconsultant 70-75 percent of the time. He stated that the firm usually performs work as a sub-consultants because, "We're usually working in a team. The larger contract is either architectural in nature, or the focus is not just landscape architecture, and the majority of the budget is not landscape architecture. For instance, if a large project involves planning and architectural design, and engineering, [then] our portion of the project budget and role is not as a prime." [#5]
- The non-Hispanic white male owner of an SBE-certified engineering firm responded "We are never the prime, we are always the sub." He explained "If there was a way for smaller firms to prime, we would do it. But for our type of work, we have to work with the larger firms." He added, "It may help if [the soliciting agency] would break up the bidding process and separate the professional services." [#7]



- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm stated that most of the firm’s work is as a subcontractor to general contracting firms. He explained that there are more opportunities as a subcontractor for the type of services offered by their firm. [#8]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm explained “We don’t have any prime work, only sub.” [#11]
- When asked to describe how often the firm works as a prime contractor or a subcontractor, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded the firm always works as a subcontractor. [#13]
- The non-Hispanic white male owner of a specialty construction firm stated that he has never been a prime contractor on any public works projects. He went on to say that he would sometimes perform as a prime on some residential projects. [CT #37]
- The Black American female owner of a construction-related business stated that she anticipates working as a subcontractor because of “the nature of the business and lack of funds.” She added that she would eventually like to grow her business to the point where she can act as a prime contractor. [CT #2]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm stated her firm always works as a subcontractor. The reason the firm does not prime is because it does not have the necessary qualifications, such as a contractor license, to bid on any Metro or any other agency projects. [#21]

**Some firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project.** [#6, #12, #15, #41, #28, #31] For example:

- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm observed, “It depends [on] if we think we have a chance to land the project as the prime contractor. If we have performed a certain type of project work before as the prime, we are more likely to prime the project.” She also stated, “We only use subs when we prime, not sub on a project. If we sub, it’s for a small project and we are the very specialized part, then we don’t need subcontractors.” [#6]
- The Asian American male manager of an international architectural, planning, and engineering services firm stated “I don’t have the exact percentages. But we’re comfortable being both. I would say a good number could be 50/50. We’re ok priming projects, we’re ok subbing to projects. Typically with the much larger-scale projects, if you’re talking about hundreds of millions of dollars, or billions, we’re typically a sub-consultant in that role. But with projects of a medium-size scale or smaller, we could easily prime.” [#12]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm explained, “It’s a combination of both. We would like to be prime more, but the constraint is having an abundance of the projects you can prime on. Subcontractor work can be easy, but

you don't get meaningful work. I have worked on projects where there is a \$3M architecture fee, but where a support architect's fee is \$250,000. That is not a meaningful role - you only work here and there. It's also the culture, because architects don't like sharing work." [#15]

- The non-Hispanic white male representative of a regional disadvantaged business association stated that members are "more or less equally divided" between working as primes and as subcontractors. He observed, "It often depends on the size of the contract. Members cannot handle contracts that are too large and therefore tend to work as primes on smaller contracts—under \$3 million." [#41]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated that the firm performs work "30 percent as a prime, and 70 percent as a subcontractor." The reason for the higher percentage as a subcontractor is because the firm gets the majority of their projects from architects and design-build contractors. [#28]
- The female representative of a non-Hispanic white female-owned specialty construction firm stated that 90 percent of the firm's work is focused on subcontractor work and the remaining 10 percent of their work is as a prime. The reason her firm most often works as a subcontractor is due to the business's specialty license. [#31]

**Some firms reported that they usually or always work as prime contractors or prime consultants.** [#9, #14, #23, #24, #26, CT #61] For example:

- The Black American female owner of a janitorial services firm reported that her business always acts as a prime contractor. She explained that her firm prefers this role because it offers "Full autonomy. Full control and not having to deal with someone else's rules [when you are] a subcontractor." [#26]
- The non-Hispanic white male owner of a trucking firm stated that the firm acts a prime contractor on all of its projects. He indicated there are no companies that can afford to hire his firm as a subcontractor. [#23]
- The non-Hispanic white male owner of a specialty trucking firm stated that his firm works as a prime contractor the majority of the time. He stated that when customers or clients seek his firm's cargo and freight services, they find him and have direct contact with him to determine pricing. [#24]
- The non-Hispanic white male owner of a janitorial services firm explained, "We don't have any subcontractors. We do our own business. We don't subcontract to anybody, and we don't subcontract under anybody. We deal with our own clients directly." When asked why the firm does not work as a subcontractor, the same interviewee responded, "You build somebody else's name on your own effort if you work for somebody as a subcontractor. So I would rather build my own name and my own company rather than help someone else. I don't believe in subcontracting." [#9]

- When asked to describe how often the firm works as a prime contractor or a subcontractor, the non-Hispanic white male owner of a pest control firm responded that the firm always works as a prime contractor. When asked why, he replied, “I just haven’t had any subcontracts. As I prime contractor, I like to have control over everything.” [#14]
- The Black American male owner of a DBE- and SBE-certified contracting firm reported that he does business primarily as a prime contractor. When he started his firm, he thought that it would be easier as a minority-owned business to obtain prime contracting jobs than to obtain subcontracting jobs. [CT #61]

**Several firms explained that they do not carry out project-based work as subcontractors or prime contractors.** [#10, #20, #30] For example:

- The Subcontinent Asian American male owner of a specialty supplier firm explained that the firm does not perform project-based work as a prime or a subcontractor. His firm only sells specialty product to factories and distributors in the private sector. [#10].
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm explained that her business is a supplier. She indicated she is not a contractor. [#30]
- When asked if he does business as a prime or subcontractor, the Asian American male owner of a trucking firm stated that his firm does not perform prime or subcontractor work. He explained that brokers will solicit a contract with a client. Then the broker will choose to contact his firm based on his price to perform the [trucking] work. [#20]

**Prime contractors’ decisions to subcontract work.** The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with DBE-certified subcontractors.

**Five firms that serve as prime contractors explained why they do or do not hire subcontractors.** [#2, #23, #24, #30] For example:

- The non-Hispanic white male owner of a trucking firm stated that his firm could not hire subcontractors due to the firm’s union contract. [#23]
- The non-Hispanic white male owner of a specialty trucking firm stated that his firm would hire subcontractors to complete an order or contract. He indicated that his firm reuses subcontractors that the firm has worked with in the past, and with whom the firm has an established relationship. [#24]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm explained that her business is a supplier. She explained that there are certain pipes that her firm provides that require fabrication; for these orders, the firm will sub out the product manufacturing. Her firm will hire the fabricator who can deliver the product “the quickest, factoring in quality and reliability of the product.” [#30]

- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm responded that the firm may hire subconsultants on some private sector civil engineering projects that are not associated with public works. [#2]
- The Asian-Pacific American male manager of an international architectural, planning, and engineering services firm indicated that the firm hires subcontractors. He added, “If there are specialties involved [we subcontract]. For example, if we’re hired on as traffic engineers, we will subcontract counts. People who go out to the field [that] survey and count, we’ll hire them on as a sub.” [#12]

**Three firms that the study team interviewed discussed their work with DBE-certified subcontractors, and explained why they hire DBEs. [#12, #24, #28] Their comments included:**

- The non-Hispanic white male owner of a specialty trucking firm indicated his firm does solicit bids from DBE subcontractors. He frequently solicits the services of DBE firms by personally contacting them via telephone. He hires these firms because they get the job done. He stated that he has not noticed any differences in working with DBE subcontractors as compared to non-DBE subcontractors. He added, “On a personal level, the disadvantaged firms are more alert if they’re being used in a negative way. They are alert to it and are more sensitive to that. Those that aren’t [certified], why would they be sensitive?” [#24]
- The Asian-Pacific American male manager of an international architectural, planning, and engineering services firm stated, “We certainly do [solicit the services of DBE subs]. We are very supportive of the program. And we do believe in supporting our community. So those are important aspects for us.”

When asked how and why the firm solicits DBE subs for bids or quotes, the same interviewee responded, “It all depends on the program. For certain programs, like the City of Los Angeles, for example, they have a very formalized process, where you have to advertise in the newspaper, actively seek out disadvantaged businesses. There is also the process of, over the years, we’ve developed strong relationships, with smaller businesses, women-owned businesses. It has transcended, ‘Ok, we’re doing it because they’re a DBE or WBE.’ But because they’re one of the best firms we know of. We have a great relationship. So that’s how it continues.” He further observed that the process of soliciting DBE subs differs between the public and private sectors. He responded, “It is very formalized on the public side, and on the private side, not so much, if at all.” [#12]

- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm responded, “[The quality of DBE subs] varies in the quality of the product, price, willingness to work on a project. On some of the projects, like the public-sector jobs, you have the requirement for the DBE, and you get their price but you don’t necessarily get the A-team on the project. Though there are some [DBE firms] who are just fantastic no matter what.” [#28]

**Prime contractors' preferences for working with certain subcontractors.** Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

**Prime contractors described how they select and decide to hire subcontractors.** [#12, #24, #28, #41] For example:

- The Asian American male manager of an international architectural, planning, and engineering services firm explained that the firm selects its subcontractors based on “a combination of factors. One is performance. They must perform. Beyond that, there sometimes [are] requirements within the contracting documents of small businesses, disadvantaged businesses, women-owned businesses, so we’ll consider that.”

The same interviewee elaborated, “Relationship is important, because having a history of teaming together, having a history of knowing how the other team member is going to help and respond. If you have to rebuild your relationship again, it’s a costly effort. Ultimately, as a consulting firm, time is money. The more time we waste getting to know each other, or fixing things where we don’t work well together, the less profitable we’re going to be.”  
[#12]

- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm indicated that based on the specific job requirements they will find subcontractors that have the qualifications and work history to perform the job. The firm will also select subcontractors with whom they have established relationships. [#28]
- The non-Hispanic white male owner of a specialty trucking firm indicated that there are subcontractors that he has established relationships with. He stated, “I use them every day.” [#24]
- The non-Hispanic white male representative of a regional disadvantaged business association observed, “The volume of work that is subbed out [by our members] is less than 25 percent, with more [subcontracting] taking place in the public sector because it tends to be more a matter of who you know and who agencies are comfortable with compared to the private sector, where it is more of a pure calculation based on cost, experience, and past performance. Members do not solicit DBE subs for bids and quotes.” [#41]

**Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform.** [#12, #24] For example:

- The non-Hispanic white male owner of a specialty trucking firm explained that he would not work with some subcontractors who are unreliable. He explained, “They’ve lied to me in order to get the subcontracting contract....They’ve lied to me telling me they can be in a location in two hours with a truck and three hours will pass and they still won’t be there so they actually lied to me and said ‘yes, [they could do the work]’, in order to get the contract.” [#24]

- The Asian American male manager of an international architectural, planning, and engineering services firm responded, “It goes back to track record and history. If they haven’t performed, we’re not going to use them. We’ll give them a chance to correct. But if they’ve consistently underperformed, or haven’t delivered, or are not good teaming partners, we won’t work with them.” [#12]

**Subcontractors’ experiences with and methods for obtaining work from prime contractors.** Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

**Two subcontractors mentioned the helpful role Metro’s programs play in finding work.** [#11, #41] For example:

- The non-Hispanic white male representative of a regional disadvantaged business association observed, “There are myriad ways [for our members] to get the work, but programs such as Metro’s Meet the Primes events and DGS’s list of certified DVBE firms are very helpful.” [#41]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded, “Through my old networks and Metro. I get the look-ahead schedules and see what contracts might have work for us. I go to Metro events and have strengthened my relationships through the outreach events. Sometimes a contract has already been awarded, but there is still a need for our services and we are the only DBE in the market.” [#11]

**Some subcontractors reported that they are often contacted directly by primes because of their specialization, their DBE certification, or because of they are known in the industry.** [#1, #25, #27, #29] For example:

- The Asian American male owner of a structural and civil engineering firm stated that his firm mainly gets on projects as a subcontractor through bids or having primes reach out to his firm and subcontract him for their projects. [#27]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated that his firm markets itself primarily through word of mouth. He expressed, “I’m the only one of a few folks that can actually do tunneling very well and my clients know it and they basically seek me out rather than me having to seek them out so that’s really by word of mouth. There really is no marketing needed. Companies look for me.” He indicated that primes will usually contact him to bring his firm on board as a subcontractor. He then vets the prime company and based on his research, decides whether or not to come on board with the prime. [#25]
- When asked how her firm finds out about and gets on projects as a subcontractor, the non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm explained, “This is what happens: if the RFP needs our kind of services, the [primes] start scrambling because they know they can’t do it. So, what they do is they look on BAVN or

Planet Bids. They look on there for companies like mine. So, what happens, because of agencies having a quota... and Metro's really been doing good in the last few years. But about having, like a certain amount of DBEs, and all that, then the clients find the DBEs; and come to us. And that's why I don't market because they come to me."

The same interview elaborated, "There's three ways [to find out about jobs]. First you go to the initial meeting. Second the prime reaches out to you because of the DBE goal. And the third one is you find out about [the project] and you contact the primes for that. My success rate is about 50 percent [using these methods], which is pretty high." [#29]

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained that the firm has a strong name and brand recognition, which helps the firm win work with prime contractors. He stated, "I can walk into an outreach event and 90 percent of the time, people know who I am." He explained that the firm is finally in a position where it can effectively convey its marketing messages through its branding. He noted that the firm has an advantage in the market because it employs a business development professional solely dedicated to marketing and branding. He clarified, "Most small contracting firms do not have the overhead budget to hire a dedicated business development employee." [#1]

**Several interviewees said that they get much of their work through prior relationships with or past work performed for primes.** [#1, #2, #3, #5, #7, #12, #22, #24, #27, #29] They emphasized the important role building positive professional relationships plays in securing work. For example:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained that he learns about subcontract opportunities through his professional relationships with various prime contractors, as well as through networking and outreach events. [#1]
- When asked how the firm gets on projects as a subcontractor, the Asian American male manager of an international architectural, planning, and engineering services firm stated "Typically through relationships. Knowing larger firms. Knowing firms who have that special skill that is being sought after. There's no other mechanism for us." [#12]
- The Asian American male owner of a structural and civil engineering firm stated that primes who have used his firm in public sector work will and have utilized his firm for private sector work because those primes understand his firm's capabilities and quality of work. [#27]
- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm stated that primes that have used her firm for public sector work will use her firm for private sector work because they have seen the high quality of work her firm performs. [#29]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm stated that relationship building with prime contractors is

equally as important for winning subcontractor work in the private sector as in the public sector. However, he explained that there are more opportunities for subcontractors in the public sector due to DBE- contracting requirements. [#1]

- The Hispanic American male owner of a demolition and trucking firm indicated that his firm gets on projects as a subcontractor by word-of-mouth. He elaborated, “Someone will tell me their friend has a job or needs a demo and I’ll just go do it. I don’t really pick who it is.” He indicated that the firm has very few contractors that it does work with so the firm does not market itself. He stated that contractors would reach out to his firm and solicit their services for a project. Usually the same contractors will solicit his firm. [#22]
- The non-Hispanic white male owner of a specialty trucking firm stated that primes that have used his firm on public sector jobs will also solicit his firm for private sector jobs. He indicated these primes will use his firm because of its reliability and good reputation. He expressed, “In business, when a company refers another company, it’s because you are trusted.” [#24]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm explained that most of the firm’s work comes from civil engineering firms with which the owner has an established relationship. Those contacts approach the firm about opportunities. [#2]
- The Hispanic American male owner of a DBE- and SBE-certified professional service firm explained, “Maybe 25 percent of my work comes from primes who contact me directly from other projects I have worked on with them.” However, when asked about networking events, he responded, “In my line of work networking is generally not worth my time. It is so highly specialized that connections do not matter as much as technical skills.” [#3]
- When asked about how his firm markets itself to prime contractors, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm responded that the firm markets in general “based on our personal relationships with primes.” [#5]
- When asked how the firm finds out about subcontract opportunities, the non-Hispanic white male owner of an SBE-certified engineering firm explained, “The primes usually call me and ask for a proposal. They know me through my previous work with them.” [#7]
- When asked how the firm gets on projects as a subcontractor, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, “In the beginning, I go and talk to people and tell them what expertise we provide. Later on, our name went around and I would get calls from people to be on their team.” [#13]



**Some business owners reported that they actively research upcoming projects and market to prime contractors.** [#1, #4, #8, #12, #13, #27, #29] Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services. For example:

- When asked how his firm learns about subcontract opportunities, the Black American male owner of a trucking firm explained “Once you find out who the contractor is, you give them a call and then they’ll tell you who they have designated as their broker. The broker [is] the one that’s going to find the trucks to do the job; he’s the one that’s going to be paying you. So you’ll be a subcontractor under him.” He also stated the firm markets itself by “word-of-mouth” and by meeting people. He added that he has “marketing products such as t-shirts with [company] logo.” [#4]
- The Asian American male manager of an international architectural, planning, and engineering services firm observed, “We do target the partners that we want to have.” He elaborated, “[We do] a combination of things – being connected to the industry, knowing who all the players are, talking to the owners, following where the agency is going, where the board of those agencies are focusing in on. So, really doing a lot of homework.” [#12]
- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm explained, “We reach out to [prime contractors], especially if there is a [goal] requirement. We flash our resume to [the prospective prime contractor] and let them know we can help them reach their [DBE, MBE or SBE] goal.” He added, “[The] owner has been in the industry a very long time and has connections with the bigger GCs [General Contractors] and will hear about projects and opportunities and he’ll reach out to them. Sometimes [General Contractors] have meetings that I’ll attend.” [#8]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm said he studies projects in the early phases (for example, the Environmental Impact Review stage), to get an idea about future opportunities for business. [#1]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm observed, “Yes. When the public sector project comes out, I try to find who the company is that has the best chance to win [the project]. If I know them, I call or email them. If I don’t know them, I try to reach them. My goal is to be on all the teams that are short-listed. It’s a lengthy process. It requires a lot of relationship talking and negotiating. Private [sector] is different. In the private [sector] they say, ‘Give me a price.’ They care about the bottom line.” [#13]
- The Asian American male owner of a structural and civil engineering firm stated that his firm proactively navigates through different websites to find out which primes are bidding on a project. He will then contact and introduce his firm to the prime he wants to work for, and talk about the previous work his firm has done for other prime contractors. This approach “has produced positive results for the most part.” [#27]

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm explained that she would contact a prime via email when the prime is interested in a specific project. She stated that is about as far as she goes when it comes to marketing her firm.

The same interviewee stated that her firm identifies potential primes through sign-in sheets for specific project events or meetings, which she receives via email. She added that most prime companies know who she is due to the nature of her firm's work. [#29]

**Subcontractors' preferences to work with certain prime contractors.** Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

**One business owner had very specific frustrations related to communicating with, and winning work from, prime contractors.** The male owner of an engineering company shared his frustrations with obtaining work from prime contractors. He stated, "When engaging with the prime architectural and engineering firms, they provide people or contacts for you to reach out to in regards to teaming opportunities or subcontracting. When trying to make contact with the referred people, there is never a response, or if there is a response they suggest to 'get this certification or another certification or some type of licensing.' When you get the certification or the license and try to re-engage with these individuals then there is almost a blackout. Where there will be no response at all, sometimes for weeks, sometimes for months. It almost appears as if the prime firms feel that us smaller firms are their competition." [WT#2]

**Many business owners and managers indicated that they prefer to work with prime contractors who are good business partners.** [#5, #11, #12, #29, FG#1, FG#2] Examples of their comments included:

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm confirmed that her firm does prefer to work with certain primes. She explained that these primes are "Honest, they try hard. They hire me all the time for different projects because it blends well together." [#29]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated "Yes, there are primes like that and it's been because they value our contribution as landscape architects. If they're looking for a low bidder, we usually don't have a very long relationship with them." [#5]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm observed, "Yes, there are [primes we prefer to work with]. Just like anything, this is a people business. There is a contractor, the biggest elephant in the room....I work with them selectively. There are only three or four project managers I will work with from that company, otherwise I say no." He explained that this is due to past bad experiences with timely payment and people that are "just hard to deal with." [#11]
- When asked if there are primes that the firm would prefer to work with, the Asian American male manager of an international architectural, planning, and engineering

services firm responded, “Absolutely. It’s those primes that basically are good business partners. We’ve worked with primes before where they’re not the best of partners. They don’t look out for the entire team. They look out for themselves first. There might be payment issues. There might be management scope issues. Basically, business is like people. There are good people, there are bad people. So that’s what we find ourselves with - is we only focus in on the good businesses that we want to work with.” [#12]

- When asked what makes a prime good to work with or bad to work with, the owner of a local small business commented that “...Number one for me are the people. I’m not going to generalize that everybody [is] challenging to work with. There are very handpicked people within... that I have worked with... since I know they will look after not my best interest, but the best interests of the entire project team. And not just theirs, not just mine, but kind of look at it from a level playing field. There are some people that are just... looking at their own numbers. They’re after their bonuses. So the more they can tighten the cash flow or maximize the profit for the prime, then the more bonus they make, and that’s just how they do business. And there are people like that out there. So... I don’t look at it as a company. But I look at it more on who I’m going to work with.” [FG#1]
- A small business owner commented that “Company culture is really a huge thing. And it needs to start from the top....But it is the individuals, you know, that you have your relationships with. The tendency is the bigger they are, the more challenging it is to work with them. Because the internal processes that they have... there’s just more hoops. That is a general statement, though. There are project managers... that will take ownership of that invoice, and will not stop until you get your check. But there are some that... don’t want to take ownership. Because in the end, the [Accounts Payable] will still send it back to him anyway. Some [project managers] would say thanks for this, I will review it, I’ll stamp it, and then move it forward to [Accounts Payable]. That’s a lot faster.” [FG#2]

**Other business owners and managers did not have strong preferences and were willing to work with any prime contractor.** [#1, #22, #24]. Examples of their comments included:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm noted that the relationship between a project manager and the subcontractor matters more than the relationship between the prime contractor and subcontractor. He concluded “I do not play favorites, my loyalties are [to my firm] and to create opportunities for [my firm].” [#1]
- The Hispanic American male owner of a demolition and trucking firm explained that there are primes his firm prefers to work with, but there are not any primes that his firm will not work with. He said, “Give me the work. Money comes after but give me the work.” [#22]
- The non-Hispanic white male owner of a specialty trucking firm responded that his firm does not have any preferences when it comes to working with certain primes. He explained that his firm has not had any difficulties with any the primes it has worked with. [#24]

**Three business owners or managers described their experiences working with DBE-certified primes.** [#1, #12, #29] For example:

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm observed, “DBE primes understand the situation [what it means to be a disadvantaged firm] so they are more aggressive in getting invoices out and understanding what small businesses go through.” [#29]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained the primary difference in working with DBE- versus non-DBE- prime contractors is their financial position. He stated that DBE- prime contractors are far more limited financially, which restricts their ability to pursue and to provide opportunities for other DBE- firms as subcontractors. [#1]
- The Asian American male manager of an international architectural, planning, and engineering services firm observed, “I would say [working with DBE primes is] a bit more difficult. And it’s typically because of the types of projects. If it were a smaller project, it would be different. But if we’re talking about a large, multi-million dollar project or even several hundreds of thousands of dollars, we haven’t really found a DBE that is capable of managing a medium to large project yet on a holistic basis. They tend to need a lot of support.” [#12]

**Subcontractors also offered their perspectives on hiring second-tier subs.** [#8, #11, #13, #22, #29] For example:

- When asked if the firm hires second-tier subconsultants, the representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm responded, “Yes, we have [hired second-tier subs] before. We use subs for work like drywall insulation.” [#8]
- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm explained that her firm will not hire second-tier subs because of a prior negative experience. She explained, “Last time I did that, it cost me six thousand dollars in extra insurance so I won’t do it.” [#29]
- The Hispanic American male owner of a demolition and trucking firm stated that when his firm is hired as a subcontractor there are jobs where the firm will hire second-tier subcontractors. He explained that his firm would hire plumbers, electricians, and landscapers, among others, as subcontractors. He noted that the firm would select second-tier subcontractors based on a job’s needs or requirements. He indicated that the firm would subcontract out to other trucking companies as well. [#22]
- When asked if the firm hires second-tier subconsultants, the Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm stated, “Yes, but it’s 10 percent or less of the time. There are certain specialties where we have never done the work, then we hire a sub. Certain equipment we rent, is considered a subcontractor.” He continued, “We try [to seek out DBE, MBE or SBE certified subcontractors]. That’s always the motivation for us.” [#11]

- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm indicated that his firm hires second-tier subcontractors. He explained, “We do a lot of specialized material testing. I hire specialized material testing [companies]. Those companies are across the United States. Typically, 30 percent of our contract goes to our subs on the average. They are specialized, the few companies that I worked with, we made a relationship and kept a relationship.” [#13]

## E. Experiences Pursuing Public and Private Sector Work

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work. Section E presents their comments on the following topics:

- Mixture of public and private sector work (*page 45*);
- Business marketing strategies (*page 49*);
- Experiences getting work in the public and private sectors (*page 50*);
- Differences between public and private sector work (*page 52*); and
- Profitability (*page 56*).

**Mixture of public and private sector work.** Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

**Four business owners or managers explained that their firms only engaged in private sector work.** [#4, #7, #10, #26] For example:

- The Black American female owner of a janitorial services firm indicated her firm performs only private sector work and never public sector work. [#26]
- The non-Hispanic white male owner of an SBE-certified engineering firm explained that the firm’s current work is primarily in the private sector. He stated “My work with public agencies was all with my prior firm, not with this company.” He added, “I’m trying to do more, but have not had the chance.” He explained that the primes with which his firm subcontracts have not offered opportunities for public sector projects. [#7]
- The Subcontinent Asian American male owner of a specialty supplier firm explained that his firm only sells products in the private sector to factories and distributors. He did note that his customers may use the firm’s product in the public sector. He explained, “Our customers sometimes have [public sector] projects. For instance, we have a customer in Japan, who applies [our product] to a transit station in Tokyo.”[#10]
- The Black American male owner of a trucking firm stated that “100 percent [of our work] comes from the private sector.” He elaborated that he has worked on highway and street projects, but stated, “I don’t work directly through the contractor. They have a broker that they’re going to work with.” He added, “I don’t know who the owners would be at all. If the contractor, whoever the state contracted the work through, or the city contracted the work through, then they go through their broker, and then the broker under them calls me, the

subcontractor, and then they give us the work. So the state or city or government pays the contractor, the contractor pays the broker, and the broker pays me.”[#4]

**One business owner expressed his desire to work in the public sector.** The non-Hispanic white male owner of a specialty construction firm stated that he currently works in the private sector but would like to work in the public sector. He explained that public works are more concerned with high-quality work than about cost, but they involve more paperwork as well. He added that there is more money in working with the public sector. [CT#37]

**Two business owners or managers explained that their firms only engaged in public sector work.** [#11, CT#14] For example:

- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm explained that his firm works only in the public sector. [#11]
- When asked whether his firm primarily performs public or private sector work, the Subcontinent Asian American male owner of an MBE-certified professional services firm responded, “Public sector, because basically what I do is Caltrans work because my experience is Caltrans-centered.” He added, “Everything is Caltrans, even the design...even when you do [other agency] work...everything is based on Caltrans procedure and standards.” [CT#14]

**For some firms the largest proportion of their work was in the private sector.** [#14, #21, #22, #23, #27] For example:

- The Asian American male owner of a structural and civil engineering firm stated about 10-15 percent of his work is in the public sector and the remaining 85-90 percent is private sector work. [#27]
- The non-Hispanic white male owner of a trucking firm responded that the majority of his firm’s work comes from the private sector. He explained, “Yes. [The work varies] day-to-day. We are very customer driven so if one customer does not need trucks and the next one does that is where we go. It can vary by the day. We can be hauling three loads out of the harbor today and nothing tomorrow.” [#23]
- The Hispanic American male owner of a demolition and trucking firm stated that 99 percent of the firm’s work comes from the private sector and 1 percent comes from the public sector. [#22]
- The non-Hispanic white male owner of a pest control firm indicated that the firm’s proportion of work is 98 percent from the private sector. When asked if there has been a trend toward or away from private sector work, he replied, “I haven’t developed all the connections. I would like to do some work for the City.” [#14]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm stated that the firm performs the majority of its work in the private sector. She did add that the firm is currently listed as a subcontractor on a Metro project. [#21]

**For other firms, the largest proportion of their work was in the public sector.** They described multiple reasons for engaging in more public sector work. [#1, #2, #3, #8, #13, #15, #41, #31]  
For example:

- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm responded, “We typically do more public works projects. There’s more opportunity for our services in the public [sector].” [#8]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm stated that the firm currently does more work in the public sector because that is where the opportunities are in the Los Angeles area. [#1]
- When asked about the firm’s proportion of work in the public sector as compared to the private sector, the executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm stated that the firm performs “90 percent public work and 10 percent private work” and asserted that this breakdown remains consistent. [#2]
- When asked about the firm’s proportion of work in the public sector as compared to the private sector, the Hispanic American male owner of a DBE- and SBE-certified professional service firm stated, “Last several years, since redevelopment, [private] money went away. It’s been all public. I gravitate to technical, economic planning work that is mostly performed by government agencies.” [#3]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm indicated that the firm’s proportion of work is almost 100 percent from the public sector. When asked if there has been a trend toward or away from private sector work, he replied, “We’re moving away from private sector work. The challenge with private sector work is there are a lot more people out there that will do it cheaper. And I’m not going to compete with them.” [#13]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm replied, “99 percent of our work is public. We would prefer to have both. I guess I like the public sector a little better because there is a major cultural shift about nurturing small businesses that’s taken place over the last seven years to give [small businesses] more meaningful work.” [#15]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that about 75 percent of members’ work is in the public sector. He noted that there had been a shift toward more private sector work as the economy improved. However, now there is a “major ramping up” of big public sector projects, so the division is pretty steady at 75 percent. He stated that there is more public sector work for small businesses in the region, and this is mainly because there is more advocacy and because of small-business programs like the DVBA and TBAC, and because Metro is “meeting its [DVBE] goals.” [#41]

- The female representative of a non-Hispanic white female-owned specialty construction firm indicated that 80 percent of the firm’s work comes from the public sector in comparison to 20 percent in private sector work. She acknowledged that the mix of work does vary from year to year. [#31]

**Other firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability in this ratio.** [#6, #12, #29] For example:

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm responded that her firm’s current portfolio is evenly split between the public and private sectors. However, she noted that the mix of work varies from year to year and season to season. [#29]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm stated, “Our work between public and private projects is split fifty-fifty, but that can vary from year to year. It depends on where there are the most opportunities for our services.”[#6]
- The Asian American male manager of an international architectural, planning, and engineering services firm indicated that his firm currently does about 50 percent of its work in the public sector and 50 percent in the private sector. However he noted that this balance varies year by year. [#12]

**Several business owners described how the proportion of work between sectors varies from year to year due to changes in the marketplace and economy.** [#5, #9, #24, #30] For example:

- The non-Hispanic white male owner of a specialty trucking firm explained that the mix of work his firm pursued in the public and private sector did vary from 2016 to 2017. He indicated there was a high demand for drinking water in the summer of 2016 due to the overwhelming drought in southern California, and his firm was solicited to provide those services. [#24]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm responded, “[Our division of work] varies from year to year because economically, if private construction is down, or there’s a recession, and it’s hit particularly hard in commercial retail or in housing, we’ve been able to take up the slack somewhat in the public sector. And when the public sector has been where budgets have been cut or whether there’s not much building in the public sector, luckily, we’ve had the good fortune to be able to find some work in the private sector. That’s why we don’t specialize in one sector, public or private, or in one type of work, whether it’s transportation or housing, because those things are also open to market fluctuations.”[#5]
- The non-Hispanic white male owner of a janitorial services firm stated “[It] varies, sometimes 50-50 [public vs. private], sometimes 40-60 [public vs. private]. Sometimes there are ups and downs. You go through the valleys and highs.”[#9]



- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm responded that the amount of work her firm performs in the public sector versus the private sector varies from year to year. She confirmed that the firm typically works in both sectors. [#30]

**Business marketing strategies.** Business owners and managers described how their firms market themselves in order to win work in the public and private sectors. [#10, #11, #12, #13, #14, #15, #21, #23, #24, #28, #30, #41, CT#2, CT#37, CT#49, CT#61]. Their comments included:

- The Subcontinent Asian American male owner of a specialty supplier firm responded, “Because we don’t have a single focus of application for [our product], we make custom products. Our customers come to us by word of mouth and industry contacts.” [#10]
- The non-Hispanic white male owner of a trucking firm stated that the firm markets itself as a prime contractor through word-of-mouth and the business websites. [#23]
- The non-Hispanic white male owner of a specialty trucking firm stated that he markets through his firm’s websites. He expressed, “There are always responses but it always comes down to pricing.”[#24]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded, “I tap into old networks that I built, and by attending Metro events. Of course, my ongoing relationships with Metro and LAX help. We really haven’t done any print ads. Our website is as basic as it can be. We don’t do social media, because it’s not suitable to what we do.” [#11]
- The Asian American male manager of an international architectural, planning, and engineering services firm said the firm markets itself through “a combination of things. Through the traditional route of RFPs, and being on the various bidders lists for agencies. Through relationships. We have an equal breakout of public and private business or clients. So we do work for agencies like Metro and we also do work for private developers. And increasingly, creating opportunities because we also recognize that opportunities develop through a connection or a connecting of the dots of needs and funding and [agency or client] will. So we like to be in the middle of all of that.” [#12]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm indicated that the firm markets itself through networking, attending events, and building relationships. [#13]
- When asked about his firm's marketing strategy, the Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm responded, “Through public events, outreach, relationships with other large architectural engineering firms, and word of mouth.”[#15]
- The non-Hispanic white male owner of a pest control firm indicated that the firm markets itself in Hispanic publications such as El Clasificado, El Aviso, and Horale. [#14]

- The non-Hispanic white male representative of a regional disadvantaged business association stated that many firms depend on events held by public agencies, but that the better firms market themselves independently. He observed that newer firms tend to not be as effective at marketing as firms that have considerable experience. Successful firms are more professional and have established relationships with primes and agencies and “know how to follow up” on contacts and introductions. [#41]
- The non-Hispanic white male owner of a specialty construction firm explained that his firm would advertise in the Penny Saver and market to affluent “hill communities” like Pasadena or Bradbury. He would also leave business cards and talk with people in order to “drum up work.” [CT#37]
- The Black American female owner of a construction-related firm said that she markets her firm by “just meeting people, networking, that’s the best.” [CT#2]
- The Native American male owner of a DBE-certified construction-related firm said that he distributes his company brochure at networking events. [CT#49]
- The Black American male owner of a DBE- and SBE-certified contracting firm commented that he uses his reputation and ability to bid low as his marketing strategy. He stated, “My industry is basically in this [particular] area and it’s possible that the lowest responsible bidder will get the job.” Therefore, the opportunity is “more like a focus to know where the market is, get the job, and do the best job you can. From that, you build a reputation and get work from that.” [CT#61]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm responded that the only opportunity that the firm has had to market itself was when she attends some type of event and she leaves a business card. Aside from that, her firm doesn’t market itself to anyone else. [#21]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated that her husband is usually the one who markets the firm through word of mouth and their many years of great service. She explained that the firm has built an impeccable reputation over the years. [#30]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated that their Los Angeles office markets itself by responding to RFP’s (Request for Proposals), RFQ’s (Request for Qualifications), invitations by architects and contractors, and attends pre-bid conferences. He stated, “We just don’t sit back and wait for things to come to us, we go out and get it.” [#28]

**Experiences getting work in the public and private sectors.** Business owners and managers commented on what it’s like to seek work with public and private sector clients in the Los Angeles area.

**Some business owners expressed that it is easier to get work in the private sector.** [#14, #22, #28]. For example:

- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm indicated that in the private sector things move a lot quicker when submitting a price or a quote, qualification and documents. He explained, “In the public sector things tend to take a lot longer, there are a lot more processes to go through and typically it's a lot more expensive.” [#28]
- The non-Hispanic white male owner of a pest control firm responded, “I’ve been contacted by the State of California Department of Consumer Affairs for private work based on my official records and being an expert in my field. With the public [sector], I haven’t had much knowledge about how the bidding goes. I think it’s probably easier in the private sector. Because you have more flexibility. In the public sector, you have to fill out certain forms, etc. that could make it more of a challenge. But it could also be stable [work.]” [#14]
- The Hispanic American male owner of a demolition and trucking firm explained that it is easier to get work in the private sector. From his point of view, the main difference between public and private sector work is all the paperwork involved. He stated that the firm had attempted to get public sector work. When he spoke with the public-sector project contractors, he was told that his firm would have to provide a lot of paperwork prior to the bidding meeting. The prime contractors also told him that deadlines had to be met before the bidding conference. He emphasized that the private sector process is completely different, and more streamlined. He shared, “For a private sector project, a subcontractor submits their proposal to a bid, and then chances are the sub will get awarded.” He surmised, “Companies will come into agreement a lot faster.” [#22]

**Several business owners elaborated on the challenges associated with pursuing public sector work.** [#24, #27] Their comments included:

- The Asian American male owner of a structural and civil engineering firm indicated that it has been easier for his firm to get work in the private sector than in the public sector. He explained, “With the public sector, projects are kind of limited per se. It doesn’t come in big portions, especially for subcontracting work.”

This same interviewee also noted that the stringent requirements for public sector projects are a challenge, stating, “My experience with public sector work is that there were always many requirements for a particular project and it’s very strict in nature.”[#27]

- The non-Hispanic white male owner of a specialty trucking firm explained that there is more of a bureaucracy in the public sector as compared to the private sector. He responded, “In private, you knock on a door and immediately it’s a yes or a no but in public, they’ll say, please fill out these forms and you have to go through this process and we’ll let you know...” [#24]

**Other business owners and managers described public sector work as easier, and saw more opportunities in this sector. [#1, #2]** For example:

- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm responded that obtaining work in the public sector “is easier” than in the private sector because of the DBE goal-related opportunities. He explained that he does not have much experience with private sector projects because the firm’s civil engineering group performs most of the private sector work. With regard to pursuing public sector projects, he stated, “From what I can see, public is easier especially if the project has a DBE goal. It does not take a lot of marketing on our part, the clients come to us, it is not much effort to get onto a team.”[#2]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained that it is easier to get work in the public sector in LA County right now because of government agencies’ emphasis on transportation and light rail projects. These infrastructure projects “are where the federal funds are being allocated.”[#1]

**Several business owners or managers noted that it is not easier to get work in one sector as compared to the other. [#9, #23, #24]** For example:

- The non-Hispanic white male owner of a trucking firm observed, “This is a very competitive business. It is not easier for any of them to obtain work. The reason is because there is always someone who is willing to undercut you, that’ll do it for less expensive.” [#23]
- When asked to describe his experience attempting to get work in the private and public sectors, the non-Hispanic white male owner of a janitorial services firm responded, “It is not easier attempting to get work in one sector compared to the other. Work is work. It doesn’t make a difference [if it is private or public work.]”[#9]
- The non-Hispanic white male owner of a specialty trucking firm noted that the firm has had good experiences with both private and public sector jobs [#24].

**Differences between public and private sector work.** Business owners and managers commented on key differences between public and private sector work.

**Many business owners and managers highlighted key differences in payment practices between public and private sector work. [#13, #29, #30]** Their comments included:

- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, “The good thing with the public sector is, when we agree on a fee, we’re going to get paid that much. With the private sector, they cut the corners, cut our fees. I realize with the private sector, they don’t need the type of specialty we provide. They don’t see the value to it. That’s why we stick to the public sector, but we get paid much later.”

The same interviewee continued, “The private sector was a bad experience. I talked to people I knew for a long time and helped them out. At the end of the day, they didn’t care

about who I was or what we do. They just care about dollar value. A couple times I did a project and they had change orders. I told them ‘You’ve got to pay us for [the extra work.]’ They didn’t pay us. I ended up [holding] the deliverable until we got paid.” [#13]

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm responded, “[It is] absolutely [different]. Private sector pays on time. Like if I work one month, put in the invoice within the first five days of the next month, then they send it to their accountant and I get paid. I get paid mostly between two to three months. With public [work], it’s notorious, [not getting paid for] six months or more.” [#29]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm explained that “everything flows much faster” in private sector work. She stated, “Decisions are made much quicker and they pay in a timely manner.” In describing public sector work she observed, “Not only do they pay slow” but the agency will discount a certain amount from the payout without explaining why. [#30]

**Other business owners commented on differences in how the bidding and contracting processes are structured and regulated.** [#5, #6, #7, #12, #14, #23, #30, #31, #41, CT#49] For example:

- The female representative of a non-Hispanic white female-owned specialty construction firm stated that the firm has to deal with more restrictions and regulations for public sector work in comparison to the private sector. However, she clarified that these challenges are not a problem for the firm. Overall, she feels that work in both sectors is almost the same. [#31]
- The Native American male owner of a DBE-certified construction-related firm stated that the private sector has fewer regulations and restrictions. He noted that relationships in the private sector are more personal with customers but added, “You don’t make the same kind of money.” [CT#49]
- The non-Hispanic white male owner of a trucking firm explained that his firm has put out bids in the public sector when asked, but will usually be told that the firm’s entering bid is too high. In the private sector, he explained that his firm will go through the same process. His firm will submit a bid but then will usually have face-to-face talks with the client about what the bid entails. He stated, “When it comes to private sector [work], a person usually answers directly to one person and responses come quicker. In the public sector, you usually have to wait until it goes through the [decision] tree. There’s more direct contact in private.” [#23]
- The Asian American male manager of an international architectural, planning, and engineering services firm noted that there are “very substantial differences” between getting work the private and public sectors. He explained, “On the public side, it is a more formalized process, understanding all of the steps you need to take to be considered a legitimate bid. On the private side, it’s a whole different conversation. It’s focused on value and time. Time is money in the private sector. It’s actually diametrically different.” [#12]

- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm noted that there are several differences between private and public sector jobs including paperwork, the bidding process, and the project time frame. [#30]
- When asked to describe the firm’s experiences doing work in the private and public sectors, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm explained, “Each sector has its pluses and minuses. I think projects tend to move faster in the private sector, because of the client or the owner's’ financing and their schedule. But there’s also frustrations in terms of certain regulations and there’s much more regulation coming out all the time. In the public sector, there’s more delay with projects and there’s a greater emphasis, and rightly so, on public participation. So projects tend to be very heavy in the schematic and preliminary stages of work, where you’re doing more community outreach.”[#5]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm responded, “The only real difference is the bidding process. The agencies want details about your experience [similar project experience], and it can be a challenge to know what projects to list and how the work we have performed relates to the current bid scope of work. Private bids are also easier because they don’t care about things like the type of paper you use [compared with public agencies that require use of recycled paper for the proposal documents].” [#6]
- When asked about the differences between public and private sector projects, the non-Hispanic white male owner of an SBE-certified engineering firm recalled his experiences with his prior employer. He observed, “There is a lot of legal contracts and documents you have to complete before you begin the actual design work [for public projects].”[#7]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that one major difference with public sector work is the size and complexity of the RFPs, which can discourage bidding on projects. He noted that the process for getting private sector work is simpler and faster. He observed that some firms are willing to venture out into the private sector but the public sector has an advantage with all of the public agency programs for SBEs, DBEs, and DVBES. [#41]
- When asked if there are differences between public and private sector work, the non-Hispanic white male owner of a pest control firm stated “Yes. For the [public] sector, they have bidding and reporting [which] would be different. With the public sector, I don’t know what the open biddings are. There hasn’t been much contact. I kind of think it’s a tighter group of people that work for them.” [#14]

**Some business owners observed that the criteria for selecting firms for project teams differs between sectors.** [#1, #13, #28]. For example:

- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm affirmed that the process for getting work is different between private sector jobs and public sector jobs. He described how public sector jobs have a mandated percentage of work that has to be subbed out to SBEs and MBEs. [#28]

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm indicated that there is a difference in public and private sector work, but not necessarily in a negative sense. He explained that in his experience there appears to be more favoritism by prime contractors toward certain subcontractors in the private sector. Getting work in the public sector is based less on favoritism between prime contractors and subcontractors, and is more competitive and fair. He explained that in order to survive in the public sector firms need to align themselves with the right team or a multitude of teams. He also stated that there is more transparency in the public sector, which creates more opportunity. [#1]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm commented, “The first day I started business, I went to a pre-proposal meeting [for a public sector project] and I asked a company, ‘I want to be on your team,’ and they said ‘You are too late, we started six months ago.’ I learned that people start teaming up six or seven months before the RFP hits the ground and try to get on teams. The difference for the public sector is, we team up, interview, win the projects, and we start the projects a year later. From the day we decide, to the day we actually start doing the work, is two years down the line.” [#13]

**Several business owners described the different expectations and timelines for projects across sectors.** [#12, #13, #23] Their comments included:

- The non-Hispanic white male owner of a trucking firm noted that the quality of service demanded in the private sector is higher. He surmised, “You tend to be under a microscope in private sector jobs. Customers know what they want.” [#23]
- The Asian American male manager of an international architectural, planning, and engineering services firm explained, “The two sectors are fundamentally different. The private sector is all about time, delivering value, [and] creation of value. Because ultimately it boils down to profitability. On the public sector side, it’s more of a formal process. Sometimes there’s a time element, sometimes there’s not. There may be hibernation periods where there’s funding gaps and things of that nature. So, you have to prepare for that. Where the two are the same: sometimes they follow scope and sometimes they don’t. And that’s a problem for both public and private. And it’s a problem for businesses because whenever you deviate from scope, it’s a budget issue.” [#12]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated “Yes there are [differences]. In the private sector, they just look at the bottom line. In the public sector, they need our service. The private sector is a handshake, [then] we start the project the next day.” [#13]

**One business owner described challenges related to winning work and growing a business in the public sector without DBE certification.** The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm explained, “The public sector, on the other hand, has its own challenges. We try to break into the business with clients. It’s been much better for us after the first year. Because the first year, nobody talked to us because we weren’t DBE. They said, ‘If you’re not DBE, we cannot give you a job.’ But that changed over time. We

haven't grown as fast as we'd like to. I've seen a lot of DBE firms - how fast they can grow. Not us, we've [had more] moderate growth." [#13]

**Profitability.** Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

**Some business owners perceived public sector work as more profitable.** [#6, #22, #27] For example:

- The Hispanic American male owner of a demolition and trucking firm stated that profitability between public and private sector work differs. He explained that the public sector is more profitable because of the required time management and more defined structure of jobs. [#22]
- The Asian American male owner of a structural and civil engineering firm responded that profitability does differ between public and sector work because, in his opinion, the capital in public sector work is unlimited. [#27]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm observed, "But public work is more profitable [than the private sector]. The projects are bigger and the agencies do not come back and try to re-negotiate after the contract is signed [as is sometimes the case with privately funded projects]."[#6]

**Other business owners and managers perceived private sector work as more profitable.** [#12, #13, #14, #41] For example:

- The non-Hispanic white male representative of a regional disadvantaged business association observed that another big difference between the private and public sectors is that the private sector is more profitable. He noted, "So it may be harder to get the work and it requires venturing out into the private marketplace, but the rewards are usually greater if you can get the work." [#41]
- The Asian American male manager of an international architectural, planning, and engineering services firm responded "[Profitability] does [differ] because with public projects, there tends to be a focus on what's an allowable profitability, whether there's extra effort involved or not. On the private side, you're allowed as much profitability as you can earn. It's just that you have to deliver the value. So, there is just a fundamental difference in mentality. It also relates to project delivery. And time on the private side, is the ultimate. On the public side, it's important, but the availability of funding becomes a bigger concern." [#12]
- The non-Hispanic white male owner of a pest control firm responded "I would say yes. I think you can make more money working in the private sector." [#14]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded "I think in the private [sector] you should be able to make more money because you're not obligated to follow the [American Association of State Highway and Transportation Officials] requirement for accounting, so you can loosely manage your



money. [In the public sector], we follow certain requirements. Ours is just a fixed fee. From the beginning of the job to the end of the job – it's fixed." [#13]

**One business owner did not think profitability differed between sectors.** When asked if profitability differs between the private and public sectors, the non-Hispanic white male owner of a janitorial services firm responded profitability does not differ between the private and public sectors. [#9]

**Three business owners or managers discussed an industry trend towards more private sector work.** [#12, #29, #30] Their comments included:

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm stated she feels there has been trend towards the private sector in her line of work. [#29]
- The Asian American male manager of an international architectural, planning, and engineering services firm replied, "We're moving more toward private sector work as the economy heats up. It's very much a function of the economy. If the economy slows down, and private development slows down, we have to switch over [to public sector work.] Because there just isn't going to be work there [in the private sector.]" [#12]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm explained that she has observed a trend towards private sector work. She explained, "There are a lot of things that prohibit orders when it comes to public sector jobs." [#30]

**One firm noted an industry trend towards more public sector work.** The Asian American male owner of a structural and civil engineering firm stated he has noticed an industry trend towards more public sector work. [#27]

## F. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. They also highlighted the challenges of public sector work. Section F presents their comments on the following topics:

- General experiences working with public agencies or Metro (*page 57*);
- Barriers and challenges to working with public agencies, including Metro (*page 61*); and
- Metro's bidding and contracting processes (*page 64*).

**General experiences working with public agencies or Metro.** Interviewees spoke about their experiences with public agencies in Los Angeles and with Metro in particular.

**13 business owners had experience working with or attempting to get work with public agencies in the Los Angeles area and in other places.** [#5, #9, #11, #12, #15, #23, #24, #27, #28, #30, CT#37, CT#46b, CT#61]. Their comments included:

- The non-Hispanic white male owner of a trucking firm explained that his trucking firm had worked with the Los Angeles water district in the past. His trucks delivered drinking water

to Northridge area residents who did not have any water after the big earthquake in the early 1990s.

The same interviewee offered his general opinion about attempting to get work with public agencies in Los Angeles, responding, “The problem with trying to obtain work in this type of business in the Los Angeles area is that districts and the state governments don’t have a lot of calls for trucking companies. It is a service that’s more private sector-based.” He concluded by noting, “It’s been so long since I’ve submitted a bid to Metro, county, or state.” [#23]

- The Black American male owner of a DBE- and SBE-certified contracting firm stated, “Basically, there is a lot of unfairness, just a lot of mishandling of things in public contracting. For instance, I just recently won a contract from a public agency where I was low [bidder] on it and the agency decided to rebid it with hopes that I would not be the low bid the second time.” He added, “...the agency practices unfairness. In this example, the things that the agency added to the job were not things for a substantial difference, meaning they could have ordered a change order or added the differences to the contract, but they did not and chose to rebid it.”

The same interviewee stated, “...a lot of times now, I’m really using the internet to my advantage going to the public agency, on their website” to learn about prime and subcontract opportunities. He also mentioned his use of FW Dodge, BidSync, vendor databases, and cold search. [CT #61]

- The non-Hispanic white male representative of a DBE- and MBE-certified specialty contracting company stated that regulations for work in the public sector can cause difficulties for small businesses when they conflict with a public agency’s preferences. He said, “For example, the EPA fines us for doing something one [way]. It’s a battle of the local resident engineer on the projects because if we do it EPA’s way, Caltrans is not satisfied. The regulations are...not consistent with the agencies.” [CT#46b]
- When asked to describe the firm’s experiences getting work with public agencies in the Los Angeles area, the executive of a SBE-certified non-Hispanic white male-owned landscape architecture firm stated “We attempted to work with the Bureau of Engineering for City of Los Angeles. Currently, we are working with the Los Angeles Department of Transportation (LADOT). In the past, we’ve worked for the Department of Recreation and Parks for the City of LA, and we’ve worked for the Department of Parks and Recreations for the County of LA. We tried to work with Metro, but didn’t get very far.”

The same interviewee commented on the difficulties of public sector work, stating “I’m thinking of certain [public] projects that we have had where there’s been turnover in the agency by either general managers, department heads, or people who are actually working on the project and they’re rotated out or they leave the agency, and so there can be problems with continuity and consistency or you’ve done work and then the parameters change, because there’s a new general manager, and they don’t agree with the previous general manager. So it has happened where we’ve had to change construction documents, so things have gotten stretched out from being a year or two in production to being four years in production. And there’s a loss of public confidence from that, where things aren’t

being done on time, and there's a loss of money when we need to do these changes - because we're not always reimbursed." [#5]

- When asked to describe his experience performing work with public agencies in the Los Angeles area, the non-Hispanic white male owner of a janitorial services firm explained that he has worked with Amtrak and Culver City. He stated the nature of the projects was janitorial and he worked directly with the agencies. He stated the bid process and receiving payment was "easy, it was easier because they're always on time." The project lasted a total of 30 days. [#9]
- The Asian American male representative of a minority professionals society explained, "Overall, the members are not very successful [at getting work with public agencies in Los Angeles], especially the older firms that have been in business for more than 20 or 30 years. They are not used to the Design-Build model. They think that DBE opportunities are limited because big firms tend to have preferred teams for the Design-Build projects. [The older firms] are used to the old way. Many are engineers who do their own design work and do not understand the process of separating goals between the design and construction side." [#11]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm replied, "Challenging. You can't be in all places at one time. There's a hustle to do business development, to find what teams to get on and try to stay in communication with those people. Metro is challenging. I've never won a significant contract with Metro. I've only primed with LAX for \$5M and the school district for a \$2M project. Those are contracts you can take to the bank. If a client is serious, they need to do the business right away, not on a task order basis. LAX makes it easier for SBE's to win contracts. They unbundle the work. Some agencies don't have the people resources to do that. Metro definitely has the deep pocket resources to unbundle. Inglewood is a good example of a city that hires within a certain radius of the projects." [#15]
- The non-Hispanic white male owner of a specialty construction firm said that having to struggle to start working in the public sector could be good. He commented, "Is it a pain in the rear? Yes, but it weeds out the sloppy contractors." He noted that a contractor might appreciate the work more if it is a little bit of a struggle to get into the public sector, but he added that it would be nice for it to be easier to obtain work in the public sector.

The same business owner added that he has thought about getting involved with Caltrans doing "small punch list jobs" and growing slowly. [CT#37]

- The Asian American male manager of an international architectural, planning, and engineering services firm stated, "Absolutely, [we work in the public sector]. Here in the Los Angeles office, we predominately work with public agencies, probably about 80/20 on the public side. We do work for cities, counties, the state, federal government." When asked to describe the firm's experiences getting work with public agencies in the Los Angeles area, the noted, "We've been doing work for Metro for 35 years. We've been doing work for all of the cities in Southern California, in various forms. [We've been doing work for] Orange, Los Angeles, San Bernardino, Riverside Counties. Basically, the focus of the firm is so broad we

can actually do a lot of work for these various agencies. It has been successful for us. We have had some challenges, increasingly in the years that are coming. Specifically, for this program, the percentage of small business and disadvantaged [business] is growing and growing [for contracts]. And what that's doing, is it's actually making it very difficult for a medium size company, like ours, to find a role on a team." [#12]

- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm indicated he has relatively good experiences attempting to get work with Los Angeles public agencies. He stated, "I find [public sector work] to be transparent. At the moment, [it is] a little more difficult [to get]. That's why working with primes makes a lot more sense because if you want to work with LAUSD or LACCD you must have completed five previous projects within the last five years and it's very difficult. I've interviewed with LAWA, LACCD, and LAUSD but have not pursued any work with Metro." [#28]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm explained that her firm fills supply orders for water-treatment plants, water lines, and other water supply equipment for the Los Angeles Department of Water and Power. She noted that her firm does not bid on these projects, but is the preferred vendor. She described the way her firm does business with LA DWP, stating, "It's actually quite simple. A lot of the time, we get the order from the engineers or the guys out in the field, they call it in, they request the material. Sometimes, we do an estimate, sometimes it's not necessary. Sometimes a P.O. is issued. It's just very fast." [#30]
- The non-Hispanic white male owner of a specialty trucking firm indicated his firm has never bid on public sector work as a prime or a sub. He explained that because his firm had a prior relationship with certain primes, the primes would solicit the firm's services as subcontractor on public sector contracts. He stated his firm has always been paid in a timely manner when the firm has worked as a subcontractor on Metro projects. [#24]

**Six business owners described their experiences working with or attempting to get work with Metro specifically. [#6, #8, #9, #13, #24, WT#10] For example:**

- The non-Hispanic white male owner of a specialty trucking firm explained that his firm is a subcontractor on a Metro project where the firm's role is to deliver environmental cleaning supplies to clean out asbestos and lead in buildings. He went on to say that his firm has had good experiences with Metro projects. However, his firm has always worked directly for the prime that had the Metro contract. His firm has never had a direct contract with or performed any direct work for Metro. [#24]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm responded, "We worked with Metro on a...project as a subcontractor. It was fun and different because we had an opportunity to do field work and be on the job site. Everything with Metro is an open book, very transparent [compared with other projects where site visits may not have been part of the process]. With Metro, everything runs like a well-oiled machine."[#6]

- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm described one a rare instance when the firm bid on a Metro project as a prime contractor, stating, “It was easy. We went through the steps of figuring out when the job was going to happen, the requirements, if we could handle the scope of the work.” He added, “As long as you follow the checklist to see if the project is a good fit, it’s easy.”[#8]
- When asked to describe his experience getting work with public agencies in the Los Angeles area, the non-Hispanic white male owner of a janitorial services firm replied that he put in a proposal with Metro about 12 years ago but had “never been in contact with Metro before.”[#9]
- The female administrator of a DBE-, SBE-certified architecture firm responded, “It’s difficult to break into the Metro family without having prior project experience. Even though our office has been in business for over 15 years and has 30+ years of professional experience, it’s not sufficient without prior ‘relevant project experience’ on all the RFPs I’ve seen.” [WT#10]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, “I’ve worked with the City of Los Angeles. I’ve worked with Metro. And it’s been pleasant so far. They provided a good service. All of them were highway or bridge construction [projects].” He added the firm bid as a sub on these projects. [#13]

**Barriers and challenges to working with public agencies.** Interviewees spoke about the challenges they face when working with public agencies, including Metro.

**Two business owners commented on payment issues with Metro.** [#1, #29] For example:

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm responded, “Working with Metro, I know twelve companies that went out of business because Metro didn’t pay during the recession. A lot of the small business are scared because [Metro has] not taken care of them.”

The same interviewee described a very specific payment issue on a Metro project. She recounted an incident when her firm was a subcontractor on a Metro project. Her prime expected her to fulfill her side of the contract without pay. She explained that she and the prime had a meeting but she ended up losing the contract. She stated that Metro told her to handle the situation herself with her prime. She stated, “Well, that one [prime] from [the] Metro [project] that didn’t pay me, and Metro didn’t stick up for me, and I won’t work for them because they have no integrity and they don’t care. They don’t care!” [#29]

- When asked about the firm’s experience actually performing work on Metro projects, the manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm expressed his frustrations with not getting paid on-time as a small business. He described a disconnect between Metro and the subcontractor as well as between the prime contractor and the subcontractor. He said that Metro and the prime contractors do not understand the ways in which cash flow is critical for a small business. He explained that when starting a Metro project, he knows that the firm will not receive

payment for services for at least 60 days. Yet, the firm still needs to pay its workers every 7 to 15 days.

The same interviewee described the lack of timely payment for services by Metro as an “incredible amount of inconsideration.” He explained that the agency attitude is “if you cannot absorb this, then don’t work with us.” As an example of the agency’s lack of understanding about operating a small business, he recalled a recent meeting with a Transportation Director who stated that she has never worked for a small business or owned a small business. He asked, “How can they understand the plight of a small business, if they have no experience in that arena?”[#1]

**Others highlighted the complexity and difficulty of the public sector bidding process, and the length and large size of projects as challenges, especially for small disadvantaged firms.** [#2, #11, #13, #27, #41, WT#2, WT#10] Several business owners discussed these challenges in the context of working with Metro.

- In discussing his firm’s experiences as an engineering subcontractor on LA DWP and LA PWD projects, the Asian American male owner of a structural and civil engineering firm stated it was harder to find work opportunities with these public agencies. He explained, “Normally, we rely mostly through phone invitation. And also by mail invitation to see if we were interested to bid in that particular project.” He also noted that the bidding process for this public sector work was more challenging. He said, “It’s harder because of the competition involved, the bond requirements, insurance requirements, and the necessary capital to perform the work.”[#27]
- When asked to describe his experience getting work with public agencies in the Los Angeles area, the executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm described a specific instance where his firm worked as a prime consultant on a Metro project that had a SBE set-aside. He explained that the firm teamed with a larger civil engineering firm and that the process with Metro “was a learning experience.” He indicated that it was difficult for his firm to go after the work because they do not have a marketing group or staff to prepare the proposal. He explained, “Our firm is small so our marketing group is one full time person. We don’t have the experience or staff to prepare proposals, especially what we think would be expected by Metro.” He also responded, “It is really not the agencies that are different, but the person we are working with that differs between agencies.” He added it is the management style and execution of the tasks that distinguishes the agencies, but that “[there are] no real differences between the agencies” when performing the work. [#2]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm explained, “The one time we bid as a prime was because Metro is doing some SBE set-asides. There is a lot of room for improvement with the process. The timelines are not always humanly possible. When you look at the big giant firms that have proposal teams, they can afford to meet these timelines. They have the overhead, I don’t have the staff. The requirements are the same [for small business set-asides], as the big RFPs. They need to make it simpler. Don’t ask me to provide resumes for 20 people, in a certain format. Tailor it and make it reasonable for a small firm.” [#11]

- The male owner of an engineering company stated, “With the size of a typical project, it presents a major impediment to smaller firms not only trying to grow but trying to stay afloat because us smaller firms do not have the capacity to bid on most projects due to their size, up front capital requirements, and resources.” [WT#2]
- The female administrator of a DBE-, SBE-certified architecture firm expressed, “RFP requirements are difficult to understand for small businesses. The forms and fee/pricing spreadsheets are complicated and not enough explanations or instructions are given. It may be easy for firms that have done it in the past, but for new firms it’s Greek to us. We are terrified our RFPs will be disqualified or considered ‘non-responsive’ because we did not prepare the forms correctly”.

The same interviewee continued, “A class or an online resource dealing with Metro forms/preparing a RFP would be helpful for ‘newbies’ like us. A simplified version of RFP for small sized projects gives us a chance to practice submitting abbreviated versions of the RFPs which takes up less resources and time to prepare. Most small businesses do not have full-time admin/marketing staff to prepare and handle RFPs. We submitted two RFPs and both were cancelled so no debriefing was provided. Given our limited project experience we knew we had slim chance of winning the contract; however, we took the time to prepare and submitted the RFP hoping to get a debriefing which will help us write a better proposal for the next time. Unfortunately, when the projects were cancelled, no debriefing was permitted. After spending an inordinate amount of time preparing the RFP, we are still unsure if what we did was good, bad or otherwise. Furthermore, given the time, effort and resources it took for us to prepare the RFPs, I am not certain it’s a worthwhile for us to do it again.”[WT#10]

- The non-Hispanic white male representative of a regional disadvantaged business association stated “The No. 1 complaint from DBEs is that the contracts and process are so lengthy. They have to hire attorneys, which they can’t afford. No. 2 is their capability to grow into the contract; they often can’t execute. Mom and pop operations can’t handle a \$1 million contract. No. 3 is the fear factor, about everything--fear of winning the contract and then fear about fulfilling it. Members fear that the length of a contract and the fact that it could be for as much as \$3 million will be too difficult for them to undertake successfully.” [#41]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, “I’ve worked with the City of Los Angeles. I’ve worked with Metro.” He continued, “The Metro Look Ahead is not quite accurate. It changes a lot. We worked a lot with SBCTA, Riverside County, RCTC. Their process is very fixed. We send out the RFP, get short-listed, interview, we get the project or not. With Metro it takes forever. A year later, we hear about it and interview. So it’s very unusual for Metro [to move quickly]. And the interview was much less formal. I think that’s why we won the job, because we were able to explain the situation. The other agencies bring a lot of third parties. Metro did not have any third parties.” [#13]

**Several business owners described favoritism in the project team and bid selection process for public agency contracts. One business owner was also critical of bench contracts.** [#3, #14, WT#2, WT#10] Their comments included:

- The non-Hispanic white male owner of a pest control firm replied, “My intuition is that I don’t think the information is out there on how public agencies award contracts. What is their procurement procedure? I used to work for the State in contracts and procurement. I was aware how they did contracts. I used to do Accounts Payable. There was an elite group of vendors. I could see how there might be racial limitations there for people – maybe people that didn’t speak English [well.]” [#14]
- The Hispanic American male owner of a DBE- and SBE-certified professional firm responded, “I believe there is unfairness in terms of the selection process. There is favoritism. You get your foot in the door with the proposal, but the panel selection is then very subjective, the scoring is subjective. I think anybody on the panel should recuse themselves from evaluating if they worked with the party being interviewed.”

The same interviewee added “[bench contracts] are also a problem. Why have them? I’ve been a sub on a bench [contract] and never got work. The theory of a bench is that they can use someone right away with no long bidding procedures. This is ridiculous. In the type of work I do, there is no urgency. It’s not like a water main emergency. These projects are known about many months or a year ahead.” [#3]

- The male owner of an engineering company stated, “Us smaller firms do see the trends that the same typical firms always are awarded the majority of contracts and rightfully so due to their ability to manage and facilitate projects as large as those that typically come out however the same opportunities, maybe on a smaller scale, should be available to other tax paying companies or citizens that are smaller in size because it appears as if most of the tax funded capital projects are distributed only to a select few big companies. There is no recirculation or redistribution of the outflow of tax revenue. [WT#2]
- The female administrator of a DBE-, SBE-certified architecture firm responded, “Most of the Metro projects are too large for small businesses to handle. It appears most of the large projects go to the same large firms over and over again and all of them seem to have established SBE/DBE firms they use over and over again. [WT#10]

**Metro bidding and contracting processes.** Interviewees shared a number of comments about Metro’s contracting and bidding processes.

**Three business owners viewed Metro as more approachable and focused on small business development than other public agencies.** [#1, #3, #41] Their comments included:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm responded that Metro is the most approachable of the agencies, because its prequalification requirements are not overly restrictive, and that the requirements do not present a barrier to obtaining work. However, he added that there are still too many good small businesses that don’t have the understanding or savvy to go after



this work. He observed that while there are consulting businesses out there that will walk smaller firms through this process, that approach is too costly. In describing his firm's experiences with the bidding process, the same interviewee stated that Metro is the easiest agency to work with at this point, with respect to communicating its requirements and having a transparent process. He added that Metro has a larger vision of working with the small business community and is more willing to provide assistance with the bidding process. He concluded by stating, "but, I don't want to say it's all 'hunky dory' by any means."[#1]

- The non-Hispanic white male representative of a regional disadvantaged business association responded that one of Metro's "greatest assets is its prompt-pay clause," paying within seven days. He observed that Metro encourages primes to pay promptly as well, which has not always been well received by the primes, adding, "Metro by far is the best public agency in terms of prompt payment." [#41]
- When asked about the firm's experience performing work on Metro projects compared to projects with other public agencies in Los Angeles, the Hispanic American male owner of a DBE- and SBE-certified professional service firm responded, "The biggest difference is that Metro, over the last years and during the recession had the most opportunities [compared to other agencies and cities]. Many consultants of my type tried to get work with other agencies, and we agree that Metro provides the most opportunity for SBE and DBE firms and are the strongest in bringing along small firms."[#3]

**One business owner remarked that the scheduling and parking for Metro's disadvantaged business outreach events can be challenging.** During a focus group session, a small business owner commented that "You get the DB outreach like that [the project-based "Building the Contractor Team" networking events] and there's three or four of them on the same afternoon... how can you do all four... when... just walking from one building to another is a challenge.. and finding parking is \$40.00 for each and every building, that's \$120 to\$160 for one day. ...So it is sometimes impractical." [FG#2]

**Five business owners discussed difficulties in learning about Metro and agency contract opportunities, and underlined their frustrations with online vendor portals.** [#13, #26, #41, WT#1, WT#12]. For example:

- The male representative of a construction-related firm expressed, "I've worked with just about every agency in Southern California except Metro. For some reason they don't advertise jobs like others do. So I just stopped looking." [WT#12]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that it is more difficult to find out about work opportunities at Metro, but did not provide specific reasons as to why this is a challenge. [#41]
- When asked about her experiences applying for janitorial and cleaning services work with Metro, the Black American female owner of a janitorial services firm commented on the difficulty of finding relevant contract opportunities online. She stated, "Their online system is a little complicated. I mean it's kind of hard to navigate. I mean they could probably

simplify that a little more because on one section - where it asks you to look at the solicitations where they have numbers and they have the descriptions - it's so many. So, if they can 'segmentize' – if that's a word – things that are for the janitorial contractors as primes, list that in a section, then we can look. Because we're scrolling through a lot of stuff that doesn't pertain to us. When you go through the section of solicitations, you have to scroll through pages and pages of stuff that doesn't pertain to us at all." [#26]

- The owner of DBE- and MWBE-certified specialty supply firm noted, "The vendor portal never brings up [the auto] parts that we could offer. Most of the stuff that is solicited and set aside for small business consists of big bus parts. We tried one time to sell some Freon and were seriously under bid by another vendor." [WT#1]
- When asked if he had any recommendations for Metro to improve its notification or bid process, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated, "Metro relies on their website quite a bit. Caltrans – whenever they update their Look Ahead, they send an email out. Metro doesn't. Other agencies use PlanetBids. Metro gives a one-time notification. If you miss it, you miss it. Metro uses their website. Metro's website is hard to navigate." [#13]

**Several business owners thought Metro's bid process was harder, and that working with Metro was more challenging, than work they have done for other public agencies.** [#12, #25, #41] For example:

- The Asian American male manager of an international architectural, planning, and engineering services firm stated, "It is in the upper end of more difficult. It's a more formalized process. We've worked for other agencies where it's been a very simple contract with simple forms that you need to fill out, standard government overhead rates. Everything's quick. With Metro, it tends to be more formalized. The part that is a bit challenging is the length of time or lack of feedback that you get after you've interviewed. That process makes it difficult because if you were one of the short-listed firms, you tend to get notified, which is great. But if you're not one of the short-listed firms, it could be months. And really the only feedback you get is, 'We'll notify you when it goes to the board.' Which doesn't really tell you what's happening. The truth is we spend a lot of money going after pursuits. And we would appreciate it if we hear and are treated like, 'You spent money, and we want to honor that,' as opposed to 'You'll know when you'll know.'" [#12]
- The non-Hispanic white male representative of a regional disadvantaged business association noted that the process is unequivocally more difficult with Metro because of the complexity of the RFPs. Some Metro projects require pre-qualification. Working with Metro "is marvelous once you penetrate the barrier of intimidation" to get through the process to obtain the job. [#41]
- The Asian American male owner of an MBE- and SBE-certified engineering firm explained, "City and County [of Los Angeles] is easier to work with more than Metro because the nature and size of the projects that Metro puts out are so big. Working with Metro is much harder for the same reason because the sizes of the contracts are so large." [#25]

**Many business owners shared recommendations as to how Metro or other public agencies could improve their contract notification or bid process.** [#2, #3, #22, #24, #27, PT#1]. For example:

- The Asian American male owner of a structural and civil engineering firm stated Metro should consider creating a sister website where they can post small project opportunities for small businesses. [#27]
- The Hispanic American male owner of a demolition and trucking firm stated that the bidding process should be easier for small businesses. He advocated for better advertising of contracts, simpler formats, and ensuring the agencies were more easily reachable by minorities. He stated, “Public agencies have a different way of bidding but Metro seems to be a harder process to finding ways to get the jobs rather than other agencies. As far as Metro, they’re a little more complicated.”[#22]
- The non-Hispanic white male owner of a specialty trucking firm stated that having a simplified portal for bidding opportunities where all the agencies could post contracting opportunities would be helpful. [#24]
- When asked about additional recommendations for improving Metro’s or other state agencies’ small business inclusion programs, the executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm, replied, “Getting information earlier in the bidding process would be helpful, especially on larger Metro projects.” He explained that it would be beneficial to obtain information during the RFQ process. Specifically, he explained that it would be helpful, “to be able to go to the Metro website to see the selected teams and see if there are openings with the selected teams. Ideally, for us it would be nice to get there before other Design-Build teams perform their Outreach.” He explained, “It would be nice to be notified about project updates. As a small firm it is difficult to stay current. We would like an email that automatically notifies us, for example, of the status during the environmental report process. We do not have time to follow projects.”[#2]
- The Hispanic American male owner of a DBE- and SBE- certified professional service firm commented, “Contract award notice - this was mentioned in the last [disparity] study. [Business owners recommended] that there should be a posting for contract awards. Now, there’s no way to know without a public records request. [Metro] should post who is getting the work. They won’t tell you how the much contract was. Yes, you can monitor board reports every month, but why can’t we receive a running list [that tells us] who got the work, for how much, [and] are they an SBE? Otherwise you have to dig, or make a public records request. We need more transparency. Also utilization reports should be published monthly on a web page.”

The same interviewee added, “There should be [a contract] debriefing [the process where the awarding agency explains to the non-successful bidder the reason they were not awarded the contract] without having to request it and find out what your scores are so that you can improve. You should automatically receive your score compared with the other firms, and why you are not selected.” [#3]

- A male representative of a DBE-certified firm stated, “For someone that maybe hasn’t had a contract directly with Metro, there should be some type of points given to them. So many of us are sub-tier going to Metro they ask ‘Have you ever had a contract with us directly?’ Most of us would say ‘no’. So unbundling large contracts could actually make a difference. If you were to give five points to somebody who’s never had a contract before that would really encourage the first-time user.” [PT#1]

## **G. Barriers to Business Development and Any Race-/Ethnicity- or Gender-based Discrimination.**

Business owners and managers discussed a variety of barriers to business development and any experiences with discrimination. Section G presents their comments highlight the most frequently mentioned barriers and challenges first:

- Insurance requirements and obtaining insurance (*page 68*);
- Obtaining financing (*page 71*);
- Delayed payment, lack of payment, or other payment issues (*page 73*);
- Any unnecessarily restrictive contract specifications (*page 75*);
- Personnel and labor (*page 76*);
- Prequalification requirements (*page 77*);
- Bid shopping or bid manipulation (*page 78*);
- Learning about work or marketing (*page 79*);
- Bid processes and criteria (*page 80*);
- Bonding (*page 80*);
- Equipment (*page 81*);
- Working with unions (*page 82*);
- Other challenges (*page 82*);
- General disadvantages for small businesses (*page 82*); and
- Other comments about marketplace barriers and discrimination (*page 84*).

**Insurance requirements and obtaining insurance.** Business owners and managers discussed their perspectives on insurance.

**Thirteen firms reported challenges associated with insurance requirements for contract jobs, including Metro’s requirements for contractors.** [#2, #3, #5, #11, #12, #13, #30, Avail#7, Avail#17, WT#14, CT #2, CT #61] For example:

- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm, responded that bonding, permits, and licenses were not a problem, but that insurance limits sometimes presented a problem. He explained, “A lot of the projects require higher limits than we have. We have to increase our

insurance and carry that coverage for a number of years.” He explained that there was a pipeline project on which they wanted to bid, but stated, “We couldn’t cover the \$10 million insurance requirement – it did not make sense for us.”[#2]

- The Hispanic American male owner of a DBE- and SBE-certified professional service firm stated that “the insurance, especially the professional liability errors and omissions, is a big impediment. There is no liability to the agency in doing a planning study, but they impose the same requirements with onerous limits as on a construction project. It is very expensive, the agency insists on a \$4,000 per year [liability insurance] policy. Metro requires you to carry the policy for three years after the project is over. When the project is only \$50,000 that is ridiculous. It is not required for most of the work I do. If you are not going to use it for your other projects, then [carrying that much liability insurance is] too onerous of a cost.”[#3]
- The executive of a non-Hispanic white male-owned landscape architecture firm explained, “In this case, the insurance requirements shouldn’t be one-size-fits-all, because if a landscape architect is working on a \$20,000,000 project, and our portion of that work is \$500,000 or \$250,000, sometimes we’re being asked to have insurance coverage which is the same as the engineer or the architect who needs to have it for the \$20,000,000. So, for us to be paying for insurance coverage which is far greater than our role in the project is not good, and many agencies and companies don’t recognize that. So in some cases, we can ask for an exception, but usually there’s these standard contracts that are developed by the lawyers for the agency or the company and they don’t get it. So we’d be asked to have 2 or 5 million dollars-worth of coverage for professional liability and our full extent of exposure is \$200,000. We can’t justify paying that amount of insurance for one project when our fee on that project is not adequate to cover the additional insurance. If the agency or company says, ‘We have this requirement and we’ll pay for that extra insurance that we’re asking you to pull’ then that’s fine, but that’s not usually the case. So insurance can be a big impediment.”[#5]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm had several comments. He noted, “[business insurance is] not really hard to obtain, but there should be a cheat-sheet that says what a guy like me offering my services needs for coverage. They lump me into the design professionals [category], but I don’t design anything, so I pay too much. The work I do does not warrant this type of coverage. I am not going to design foundations or any high risk activity. I’m just going to read reports and tell you if it meets requirements and specs. It is for information only. Metro may want to provide guidance.” [#11]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded, “We can obtain insurance. The requirements: I’ve seen become more and more ridiculous. Nothing from Metro yet, but working with other agencies require \$10,000,000 professional liability insurance. Typically it’s \$1,000,000 to \$2,000,000. For bond projects, they ask us for \$10,000,000. I told [the agencies] ‘the maximum we can get you is \$5,000,000. Look at our revenue.’ I see a lot of agencies starting to require for cyber-attack insurance. For us it costs \$3,000 a year. It’s not worth it for us.” [#13]

- The Asian American male manager of an international architectural, planning, and engineering services firm responded, “We’re a medium to large firm, so we’re in a different category than a small business. I’m not representing small businesses. I think understanding the industry, small businesses do have challenges with those things, like insurance and bonding. And I’m relating it from the standpoint of when we talk to our small businesses as a sub, and we tell them, ‘Metro has imposed on us a \$2,000,000 insurance requirement.’ We can absorb that, typically. A small business can’t, because all of a sudden, you’ve doubled or tripled their insurance cost. Which is also a double-edged sword, because then what happens is they can’t obtain that insurance, so then we, as the prime, have to cover them. If we are to use them. Then that becomes a cost and burden to us. Which makes our business less profitable and imposes a problem.”

The same interviewee continued, “But I also see a problem from Metro’s standpoint, because if you don’t have everyone well-insured and well-bonded, if there is ever a default or problem with the project, Metro could be left holding the entire bag.” He added, “So that is one aspect of this general question that I did want to bring to Metro’s attention. We are supportive of the whole program...of small businesses, disadvantaged businesses. We absolutely have been, and always will be. But we also see that the percentage - the requirements which is being mandated by Metro is starting to grow very large. In some cases greater than 30 percent. And essentially what that does is it means there’s only going to be one large firm, and the small businesses. Because the large firm, they have to do at least 50 percent of the work in order to cover the expense of managing that work. That’s just business. And if they don’t have 50 percent, they’re not going to prime. The 30 percent mandate means there’s no other medium size firm, like [our firm] in the picture. So now you have all of these small businesses who probably don’t have the bonding or the insurance, if it’s a big project – \$2,000,000 bond, \$4,000,000 bond. They’re going to be, ‘If something happens, you’re just going to put us out of business. We’ll go bankrupt. We’re over.’ And the large business may not be able to cover them. In essence by mandating such a large percentage, we’ve actually socially engineered a team that may or may not have the capacity if something goes wrong. And it shifts all of that risk back to Metro. We should absolutely have a percentage in there to sponsor that growth, but if it gets too large, we could have problems. Because we’re going to shut out the medium size businesses.” [#12]

- When surveyed, a business owner responded, “It’s quite harsh for transportation projects. The insurance cost is too high for minority-owned businesses.” [Avail#7]
- When surveyed, a business owner responded, “Insurance is going through the roof, and Bid Bonds are difficult to obtain.” [Avail#17]
- The principal of an Economically Disadvantaged Woman-Owned Small Business (EDWOSB) and a DBE-and SBE-certified construction-related firm reported that prime contractors have unrealistic expectations of subcontractors in the public sector. She commented, “...It is not affordable for the small contractor to pay additional insurance cost just to secure the contract.” [WT#14]

- The Black American female owner of a new construction-related business said that she assumes “insurance could be an issue and I assume it’s really gonna be expensive getting started.” [CT #2]
- The Black American male owner of a DBE- and SBE-certified contracting firm stated that insurance is “a blanket; you can’t really generalize it as a key [to business success] because it fluctuates. There are some prime contractors that allow you to work with them as long as you meet the insurance requirements.” [CT #61]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm responded that obtaining insurance has been a barrier for her firm due to the nature of her business. [#30]

**Three firms noted that insurance has been a challenge but did not provide specifics.** [#27, #25, #2]

**Two firms had other comments on insurance.** [#14, #20] For example:

- The Asian American male owner of a trucking firm stated that his firm will work hand-in-hand with the insurance agents to find the best deal on business insurance due to rising premiums. [#20]
- When asked if insurance requirements are a barrier to business in the local marketplace, the non-Hispanic white male owner of a pest control firm responded, “It’s expensive with insurance for workers’ comp and liability insurance for vehicles. It can be a problem that it can be expensive and vary quite a bit.” [#14]

**Obtaining financing.** Interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics [#26, #27]. Many firms described how securing capital had been a challenge for their businesses. Examples of their comments are included below.

**Eleven firms described challenges associated with obtaining financing.** [#11, #13, #15, #20, #30, #37, Avail#1, Avail#22, Avail#28, CT #2, CT #27, CT #37, CT #46a] For example:

- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded “I have lot of thoughts about this. When I started my own firm, I had no savings. I cashed out my PTO, and that was my capital. I went to the bank that has my mortgage, and they would not even issue me a company credit card. I attended small business training at resource centers and the Value Development Counsel. They would introduce you to a bank, but I would always get declined. What nobody tells you [at the resource centers] is that the bank wants three years of business activity. There is a definite problem with funding. Not a lot of people who have dreams of starting a small business have more than \$20,000 in their account. Now that my cash flow is positive and the bank is seeing \$60,000 to \$70,000 in a month they send me invitations to apply [for credit]. But, Wells Fargo who has seen my account go from zero to a quarter of a million still will not issue me a company credit card. Finally, QuickBooks invited me to apply for a small

business loan. Even though I don't need the money, I applied, because I want to build credit. I was immediately given \$20,000. There should be more banks like this. This is a space that needs a lot of work." [#11]

- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded that obtaining financing has been a barrier for his firm. He explained, "I've been trying to get a line of credit, but they refused it. It has been a challenge for us, but it has nothing to do with race. It was a matter of timing." [#13]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm responded, "If the contract is not large enough, I can't get financing. If I'm a sub on [a project]...and my contract is \$5M and I know the first 20 months is design services and that I'm going to burn \$3M, I can go to the bank and get a revolving line of credit. If you give me a \$1M contract for five years, I can't go to the bank, there is not enough burn rate. That's something that public agencies need to be conscious about. This way, you can't hire people, you get scared. They're going to cost you, and you have to pay out of pocket until you get paid." [#15]
- When surveyed, a business owner responded, "It's a little rough at the start to gather capital. I should be underway to take contracts this year." [Avail#1]
- When surveyed, a business owner responded, "Financing for growth has been hard over the past few years; also hiring good qualified people has been a barrier." [Avail#22]
- When surveyed, a business owner responded, "It's hard to get affordable financing to start." [Avail#28]
- The Black American female owner of a construction-related business stated that the biggest challenge to starting and maintaining her company is obtaining funding. She reported having very little cash or other resources to invest at startup, which affected her ability to pursue opportunities, purchase equipment, and fund the day-to-day operations of her business. [CT #2]
- The non-Hispanic white male owner of a specialty construction firm stated that cash flow is the biggest barrier to doing business. He stated that he is not going to take out a loan of \$60,000 or more to fund a job. He added that he would rather his business stay small than take out a loan.
- The same business owner stated that financing is like "a big, huge machine." He explained that if he went out and bought a piece of equipment, he would have to finance it; and, then, in order to make the payments, he would have to go out and get jobs just to help pay for the equipment. He added that seeking financial assistance makes him "a little afraid," because "it seems so far out of reach." He went on to say that "it probably isn't.... They're just as willing to help me if I would just work with and call them and enlist their assistance." [CT #37]
- The Hispanic American male owner of a DBE- and MBE-certified specialty contracting company reported that financing is hard to acquire. He stated that his firm has not been



able to get any financing. He explained, "...We have taken out hard cash loans to keep the company flowing. So we're stuck where we're at." [CT #46a]

- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm confirmed that her firm found access to financing a challenge when it applied for small business loans [#30].
- The Asian American male owner of a trucking firm stated that financing has always been a challenge for his firm, but more so when the firm first started. He explained that obtaining financing has become "a little easier." [#20]

**Two firms offered other comments on obtaining financing.** [CT #2, CT #49] For example:

- The Native American male owner of a DBE-certified construction-related firm said that financing is a key to business success. He also commented, "Having a line of credit is crucial to be able to survive." He added that, in his current industry, credit helps in paying employee salaries and consultant's fees. [CT #49]
- The Black American female owner of a construction-related business said that access to financing "could be a barrier.... Hopefully it's not. I have a good product, so hopefully it's not a barrier." [CT #2]

**Delayed payment, lack of payment, or other payment issues.** Nine business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#5, #12, #13, #23, #26, #30, Avail #11, CT #61, WT#A].

- The Black American female owner of a janitorial services firm noted that her firm has experienced slow payments but that the payment delay was not due to racial-, ethnic- or gender-based discrimination. [#26]
- The non-Hispanic white male owner of a trucking firm stated that timely payment by the customer or prime has always presented itself as a challenge but expressed that these late payments are not due to any type of discrimination. [#23]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm replied, "You usually get some non-payment in the private sector. And since we're the sub-consultant, we usually don't have very much control over that. Because you won't be paid if the primes not paid. Also if there's some issue with the primes work or other consultants, the agreement is the prime doesn't pay sub-consultants unless he or she is paid. So, I would say that [timely payment] is an issue more in the private sector than the public sector."[#5]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm replied, "It's always a challenge because we don't get paid fast enough. My challenge is 30 percent of my total contract goes to my subs. And all those subs want their money fast. And because I'm a small company I always pay them fast because I want to

maintain a relationship with those companies. If we don't get paid fast enough we can't pay them. We always have a huge cash flow issue." [#13]

- When asked to describe the firm's experiences getting paid on Metro work or other work with public agencies in the Los Angeles area, the Asian American male manager of an international architectural, planning, and engineering services firm responded, "It tends to be pretty good. [But] I mentioned we get into this nebulous area of we had scope changes, but it hasn't resulted in changes in budget. That can take months sometimes. I think it reflects the fact that it may or may not be a priority of the project manager to resolve those issues. So, what could happen is of those changes and deviations, we're not allowed to bill. If we're not allowed to bill, we're not going to get paid. Even for a firm our size, that hurts. If we're not paid in 30 days, 60 days or longer, we're going to have to go out and get a loan to pay our employees. And that's a cost we don't get reimbursed. So, it goes back to treating your people fairly, as a business partner and making sure that if there are items that need to be resolved, they are resolved quickly so we can keep the revenue and work flowing. It's making sure that the whole process of scope, budget and approvals are happening in a timely fashion. If there are some items that need resolution, that it gets put onto a resolution path. As opposed to languishing. When there are some differences [about how to best resolve scope issues], it seems to languish, and that's when it becomes very painful for the firm." [#12]
- When surveyed, a business owner responded, "We can't do anything because of the recession. We weren't paid in a timely matter, and lost a lot due to Metro and High Speed Rails not paying on time. [It is a] lack of great business standards." [Avail#11]
- The Black American male owner of a DBE- and SBE-certified contracting firm commented that timely payment by the agency has not been a problem. Caltrans, specifically, pays on time. Regarding other public agencies, the same business owner suggested that they consider the effects of slow payment when budgeting for projects. He said, "Your advance billing, your ability to pay, affect your outcomes. If you are not paid on time, that can cost you possibly 30 percent more in business. Consideration should be given by agencies because the late fees rack up cost of doing business." [CT #61]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm confirmed that she has experienced slow payment by customers. However, the delays were not due to racial, ethnic, or gender-based discrimination. [#30]
- The non-Hispanic white female owner of a WBE- and SBE-certified construction firm discussed her experience getting paid in the private sector. She stated, "On a private contract, I was paid last. After hearing, 'He has a family' and knowing other sub-contractors got paid well before me. I had no funding for 78 days. [WT#A]

**One business manager provided detailed comments about payment issues for subcontractors involved in Metro contracting.** For example:

- The president and CEO of a DBE- and SBE-certified engineering firm stated, "I have had to take a loan this year because the company's cash flow was not regular enough to support

typical expenses. This was due to slow payments from clients. The loan expenses alone will consume all of my profit I would make on the project. Metro provides reporting of prompt payment as a protection for DBEs. What is overlooked is projects that get stalled financially due to incremental funding. The prime contractor has the cash flow to keep working and sustain a gap in payment for three to six months. Concurrently, the Prime contractor does not notify the DBE that there will be an interruption in cash flow. The DBE unknowingly continues to work, building the financial exposure. The DBE submits invoices monthly and they stack up with the prime contractor. The invoices are held back because they are not approved by Metro to be submitted.”

The same interviewee observed, “One way to identify this trend would be for Metro to ask the DBE to report within their system when each invoice was submitted and the invoice amount. This would expose this practice of holding invoices and the expense of it might be eye opening for Metro. I really appreciate the high goals Metro sets for DBEs which has resulted in large value subcontracts for my company, but the interruptions in cash flow I have experienced as a subcontractor can create financial hardship. This does not level the playing field for DBEs to compete with larger firms’ because their cash flow is larger and more diversified. In addition, larger firm project managers (who have not owned a small business) do not understand the financial hardship this creates for DBEs. Monitoring invoice submittal would increase communication and accountability to keep Metro projects moving in the right direction.” [WT#6]

**Any unnecessarily restrictive contract specifications.** The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Eight interviewees commented on personal experiences with barriers related to bidding on public sector contracts [#2, #5, #12, #23, #30, Avail#8, CT #49, FG #3]. Their comments included:

- The non-Hispanic white male owner of a trucking firm stated that unnecessarily restrictive contract specifications on bidding procedures have been a challenge for the firm from time to time. [#23]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm indicated that unnecessarily restrictive contract specifications and bidding procedures have impacted the firm. [#5]
- When surveyed, a business owner responded, “Compliance with the regulations has been a barrier. We are newcomers and we are not familiar with them, so we have to work with a local company.” [Avail#8]
- When asked if unnecessarily restrictive contract specifications and bidding procedures are a barrier to business, the Asian American male manager of an international architectural, planning, and engineering services firm replied, “That is a bit challenging sometimes. In general, it’s just filling out all that information, all the forms, making sure all of that is complete. Not so much for us, but when we have a larger team, and especially with the smaller businesses that are not used to that level of detail. That could be difficult.” [#12]

- The Native American male owner of a DBE-certified construction-related firm stated that local school districts require a five-year “track record” for work performed in his industry and that requirement is unnecessarily restrictive to smaller firms. [CT #49]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm stated that when working with the Department of Industrial Relations (DIR), the prevailing wage and contractor registration requirement is difficult. He expressed frustration with having to explain that his firm is a professional services firm and does not have prevailing wage workers. He explained that the DIR still requires his firm to perform the contractor registration process. He stated, “We don’t have workers covered by prevailing wage, so we do not understand why we have to register. The DIR questionnaire is not designed for a company like ours. If you answer honestly, you can’t complete the registration, so we enter whatever it takes to complete the process.”[#2]
- Commenting on challenges related to Metro’s non-compete contract language, a small business owner added that, “as a small business you count [that contract commitment] as part of your money. The reason why I left the corporate job was because of that. I jump out [as a small business]. Then they got me – they got me a subcontract agreement. ...Then it comes to giving you the task...but there was not a week that I was going more than 20 [hours]. And --- months into this program, [even though the prime] promised [a certain amount]; you haven't even given me [that amount of] work. So I asked to be released out of that contract. Because that contract has a condition that I cannot enter into any other contract with Metro. That can make a small business die right there. That's why I left that contract.” [FG #3]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated that unnecessary restrictive contract specifications on bidding procedures can be a barrier and noted that her firm has experienced this challenge. [#30]

**Personnel and labor.** Eight business owners and managers discussed how personnel and labor can be a barrier to business development [#6, #13, #14, Avail #3, Avail#4, Avail#29, PT#11]. For example:

- The Black American female owner of a janitorial services firm responded that her firm has experienced personnel and labor issues as a barrier to business. She explained that there is no longer a large pool of people with cleaning experience who are applying for work with her company. However, she noted that she does not think discrimination plays a key role in this labor shortage. [#26]
- When asked if personnel/labor is a barrier to business in the local marketplace, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm explained “Finding a good quality person is hard. It’s always a challenge, especially if you’re a small company.” [#13]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm expressed her frustration with the prevailing wage requirements, specifically for

surveyors. She said “We normally pay our surveyors around \$25 an hour, but on a prevailing wage project, you have to pay \$40, when all they [the surveyors] are doing is walking the jobsite and taking measurements. That does not justify \$40 an hour.” [#6]

- When asked if personnel/labor is a barrier to business in the local marketplace the non-Hispanic white male owner of a pest control firm explained “It can be hard. They have a lot of processes now for background checks. This is a problem because if I want to get someone to work, get licensed and do training. I have to hire them and have them take a test with the State. I have to have them go get a scan and hand stamp. I have to submit one to the FBI and the other to the Department of Justice. I’ve had it take six months for them to get back to me. When you have to hire someone and they’re ready to work, and it takes six months for the DOJ to come back...this is a problem I’ve had to call my local congressman to have them call the DOJ. That was very frustrating.” [#14]
- When surveyed, a business owner responded, “There is plenty of work but not enough drivers. It’s hard to find employees. The biggest hit was when the Clean Truck program went into effect.” [Avail#4]
- When surveyed, a business owner responded, “Workers comp is killing us, insurance and field costs are high.” [Avail#3]
- When surveyed, a business owner responded, “The excess of eight hours overtime for security businesses is a barrier. Therefore, people only work three days a week. The workers are hurt more than anyone else.” [Avail#29]
- A female representative of a construction firm provided her experience with Metro bidding expressing, “Metro has a project labor agreement (PLA) on its large construction projects. When outreaching to DBE and Non DBE subs, in certain scopes there are a lot of non-union contractors who refuse to work on a project with a PLA. This has greatly reduced the number of firms that are willing and available to bid on Metro projects.” [PT#11]

**Prequalification requirements.** Public agencies, including Metro, sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on government contracts. Seven business owners and managers discussed the challenges associated with pre-qualification [#14, #23, #30, CT #56, CT #61, FG #2]. Their comments included:

- The non-Hispanic white male owner of a trucking firm stated that prequalification requirements sometimes are a challenge when trying to obtain new business. [#23]
- The non-Hispanic white male owner of a pest control firm stated “[Pre-qualification requirements] could be a problem. [For example] some people may have a case [in their criminal record] for marijuana. It could be skewed racially and cause a delay in getting people hired.” [#14]
- The Subcontinent Asian American female representative of a minority woman-owned DBE-certified supply firm reported that her firm has to submit prequalification information “all

the time.” She added, “...some of the prequalification information that we do fill out, I feel is redundant. There needs to be another way to pre-qualify. It takes ten minutes out of one of our days. I know that ten minutes does not sound like a lot, but at the same time, every bid that we do takes a ten-minute situation. Well, that could take a long time for multiple bids.” [CT #56]

- When asked about prequalification requirements, the Black American male owner of a DBE- and SBE-certified contracting firm responded, “One public agency in particular didn’t require or doesn’t require prequalification. However, they do have new online bidding programs which are hard to get through. The thing is that you have to wait on them to respond to you.” He added, “I’ve tried to get a number a few times to bid and I wasn’t successful.” [CT #61]
- When asked for additional concerns or challenges related to prequalification, a small business owner commented that, “When I did my very first pre-qual, I was totally hungry, surviving out of credit. And yet I passed the pre-qual. If I had a contract, and I had an employee, I had no way to pay my employee. But I have pre-qual. What is the value? And then if... let’s say for example three or four procurements are in front of me right now, all of them requires me to do a pre-qual. So I submit all my pre-qual docs. That’s a lot of work... And not guaranteed to get work. Maybe one way of doing it is you pre-qual before you’re allowed to execute a task order. So that you only exert the effort when it’s already almost a sure shot. Rather than you’re still at the proposal phase, and there’s still eight primes that are going to submit.” [FG#2]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm observed that the prequalification requirement has been a barrier for her firm from time to time, and can also be a challenge for other firms in her line of work [#30].

**Bid shopping or bid manipulation.** Bid shopping refers to the practice of sharing a contractor’s bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process, or a bid, to exclude fair and open competition and/or to unjustly profit. Seven business owners and managers described their experiences with bid shopping and bid manipulation in the Los Angeles marketplace [#1, #5, #8, #23, #30, Avail #23, CT #37]. For example:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm replied “yes, we have experienced this - this is what an RFP is.” He explained that the prime knows what it is building and the cost and that they should be more straightforward in communicating what they are willing to pay. He said, “They need my DBE- participation, but they are still going to shop.”[#1]
- The non-Hispanic white male owner of a trucking firm responded that there was a situation where his firm experienced bid manipulation. He explained, “There was an occasion where a customer took our rates and presented it to a minority-owned competitor and said, ‘This is what you have to beat.’ And I had proof but I couldn’t use it because I didn’t want to alienate the customer.”[#23]

- When asked about bid shopping, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm observed, “I think in terms of public agency work, the bid shopping has been, ‘Are you a DBE?’ because that’s what they want, usually. It’s affected us negatively.”[#5]
- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm responded, “There are times when we know [the General Contractor] is looking for a [bid amount]. They already know who they are going to go with, but want to see if [that subcontractor’s] number is a good number for comparison.”[#8]
- When surveyed, a business owner responded, “When you bid on work, Vets and other companies get priority. Your years in the business don’t matter. Woman and minority companies get the work.” [Avail#23]
- The non-Hispanic white male owner of a specialty construction firm stated that there is a lot of bid shopping that happens because of the economy. He stated that as a contractor you learn as you go. The same business owner, regarding bid manipulation, reported that a prime contractor asked him to increase his quoted price simply so they could make more money from the client. He noted that he stopped working with that company because they were not being honest. [CT #37]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm explained that her firm has experienced bid manipulation by a public agency, but did not provide further details. [#30]

**Learning about work or marketing.** Five business owners and managers discussed how learning about work is a challenge [Avail#9, Avail#10, Avail#12, Avail#13, Avail#15]. For example:

- When surveyed, a business owner responded, “The industry is changing and we’re realizing that big companies already have who they want working for them and it’s hard to get into the market.” [Avail#9]
- When surveyed, a business owner responded, “It’s difficult when you’re starting out. Getting clients and getting your name out is a lot of work.” [Avail#10]
- When surveyed, a business owner responded, “For the past five years, we’ve had a hard time getting state projects because it’s hard to get in as a Prime consultant.” [Avail#12]
- When surveyed, a business owner responded, “I’ve really not found any ready avenues to search for and acquire that kind of work.” [Avail#13]
- When surveyed, a business owner responded, “It’s difficult if your company doesn’t have a NAICS Code and your company doesn’t always fit into those criteria.” [Avail#15]

**Bidding processes and criteria.** Six interviewees shared comments about the bidding process for agency work; five business owners or managers highlighted its challenges [#5, #23, #30, Avail#27, CT #61]. For example:

- The non-Hispanic white male owner of a trucking firm stated that the bidding process in the public sector has presented itself as a barrier because his firm is not minority-owned. He explained “We’ve lost business to a minority company even though our rates were cheaper.”[#23]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm explained “Yes, it’s almost a reverse issue with me. I’m not sure about the bidding criteria...it hasn’t worked to our advantage. Whether it negatively affects us? I think it has in the past. I’m not sure it does today. I don’t think now minorities in landscape architecture are facing a barrier. If you consider the definition, which include Asians...and other categories, those firms in our field are very well qualified and [the bidding criteria] have not hindered them. In fact, it has worked to their advantage to be a minority. From my point of view, it’s worked to our disadvantage.”[#5]
- When surveyed, a business owner responded, “It makes it difficult for new contractors to place bids if they haven’t already done work for other cities or counties.” [Avail#27]
- The Black American male owner of a DBE- and SBE-certified contracting firm commented that he is uncomfortable with the bidding process at the state level and believes it is unfair. He stated, “Right now with Caltrans I don’t feel comfortable to bid.” He explained that around 2009, “It changed...it wasn’t always [unfair] like that, but it changed.” He further added that bidding is more open on the local level than it is on the state level. [CT #61]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm responded that the bidding process can be barrier for small firms. She noted that it has been an issue for her firm because the process is “incredibly lengthy.” [#30]

**One business owner commented that the bidding process is working well.** For example:

- The Hispanic American male owner of a DBE- and MBE-certified specialty contracting company commented that the bidding process “has been real[ly] good. It is basically we go on the website and if the job pertains to us we will take a look. We will make some phone calls to contractors to find out if we are going to do the job or not.” He added, “Sometimes they say no, and we try to find someone else that might [say yes].” [CT #46a]

**Bonding.** Public agencies in California typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds. Securing bonding was difficult for some businesses. Four interviewees discussed their perspectives on bonding.



**Three business owners described challenges associated with bonding.** [#27, Avail#6, Avail#21]  
For example:

- The Asian American male owner of a structural and civil engineering firm noted that bonding has been a challenge but did not provide specifics. [#27]
- When surveyed, a business owner responded, “The main issue is bonding. It’s hard to obtain bonding when rates are really high.” [Avail#6]
- When surveyed, a business owner responded, “When it comes to bonds, we run into problems. When we just sell, we don’t run into this. If it’s a must [for a contract], bonds are an issue.” [Avail#21]

**One business owner explained the importance of bonding, and noted that the price of bonds is declining.** The non-Hispanic white male owner of a specialty construction firm stated that bonding, from his perspective, “is like an insurance policy.” He explained that in order to get a contracting license in California, a contractor needs bonding, but that he has never had a problem with bonding. He said that now, compared to years past, even firms from out of state are competing to provide bonds for his business, which lowers the price a bit. [CT #37]

**Equipment.** Four business owners and managers discussed their experiences and challenges obtaining the necessary equipment for their firms.

**One interviewee described his experience with discrimination when attempting to purchase a truck for his business.** The Hispanic American male owner of a demolition and trucking firm stated that his firm suffered discrimination when attempting to purchase a truck. Because he is a Hispanic male, the company selling the truck indicated to the owner that he would have to fill out more paperwork and jump through more hoops than anybody else in order to purchase a new truck. He shared, “They told me, ‘You’re gonna have to do a lot more paperwork.’ and I was like ‘What?’ and you know, I walked away.” [#22]

**Three business owners or managers described how purchasing equipment can be a challenge for a small business.** [#12, Avail#5, CT #2] For example:

- The Asian American male manager of an international architectural, planning, and engineering services firm responded, “I think the only thing, as it relates to equipment, is if the contract requires us to acquire equipment, we typically will need to ask the agency to pay for those equipment once they’re procured. And not have us be the bank financing that equipment, getting the equipment, and then having to wait to get paid because we’ve acquired that equipment. So, we always look out for those clauses that say ‘You’re going to acquire the equipment, but you don’t get paid until this milestone is complete.’” [#12]
- When surveyed, a business owner responded, “The air regulations are extremely difficult. Older trucks work well, but the state requires you to buy new equipment and the contract rates have not gone up. Rates are too low to compete with.” [Avail#5]

- The Black American female owner of a construction-related business noted that acquisition of equipment might be a barrier for her firm due to limited cash flow. She said, “Hopefully, just with the right job and I am able to prepare properly and have that money saved up so when the time comes you know I can move forward, but [not being able to obtain the proper equipment] would definitely be a barrier [to business success].” [CT #2]

**Working with unions.** Two business owners and managers described their challenges with unions [#23, #41]. Their comments are as follows:

- The non-Hispanic white male owner of a trucking firm stated that unions are a big problem for his firm. He explained that it is because of unions that his firm is going out of business. He went on to say that being a union employer has been a challenge, especially because his firm is the only union employing company in the trucking industry. [#23]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that some members avoid becoming a union shop or working with unions. He explained that this can hurt them, especially on major construction projects for Metro and in working for “big companies, which are union shop.” [#41]

**Other challenges.** Three business owners described other types of challenges.

**One business manager noted that obtaining inventory has been an issue for his firm.** The non-Hispanic white male owner of a pest control firm indicated that obtaining inventory or other materials has sometimes been an issue for his firm. [#14]

**One business owner described how experience and expertise is a barrier to business in the local marketplace.** The non-Hispanic white male owner of a pest control firm responded, “I have a hard time finding people with experience. There are some provisions that I can train people. I want to get Spanish-speaking or bilingual people. People who are culturally-sensitive. Females in this job tend to have a harder time, this tends to be a male [industry.] I have a female that works for me, a technician. I had to fight internally, like ‘No I’m going to give this person a chance. They’re qualified. This is the United States.’ I think learning the trade for females can be a problem.” [#14]

**One business owner described unfair treatment by a customer or prime as a barrier for her firm.** The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm noted that her firm has had some experience with this barrier but did not provide a specific example. [#30]

**General disadvantages for small businesses.** Thirteen interviewees indicated that they face challenges in the marketplace because their businesses are small, or described how challenges are exacerbated for small business owners [#2, #7, #8, #12, #22, CT #49, Avail #2, Avail #16, Avail #25, Avail #26, Avail #30, CT #37, CT #46a]. Their comments included:

- The Native American male owner of a DBE-certified construction firm said that a small business bidding as a prime contractor is “like little fish swimming in a shark tank.” He noted that there are larger firms with internal resources to pursue projects and present

owners with nicely packaged proposals. He went on to say, “You know, writing a proposal is very difficult for a small firm.” [CT #49]

- When asked if discrimination based on race or ethnicity was a potential barrier to working in the local marketplace, the executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm said, “Not because we are a minority business. I know there are some concerns about the size of our business and whether we can perform the scope of work.” When asked if the firm was ever denied an opportunity because of their size, he responded, “No, we have only been asked if we can manage the scope of work on the project.” He indicated that he did not think the question rose to the level of discrimination. [#2]
- When asked if discrimination based on race or ethnicity was a potential barrier to working in the local marketplace, the representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm said, “I don’t think so. The only barrier for us is that we are a small business and there is only so much work we can do. When we’re committed to certain projects, that’s it. We can’t take on more work. That’s the biggest barrier for us.”[#8]
- When asked about barriers for small businesses in the marketplace, the non-Hispanic white male owner of an SBE-certified engineering firm stated, “It’s just tough [as a small business] to get people to know you’re out there.”[#7]
- The Hispanic American male owner of a demolition and trucking firm responded that simply being Hispanic or a minority makes a small business much more likely to face barriers linked to discrimination. [#22]
- The Asian American male manager of an international architectural, planning, and engineering services firm replied “The real barrier is the percentages are getting very high [for required DBE participation on agency contracts]. It’s probably the highest in the nation that we’ve seen – the over 30 percent plus.” [#12]
- When surveyed, a business owner responded, “The only barrier is who you know. You have to know a lot of people in this business...” [Avail#2]
- When surveyed, a business owner responded, “It is getting harder and harder to do business in California. The rules, regulations, and the laws work against the small businesses and the insurance fees are out of hand.” [Avail#16]
- When surveyed, a business owner responded, “The politics and the cost of running a business in California are high.” [Avail#25]
- When surveyed, a business owner responded, “Starting a business in California is ridiculous; it is not business-friendly. It is a pain, especially in construction. If you had a customer that doesn’t pay you, good luck getting your money. This why so many businesses are moving out of California.” [Avail#26]

- When surveyed, a business owner responded, “They certainly don’t make it easy when it comes to public work, especially for a small business. We have a limited amount of resources and we have to prove that we qualify and go through a long vetting process. Sometimes it’s daunting, especially for small businesses.” [Avail#30]
- The non-Hispanic white male owner of a specialty construction firm reported that he has access to pricing information for materials; however, he believed that larger companies could get better pricing because of the volume bigger companies use. [CT #37]
- When asked if there are challenges for minority- or woman-owned small businesses working as subcontractors, the Hispanic American male owner of a DBE- and MBE-certified specialty contracting company responded that relationships are a challenge for his firm. He said, “Relationships are born. In our part of the business, you’re trying to find out who’s got what, who can sell it out at a better price, who you could contact at a business that you don’t have a relationship with. A lot of times, the prime contractors don’t want to bother with you because they don’t know you. So if you came from a business with somebody new coming in, you can be the greatest...man on the planet, probably won’t get to work without knowing somebody on the other side.” [CT #46a]

**Other comments about marketplace barriers and discrimination.** Some interviewees described other challenges in the marketplace, and offered additional insights.

**Three business owners shared their perspectives on marketplace discrimination and other barriers.** [#15, Avail#14, CT #56] For example:

- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated, “Right now, California has the stupidest law, Prop 209. Some officials think it creates a barrier to select people based on race and gender. California was [before Prop 209] very progressive where they would focus on increasing percentages each year of minorities and gender. I watched it go from five percent women-owned business, to eight percent. When you do that you’re nurturing the same market that pays the taxes.” [#15]
- When surveyed, a business owner responded, “I am an immigrant, we are a small company. It’s a disadvantage because it is separated by race and other factors. I came to this country with nothing and the system is not set up in the right way.” [Avail#14]
- The Subcontinent Asian American representative of a minority woman-owned DBE-certified supply firm indicated that she is aware of allegations of discriminatory treatment. However, she noted, “I would say yes I’m aware of it and I’ve had people that I now consider friends in the business accused of it. The construction industry that I work with, doing work for larger firms...they definitely have to be careful with what they’re saying when it comes to allegations towards other people.” [CT #56]

## H. Additional Information Regarding any Race-/Ethnicity- or Gender-based Discrimination

The study team asked interviewees about whether they experienced or were aware of other potential forms of discrimination affecting minorities or women, or minority- and woman-owned businesses. Section H presents their comments about the following topics:

- Stereotypical attitudes about minorities or women (or MBE/WBE/DBEs) (*page 85*);
- Unfair termination of contracts (*page 86*);
- Any double standards for minority- or woman-owned firms when performing work (*page 87*);
- Unfavorable work environment for minorities or women (*page 87*);
- Any “good ol’ boy” network or other closed networks (*page 87*);
- DBE Fronts or Frauds (*page 89*);
- The negative consequences of Good Faith Efforts (*page 89*); and
- Other factors or forms of discrimination that affect opportunities for minorities and women to enter and advance in the industry (*page 89*).

**Stereotypical attitudes about minorities or women (or MBE/WBE/DBEs).** [#1, #14, CT#2, CT#61, WT#6] A number of interviewees reported stereotypes that negatively affected minority- and woman-owned firms. For example:

- The Black American female owner of a construction-related firm said that her lack of experience as a business owner and her minority status presents challenges to working as a subcontractor. She specifically talked about instances where she felt that her “youthful appearance” was a barrier because the older, more experienced, people in the business thought that she could not possibly know what she is doing. She reported that she has had to work hard to prove her competency.

The same interviewee went on to say, “Even in my time working [at my previous firm], going into meetings...a lot of people did not take me serious until I made them.... In six months I got them over \$100,000 in contracts.... So this is what I love, and...that’s the way I shut them down, shut [them] up.” [CT#2]

- The president and CEO of a DBE- and SBE-certified engineering firm stated, “As a woman in this industry I have to overcome discrimination with each project I work on. My participation is typically overlooked or dismissed in the initial stages of a project. Once my work is known within the team, the barriers are reduced and I become a valued team member. I battle with two common perceptions in my industry: white collar workers assume I am not technical and/or do not have experience; blue collar workers dismiss my qualifications because I have not performed physical work on a railroad. I could respect the view of the second perception if it were not gender weighted, but I’ve observed men with experience similar to my own given the benefit of the doubt. For women, the initial perception is skepticism until disproven. On a project where the results matter, a successful

group utilizes team members that provide valuable outcomes regardless of race or gender. The problem is the many project teams are often formed in the early stages using inaccurate initial perceptions. The valuable team members are not identified. This is why intervention in the form of SBE/DBE goals are needed. As a woman business leader I have had to show persistence, strength, and directness to shepherd my business through challenges. These attributes when demonstrated seem to classify women differently than men. Female peers in positions of leadership within my industry are described as ‘difficult’ when they hold those around them accountable. Unfortunately I cannot think of a high profile woman in my industry that I have not heard described that way. There seems to be a devaluation of women's leadership qualities as judged by the larger group.” [WT#6]

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm, speaking about the owner of his firm, stated, “As a black female president...she has experienced every derogatory situation.” He stated that “there has been some improvement, because society no longer tolerates this behavior, but [discrimination] still exists.”[#1]
- The non-Hispanic white male owner of a pest control firm responded, “Yes [stereotypes exist]. With women, I’ve had [customers] say, ‘Can you send a guy next time?’ or someone say ‘Can you send a Spanish speaker?’ It’s usually by private homeowners. Sometimes they don’t want a woman. Or they want someone who they can communicate with, which I can understand.” [#14]
- The Black American male owner of a DBE- and SBE-certified contracting firm reported unfavorable treatment by a public agency that may have been racially motivated. He explained, “We had a contract...and we were solicited by the agency to complete some additional work that would have cost [the agency] a lot more money to formally bid.... I said ‘fine, we’ll do it.’” He added, “[When] time came for us to do the work, the agency decided that they would have another contractor come in and do the work.... They had the other contractor in the same yard where we’re doing our work. This other contractor...was invited to informally come in and take the additional work...performing the same function that we were doing. I mean, I can’t specifically say it was race, but I wouldn’t rule that out, what else could that be?”

The same interviewee commented that he has experienced an agency staffer that shunned him while picking up plans for a project. In the exchange, the staffer gestured to him in a manner that expressed a preconceived opinion of his capabilities. He added that the staffer gave him the wrong plans to deter his intentions of bidding. [CT#61]

**Unfair termination of contract.** The interview team asked business owners and managers if their firms had ever experienced the unfair termination of a contract.

**Two interviewees commented on their experiences.** [#1, CT#61] For example:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm described an instance when the firm’s contract on a project was terminated for no apparent reason. He stated that it is typically very difficult for a small

business to negotiate a low cost for construction materials. He explained, “It is the ‘big guys that have the advantage of a sales force and can purchase in large volumes.” In this instance, his firm was able to negotiate a good price for materials because of its involvement in a long term project. He explained that when Metro terminated the firm’s contract, there was an adverse effect on the company’s reputation. He described the firm as being “on the hook” for the materials and “looking like a liar.” He added that he made a big deal over this event, which ultimately led to change in policy whereby Metro has to create a dialogue to determine the impact of contract termination. He explained that in his view the disparity not only happens in the bidding process, but also during the project, with regard to how contracting events impact small businesses. [#1]

- The Black American male owner of a DBE- and SBE-certified contracting firm stated that his worst case caused him damage. He indicated that he had an agency project and said, “We were terminated wrongfully... [and] asked to do things that did not pertain to the contract of the job...and because we would not perform, they [cut] us off. And when they did that they caused damage.” [CT#61]

**Any double standards for minority- or woman-owned firms when performing work.**

[CT#46a, CT#61] Interviewees discussed whether there were double standards for minority- and woman-owned businesses. Their comments included:

- When asked if there are double standards for minority- or woman-owned firms when performing work, the Black American male owner of a DBE- and SBE-certified contracting firm responded, “Yes, we’re going to go through a scrutiny. [The agency] may see you as being inferior because you do not have 10 trucks pulling up when a job really requires one. You do not have ten people to bring to the site, when you only really need five. So, you end up being scrutinized because you’re lean and not showy.” [CT#61]
- The Hispanic American male owner of a DBE- and MBE-certified specialty contracting company reported, “When we first started, we had to prove every step of the way we had the ability to do the work.” [CT#46a]

**Unfavorable work environment for minorities or women.** The interview team asked business owners and managers about their experiences with unfavorable work environments for minorities or women.

**One business owner shared his experiences.** The Black American male owner of a DBE- and SBE-certified contracting firm said that he has experienced unfavorable work environments in his line of work. He said that he gets “an impression that you are inferior. Although you are meeting the requirements of the job such as time, quality, [etc.], you get a letter saying that you need to have more men in the field from their opinion. Those things are a distraction because whereas you should be focusing on the advancement of the business, you’re focusing on the existence.” [CT#61]

**Any “good ol’ boy” network or other closed networks.** There were a number of comments about the existence of a “good ol’ boy” network or other closed networks.

**Two business owners specifically mentioned the continued existence of the good ol' boy network.** [#1, CT#49] For example:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm stated that despite improvements and transparency in the Metro bidding process, the “good old boy network” still exists within Metro and the other agencies. He added, “Everybody knows it happens.”[#1]
- The Native American male owner of a DBE-certified construction-related firm said, “...That does exist and unfortunately.... I don't care how hard you try to restrict that [good ol' boy network], it's going to happen.” [CT#49]

**Two business owners felt that the influence of the “Good Ol' Boy” network was waning.** [#12, CT#56] For example:

- The female representative of a minority woman owned DBE-certified supply firm commented, “...I am a younger female in this large construction business. I think that the ‘good old boy’ [network] is going on but going out. It is not as prominent as it once was...” [CT#56]
- The Asian American male manager of an international architectural, planning, and engineering services firm responded, “There is some degree of [closed networking], but we haven't experienced it directly. There is a difference between knowing people and knowing active players in the marketplace versus the ‘Good Ol' Boy” network, which I don't think it exists as it did in the past.” [#12]

**Other business owners acknowledged the existence of closed networks, and the practice of working with firms and colleagues you know.** [CT#2, CT#61, CT#37] For example:

- The Black American female owner of a construction-related firm stated that she has seen closed networks in her field. She observed, “What it is, is that [firm owners] know each other, they've been dealing with each other, they go play golf with each other, you know.” She added that closed networks are less of a problem in the public sector saying, “Caltrans, they make it pretty fair, you know with just even helping us, you know minorities.” [CT#2]
- When asked if he has experienced any “good ol' boy” or other closed networks, the Black American male owner of a DBE- and SBE-certified contracting firm responded, “I see there are strong relationships in [the construction] business where people do things because they know you. You're going to do [helpful things] for your friend for whatever reason.” [CT#61]
- When asked about “good ol' boy” networks, the non-Hispanic white male owner of a specialty construction firm stated that he was not aware of anything official. He added that “maybe back in the day there may have been more [closed networks], but sometimes you're just comfortable working with who you know.” He reported that, especially in his industry, which is “all I know about...you just get comfortable with your team.” [CT#37]



**DBE fronts or frauds.** The interview team discussed business owners' and managers' experiences with DBE fronts or Frauds.

Four business owners commented on their experiences. [#13, #22, CT#37, WT#A] For example:

- The Hispanic American male owner of a demolition and trucking firm stated that he believes he has seen DBE fraud but he has no way of proving it. [#22]
- When asked if DBE fronts or fraud affects business, the non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded "I've seen it quite a bit. I've seen a lot of companies that are the middle man." [#13]
- The non-Hispanic white male owner of a specialty construction firm stated that he is not aware of any "fronts" or abuse of certification by firms. [CT#37]
- The non-Hispanic white female owner of a WBE- and SBE-certified construction firm stated, "One direct competitor, a White-owned company, lists the second ex-wife as the 51% owner. I believe they are still representing themselves as Woman-owned. [WT#A]

**The negative consequences of good faith efforts.** Business owners and managers shared their experiences with "Good Faith" programs, which give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet DBE contract goals.

**Two business owners pointed out problems with the implementation of good faith efforts.** [#41, CT#61] For example:

- The Black American male owner of a DBE- and SBE-certified contracting firm said that the DBE program is no longer helping his firm because prime contractors are abusing the good faith efforts process. He said, "The problem is that the contractors that are getting the jobs have found a way to circumvent using a DBE. They just put out a good-faith goal, send you a fax and say you didn't respond." [CT#61]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that the "biggest barrier" facing DVBEs is trying to get contracts subject to "good faith" guidelines, which lack the teeth to enforce DVBE contract goals so that agencies "just go through the motions." He stated that Metro eliminated good-faith guidelines but primes still don't know. "They think they can put down some firms on their list and not follow through. They don't realize Metro is serious." [#41]

**Other factors or forms of discrimination that affect opportunities for minorities and women to enter and advance in the industry.** [CT#49, CT#56, CT#61] A number of business owners and representatives discussed various factors that affect entrance and advancement in the industry for minorities and women. For example:

- The female representative of a minority woman owned DBE-certified supply firm commented, "A lot of these larger corporations have men in power; thus, they want to work with a man that has the same power." She added, "When they walk into a room, some of

these guys don't speak because they don't even want to work with women in business because they don't feel that they're on the same level. This attitude impedes progress and advancement in the industry." [CT#56]

- The Black American male owner of a DBE- and SBE-certified contracting firm said, "Minority or women businesses may not be exposed to the right opportunity. If they are exposed, they really do not have the work experience to do the work. We have one example here locally. A contractor was given a very low contract and he did not really have the on-hand experience to perform. So, he was made to be an example of why we don't give DBE and minority contractors these kinds of jobs."

The same business owner said, "When it comes to executing the job, whether it's directly for the agency or as a sub, you have to have the experience. You have to have it--or you won't make it." [CT#61]

- The Native American male owner of a DBE-certified construction-related firm observed that there are only a few women in his industry. He added, "It's not a discriminatory factor, but how the industry is set-up." [CT#49]

**Several business owners stated that they had not encountered discrimination in the marketplace.** [#11, CT #2, CT #37, CT #49]. Their comments included:

- The non-Hispanic white male owner of a specialty construction firm stated that in California he has not seen any discriminatory treatment. [CT #37]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm observed, "I haven't really encountered one. I may be a fluke, because I worked in the big firms, so I know how the system works. I may be a minority, but never stayed only in the minority circles. I never had a discomfort working with other ethnic groups. A lot of firms I know sometimes have reservations in working with other companies that are not of the same group [ethnicity]. There are different mafias out there. The Koreans tend to work with each other, the Indians work with each other. Even the Filipinos tend to work with each other. I am a little different and am more mainstream." [#11]
- The Native American male owner of a DBE-certified construction-related firm reported that he is not aware of challenges faced by minority- or woman-owned firms. [CT #49]
- The Black American female owner of a construction-related business stated, "I haven't really started working yet. I'm just getting my certifications now with my WBE..." She added that she does not anticipate any disadvantages or barriers associated with her business being woman-owned. She said, "The good thing about construction is the bid process... the bid process kind of makes everything fair around the board." [CT #2]

## **I. Insights Regarding Business Assistance Programs or Other Neutral Measures**

The study team asked business owners and managers about their views of potential race- and gender-neutral measures that might help all small businesses, or all businesses, obtain work in

the Los Angeles 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 summarize comments pertaining to:

- Awareness of programs in general (*page 91*);
- Technical assistance and support services (*page 91*);
- On-the-job training programs (*page 92*);
- Mentor-protégé relationships (*page 93*);
- Joint venture relationships (*page 94*);
- Financing and Bonding assistance (*page 95*);
- Information on public agency contracting procedures and bidding opportunities (*page 95*);
- Hardcopy or electronic directory of potential subcontractors (*page 96*);
- Pre-bid conferences where subcontractors can meet prime contractors (*page 96*);
- Other agency outreach such as vendor fairs and events (*page 97*);
- Breaking up large contracts into smaller pieces (*page 97*);
- Price preferences for small businesses (*page 97*);
- Small business set-asides (*page 98*);
- Mandatory subcontracting minimums (*page 99*); and
- Formal complaint and grievance procedures (*page 99*).

**Awareness of programs in general.** The study team asked business owners if they knew about and had experience with any business assistance programs.

**Many interviewees were not generally aware of any small business assistance programs but, when different types of support programs were described, they thought the majority of these suggested programs would be useful.** [#2, #6, #7, #8, #9, #12, #13, #15, #20, #21, #22, #23, #24, #25, #28, #30, #31]

**One interviewee explained that he knew about SBA assistance but felt it was too much work for him.** The non-Hispanic white male owner of a specialty construction firm stated that he has never been involved with any business assistance programs. He said that he is aware of the Small Business Administration and added that he went to their website and “took a look” at the SBA; but, it looked like too much work for him to take on. [CT#37]

**Technical assistance and support services.** The study team discussed different types of technical assistance and other business support programs. Some interviewees reported experience with or knowledge of technical assistance and support services.

**Two business owners offered positive opinions about technical assistance programs.** [#26, CT#37] For example:

- The Black American female owner of a janitorial services firm stated that she is aware of some technical assistance and support services programs. She elaborated, “Anytime there is an extra service or resource that could streamline these operations is useful and beneficial. Like SCORE for instance. That’s helpful and beneficial for new businesses with creating business plans and financing and where to find it. SBA is another one.” [#26]
- The non-Hispanic white male owner of a specialty construction firm stated that he had heard of a company that would help with technical support and with understanding “how to jump into a system like Caltrans” but could not recall the company’s name. He went on to say that Caltrans has its own culture “even down to how you measure things and do their plans,” so this company provides support to make that transition and help businesses learn the system. He said that type of assistance would be helpful. [CT#37]

**One business owner did not feel technical assistance programs were beneficial.** The Black American male owner of a DBE- and SBE-certified contracting firm reported that technical assistance and support services are not beneficial; particularly with the amount of time that is required to receive the assistance of services, it does not get a firm any work. [CT#61]

**On-the-job training programs.** Some interviewees felt that on-the-job training programs would be useful or had experience participating in a program. For example:

**Three business owners felt on-the-job training programs were good for their business.** [#26, CT#2, CT#46a] For example:

- The Black American female owner of a janitorial services firm stated that she is aware of one on-the-job training and rehab program. She explained, “They would send me candidates and they would work in the company. They would have a coach come to work with them and just see how well they’re performing and how well they’re adjusting to the job. It’s a rehab program. I think it’s for those people with disabilities.” [#26]
- The Black American female owner of a construction-related firm reported that she takes advantage of all Caltrans online training. She said, “I know I sound like a “Caltrans commercial. They are very good. I have taken training courses with them on-line.” [CT#2]
- The Hispanic American male owner of a DBE- and MBE-certified specialty contracting company reported that on-the-job training programs are “very important” to his firm. He added, “The more [trained workers] we have, the more work we can get.” [CT#46a]

**Two business owners did not see the value in on-the-job training programs.** [CT#49, CT#61] For example:

- The Native American male owner of a DBE-certified construction-related firm noted that in his industry on-the-job training programs would typically not work because a certification is required to perform the work. [CT#49]

- The Black American male owner of a DBE- and SBE-certified contracting firm noted that he does not see value in on-the-job training programs. He stated, “You have to be licensed to be a contractor.” [CT#61]

**Mentor-protégé relationships.** Several interviewees commented on mentor-protégé programs. A number of business owners made suggestions for improving mentor-protégé relationships.

**Several business owners and managers saw the value in creating more opportunities for mentor-protégé relationships.** [#6, #8, #27] For example:

- The Asian American male owner of a structural and civil engineering firm noted that this kind of program would help small businesses gain more knowledge. [#27]
- When asked if mentor-protégé programs would benefit the firm, the representative of a DBE-certified non-Hispanic white female-owned civil engineering firm responded, “Yes, and it would help to introduce mentors by hosting mixing events.” She explained “Right now we attend Pre-Bid meetings, and find those helpful to learn about other companies and subcontractor opportunities.”[#6]
- When asked if mentor-protégé programs would benefit the firm, the representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm responded, “Yes, definitely. [Mentor-protégé and joint venture programs] would be great because we could benefit from working with bigger firms that can handle bigger projects.”[#8]

**Five business people voiced recommendations and several offered insights specific to improving Metro’s mentor-protégé initiatives.** [#1, #11, CT#14, FG#1, WT#10] For example:

- When asked if mentor-protégé programs would benefit the firm, the manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm replied, “What you [Metro] are saying [to firms like mine] is that the big guy knows more than you.” He stated that it is his belief that agencies typically designate mentors who know nothing about the challenges and suffering of running a small business. He explained that a protégé/protégé program would be better, because small companies can benefit from their shared experiences. [#1]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded, “Yes. Metro is now including a provision for mentoring, but they don’t have a clear program with structure. If Metro is going to take that seriously, primes need a clear idea of what the mentoring is supposed to do [and of the objectives]. They [the primes] wonder, why would somebody train a company that is going to be a competitor?” [#11]
- The female administrator of a DBE- and SBE-certified architecture firm disclosed, “I think this program is a wonderful idea for small firms like ours to get our ‘foot in the door’. Unfortunately, the program is too complicated and not effective. First I have to find a Metro project that requires a Protégé, then I have to initiate and find a Mentor who is willing to

take us on. It's like finding a needle in a haystack and we don't have the time or the resources to take this on. I wish there's a way to formalize this program since this could be a way for small businesses to gain that project experience all RFPs are looking for. [WT#10]

- The Subcontinent Asian American male owner of an MBE-certified professional services firm reported, "The mentor program that Caltrans has is very good in concept, but they need to carry forward a step further." He said, "They make sure that the mentor and the protégé have meetings and discuss the problem, the solutions. The mentor, the protégé, step-by-step to marketing, to the FAR compliance issue, marketing, finance, everything... very effective, and they should do it statewide." [CT#14]
- Commenting about the Caltrans mentorship program, another business owner raised a concern, stating, "...People who have already gone through the Cal Mentor program know that it's a bit... for show. Because there's really no measurement, per se, of how the mentors and the protégés work together and how the success is measured. They get a score, the primes get a score, but there's really not a Metro program saying... if you're... going to use the term mentor protégé, this is what we mean... you are going to have a PM four hours a week... and along those topics that need to be covered are the following. At Caltrans, there's an MOA... there's a template that is put together between the... mentor and the protégé, identifying the... objectives... what are the four things that you wanted to accomplish. So it's better, because you have that... But... once it is signed, and sort of witnessed by the Caltrans person, that's the end of it. There's no follow up. There's nobody from the agency that really says 'Mentor, protégé, did you really do... number one? Did he really spend time with you and show you how to do invoices? Did he really sit down with you and show you how to improve your resumes? Did he really sit down with you and show you basics of accounting?' If Metro can improve on that, not only having a memorandum of agreement or understanding between the parties concerned, but also a you know, executable program, a measurable program." [FG#1]

**Joint venture relationships.** Interviewees also discussed joint venture relationships. Many business owners are interested in, support, or already participate in joint ventures.

**Two business owners questioned the value of joint venture relationships, especially for inexperienced firms.** [#1, #5] For example:

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm explained that a public program encouraging joint ventures would have little value to his firm, because it is already "steps ahead of what Metro is doing." He stated that he believes agency sponsored programs are a "dog and pony show" typically limited to professional service firms. [#1]
- When asked if joint venture relationships are helpful to small businesses, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm replied, "Very rarely have we done that. There are too many variables to be able to answer that, whether it would be advantageous for them, whether they should stay away from joint ventures, because if they're not familiar with it, they could get hurt by it, if they weren't an equal joint venture partner. The devil's in the details, when you draw up joint ventures. It might be

helpful to know about it, if Metro had a program like that. I would warn DBEs or small businesses to be very careful.”[#5]

**Financing assistance.** [#5, CT#61] The study team asked business owners and managers about financing assistance. Two business owners commented:

- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm replied that financing assistance would be helpful but did not explain his rationale. [#5]
- The Black American male owner of a DBE- and SBE-certified contracting firm described a business assistance program that he would support, “...selling accounts receivable to a third party, so that your firm is paid immediately and the third party collects debts from the client] would be good if it was reasonable. The fees are very high. That’s your money that you’re banking against.” [CT#61]

**Bonding assistance.** The study team asked business owners and managers about bonding assistance. One business owner did provide his thoughts. The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated, “Yes, [bonding assistance] would be helpful, but I think it’s more about the agency recognizing that the amounts they require need to be realistic depending on the percentage of the construction that the sub-consultant is assuming.”[#5]

**Information on public agency contracting procedures and bidding opportunities.**

Many interviewees indicated that more information on public agency contracting procedures and bidding opportunities would be helpful. [#5, #21, CT#37] For example:

- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm replied that it would be helpful to get more experience with and information about public agency contracting procedures and bidding opportunities. [#5]
- The non-Hispanic white male owner of a specialty construction firm stated he is not very familiar with public agency contracting procedures and bidding opportunities, other than that some cities utilize the “Green Sheet” to list projects and that some cities list projects on the city’s website. He reported that as a small business he would “love” to bid on public agency work, but it seems out of his reach because of bonding—a barrier that he said “may all be in my head.” He went on to say, “Work is work.... It’s just getting through the red tape...it all seems so daunting.” He added that he thinks getting information on public agency contracting procedures and bidding opportunities would be helpful. [CT#37]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm shared, “there are a lot of smaller jobs. For example, just a mile or two down where Metro keeps their buses. We would be able to pick up their oil, their filters, and any kind of hazardous waste from the maintenance of their vehicles but I can’t find anything like that. I think that there might not be a contract for that. I think they just use a vendor on an as-needed basis. If there were maybe somewhere that I could register as a vendor and

introduce myself without the need for a contract that would be great. That would be more along the lines of what we can do.” [#21]

**Hardcopy or electronic directory of potential subcontractors.** [#5, CT#37] Two interviewees commented on the prospect of hardcopy or electronic lists of potential subcontractors:

- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm replied that hard copy or electronic directory of potential subcontractors would be good and should be made available. [#5]
- The non-Hispanic white male owner of a specialty construction firm stated that a directory of potential subcontractors would be helpful as long as the firms were vetted and legitimate. He believes that currently anyone can go online and create a profile but thinks that changing this so that registered firms complete an investigation to be sure they are legitimate would be helpful. [CT#37]

**Pre-bid conferences where subcontractors can meet prime contractors.** Business owners and managers commented on holding pre-bid conferences.

Business owners and managers expressed mixed feelings on the benefits of pre-bid conferences, and offered recommendations for improvement. [#5, #11, #41, CT#14, FG#1] For example:

- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm stated, “Theoretically it sounds good, but it hasn’t been very beneficial to us.”[#5]
- When asked if pre bid meetings are a beneficial, the Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm replied, “Yes, but when they do pre bid, it would help if they could hold it in one venue. Often, one is in Orange County, one in Burbank, and one in Los Angeles. How can I be in all these places? I have to pick and choose. As much as I want to spread out and tell my story to all of them. Maybe Metro can help out by hosting in a neutral location, in four or five meeting rooms, all in one day.” [#11]
- The non-Hispanic white male representative of a regional disadvantaged business association, stated that “Metro’s programs are phenomenal: Doing Business with Metro, Meet the Primes, Meet the Buyer’s, Meet the Project Managers,” among others. [#41]
- The Subcontinent Asian American male owner of an MBE-certified professional services firm reported that he attends pre-bid conferences, but they are often not helpful. He stated, “I go to the preconstruction meeting, pre-proposal meeting for the IP and try to network and mingle with those people there.” He added, “But what happened is, I found out that, in many cases, the primes have the teams set up long before the bid [conference for] the proposal. So, if I go to the pre proposal, it is too late.” [CT#14]
- When the discussion moved to Metro-sponsored outreach events for disadvantaged businesses, a focus group participant reflected on the project-based “Building the Contractor Team” networking events. The participant did not find these pre-bid events



helpful because by the time they occur, most contractors have already formed their project teams. The participant said, “Some companies are honest enough to say...‘We have already decided [on our team].’ ...But most don't. Most they say okay, we're doing a DB outreach... just to satisfy the requirements of the RFP. That's four hours of a small business time. We could start working on a proposal. We could get our forms done in four hours.” [FG#1]

**Other agency outreach such as vendor fairs and events.** [CT#37, CT#61, FG#2] The study team asked interviewees to speak about their knowledge and experience of agency outreach such as vendor fairs and events.

- The Black American male owner of a DBE- and SBE-certified contracting firm reported that he does not believe in outreach such as vendor fairs and events. He commented that such events “...steal so much of your time that you would lose focus on what you're really trying to do. What you're really trying to do is get in a room with that agency and sign a contract.” [CT#61]
- The non-Hispanic white male owner of a specialty construction firm stated that he feels agency outreach events are like big “schmooze fests,” but he thinks they are great networking opportunities. [CT#37]
- A focus group participant praised Metro's annual “Meet the Primes” event. The participant commented, “[Metro] had a master outreach event that had all their general contractors in one building. And it was great. You could move from room to room to room and walk around. And... it's free parking. That's huge.” [FG#2]

**Breaking up large contracts into smaller pieces.** [#41, CT#46a, WT#10] The size of contracts and unbundling of contracts were topics of interest to many interviewees.

- The non-Hispanic white male representative of a regional disadvantaged business association stated that unbundling and breaking up contracts is needed. “This is extremely helpful to our members. The more unbundling, the better. Metro has been resistant on this.” [#41]
- The Hispanic American male owner of a DBE- and MBE-certified specialty contracting company did not support breaking large contracts into smaller pieces saying, “We like the big ones.” [CT#46a]
- The female administrator of a DBE- and SBE-certified architecture firm stated, “Metro should have SBE/DBE set-aside of small sized projects (that does not require a RFP) for small businesses like us. It's an opportunity for (1) Metro to see our capability as a firm without taking on too much risk, (2) a manageable project size for small firms, (3) allow us to gain project experience, (4) establish and build trust and relationship with Metro, (5) grow our business, hire more people and expand our capacity (so we can bid on larger projects). [WT#10]

**Price preferences for small businesses.** One interviewee had positive comments related to price preferences for small businesses. The non-Hispanic white male owner of a specialty

construction firm stated that he thought price preferences for small businesses would be helpful. He also stated that he is aware of some public agencies that have thresholds where projects under \$25,000 can be awarded to anyone they choose, but the project must go public if it is over that amount. [CT#37]

**Small business set-asides.** The study team discussed the concept of small business set-asides with business owners and managers. This type of program would limit the bidding of certain contracts to firms qualifying as small businesses.

**Two business owners described the challenges of small business set-asides for firms and more generally.** [#2, #12] For example:

- When asked if small business set-asides would be helpful to his firm, the executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm replied, “Set asides would only benefit our firm if we could perform 40 percent of the work [on contracts]. Our work is typically ten percent on traffic projects” He explained, “It’s hard for us to keep 40 percent of work, because our work is typically 10 percent of a project, and I think that Metro requires the SBE firm to have 40 percent of the work for a set-aside. It limits us because our experience and skills does not allow for us to perform 40 percent.”[#2]
- The Asian American male manager of an international architectural, planning, and engineering services firm stated, “I’m aware of the program. I am concerned about it because the contracts themselves are getting larger and larger, bigger in scope. It’s difficult to find a small business that’s capable of doing that. What ends up happening is the small business will have to seek out a larger firm to help support. Which isn’t a problem, but it also creates a different imbalance, because if the small business is meant to be in charge of that project, they need to have the talent to do that. If they’re depending on another firm to do it, and the budgets are mandated, it’s creating a situation that is unstable.” [#12]

**Most business owners and managers supported small business set-asides.** [#3, #7, #8, #11, WT#6] For example:

- When asked if small business set-asides would be helpful to his firm, the Hispanic American male owner of a DBE- and SBE-certified professional service firm replied, “That’s a great idea. If it wasn’t for small business set asides, a prime would never bring in a small business.” He added, “It should also apply to project extensions and amendments.”[#3]
- When asked if small business set-asides or goals would be helpful to his firm or other small businesses, the non-Hispanic white male owner of an SBE-certified engineering firm replied, “Yes, that’s something that would be good for small business, like breaking up the bid to separate structural engineering work.”[#7]
- When asked if small business set-asides and breaking up large contracts would be helpful to his firm, the representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm replied, “Yes, if it was for DBEs and SBEs, then it would definitely help. Only if the project is large enough to spread the work. Then it helps small companies.”[#8]

- The President and CEO of a DBE- and SBE-certified engineering firm stated, “The best thing about working with Metro is their set-aside program for small businesses. When my company is the prime contractor, we don’t run into payment problems because we control our invoice destiny and we communicate with the Metro project manager. We know that our financial health depends on it.” [WT#6]
- The Asian American male representative of a minority professionals society explained, “[Our members] like the idea of SBE set-asides and think it should be extended to DBE’s as well.” [#11]

**One business owner offered recommendations for improving the small business set-aside program.** The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm replied, “For set-asides, they need to increase the magnitude, like a contract that can go up to at least \$5M. That’s going to attract a lot of small businesses to respond. For goals, it should be set at 35 percent and give points for people who go over that. That creates competitiveness for large firms to win and they’re going to give more meaningful work.” [#15]

**Mandatory subcontracting minimums.** [#12, #41, CT#37] Interviewees expressed mixed support for requirements mandating a minimum level of subcontracting on projects.

- The non-Hispanic white male representative of a regional disadvantaged business association stated that he doesn't know about mandatory subcontracting minimums. He stated, “Primes shouldn’t be told what to do. They already are bound by goals.” [#41]
- The non-Hispanic white male owner of a specialty construction firm expressed that mandatory subcontracting minimums make sense on big projects, but on smaller projects, they do not make sense because small contracts are better suited for small contractors as primes. [CT#37]
- When asked if small business subcontracting goals are helpful, the Asian American male manager of an international architectural, planning, and engineering services firm replied, “Goals are good. But if it gets too large and it becomes the influencing decision, rather than letting the best team form, it becomes a problem.” [#12]

**Formal complaint and grievance procedures.** [CT#56, FG#5, FG#6, WT#4] There were a number of wide-ranging comments, including those who support procedures to resolve complaints and grievances. For example:

- The director of a DBE-, SBE-, and MBE-certified consulting firm stated, “Almost every government requirement of work includes a requirement for SBE/ DBE/ DVBE and such other Disadvantaged Enterprises to be provided a certain percentage of work. In the last 10 years of our business, we have provided at least a hundred subcontracting proposals to Small/ Medium/ Large companies, who have submitted us as sub-contractor to fulfill those requirements. A good number of those have won those RFPs, but we have never seen sub-contract work from them. Federal Government has strict verifications of subcontractors participation and enforcement process. However, from the state to local levels of public entities in California does not seem to have any notification system to subcontractors and/ or grievance handling process in existence. That is why sometimes when on paper it is found

that a subcontractors have been provided with certain percentage of work but it may never have been included. This is just to bring to your notice that there has to be a mechanism to verify sub-contracting work, so that even major contractors cannot go around meeting such requirements on paper and then just ignoring such requirement.”[WT#4]

- The female representative of a minority woman owned DBE-certified supply firm commented, “...to be honest, I don’t really complain that often. So, it would be a good thing for people but I think that at the same time, it’s not necessarily a good thing because there are some people that complain just to complain.” [CT#56]
- During a focus group with a regional trade association, a small business owner suggested that bidders on Metro contracts have an opportunity to protest earlier in the bidding process, adding, “They don't allow you to do anything until after it's been awarded through the board. And that's kind of a block up here. So it's pretty frustrating I think for people. Then afterwards a lot of people just give up, you know, they just say okay, it's been awarded, already went to the board, you know you can protest, but it's kind of after the fact. ...you get disillusioned.” [FG#5]
- During a focus group with a regional trade association, a small business owner suggested that Metro consider appointing an ombudsperson to assist with contracting disputes related to DBE awards. This individual observed, “At BART [Bay Area Rapid Transit], they have an ombudsman who really helps to navigate that for a lot of entities. So having something like that [would help] to support... small businesses. [It] won't get them blacklisted by saying something publicly.” [FG#6]

## J. DBE and Other Certification Programs

Business owners and managers discussed their experiences with DBE and other certification programs. This section captures their comments on the following topics:

- DBE certification status (*page 100*);
- Advantages of DBE certification (*page 103*);
- Disadvantages of DBE certification (*page 104*);
- Experiences with the DBE certification process (*page 105*);
- Recommendations for improving the certification process (*page 107*); and
- Comments on other certification types (*page 109*).

**DBE certification status.** Business owners discussed their DBE status, and shared their opinions about why they did or did not seek certification. For example:

**Thirteen firms interviewed confirmed they were certified as DBEs.** [#1, #2, #3, #6, #8, #11, #15, #21, #29, CT#49, CT#56, CT#61, CT#46a] For example:

- The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm stated that her firm is currently certified as a DBE with Caltrans, CUCP, and Metro. [#29]

- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm stated that his firm is DBE-certified by Metro. The firm is also WBE and SBE- certified. The firm has held these certifications from Metro, and the California Public Utilities Commission (CPUC), for approximately fifteen years. [#1]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm stated that the firm is certified as a DBE by Metro. [#2]
- The Hispanic American male owner of a DBE- and SBE-certified professional service firm stated that the firm is certified as a DBE and SBE by Metro, Caltrans, the County of Los Angeles, the City of Los Angeles, and other cities. [#3]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm stated that the firm is certified as a DBE by Metro, the State of California, and the Port of Los Angeles. [#6]
- The representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm stated that the firm is certified as a DBE and SBE by Metro and as a SBE by the City of Los Angeles. He added that the firm is also certified by the City of Long Beach, but does not know the type of certification. [#8]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm stated that his firm is MBE certified by the CPUC, and is DBE and SBE-certified by Metro and the City of Los Angeles. When asked to share his firm’s experience with the certification process he said, “Because I have helped a lot of firms, I already knew the process. I knew who to bug at Metro regarding the status. I know who to call and email for follow up.” [#11]
- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated that the firm is MBE 8A- and DBE-certified at the federal level, SBE certified through Metro, the City of Los Angeles, Los Angeles Unified School District, The County of Los Angeles, and the State of California. He added, “The process is easy. The 8A [certification process] is very in-depth and very detailed. State of California is another that is very challenging. But once you do those two as the hardest, the others are simple. It consumes a lot of time.” [#15]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm stated that her firm is currently certified as a DBE with the City of Los Angeles. [#21]

**One business owner explained why her firm sought DBE certification.** The non-Hispanic white female owner of a DBE-, WBE- and SBE-certified specialty consulting firm explained that she decided to certify her firm as a DBE because the firm is a disadvantaged business. She noted, “As a woman-owned business in construction, it’s still the ‘Good ol’ boy network.’ And they will just go to their guys. So [the DBE certification] has helped in certain ways. But because we’re such a

specialized kind of company, it's still a disadvantage because they don't have to use us. They can get it some other way..." [#29]

**Two firms interviewed were not certified as DBEs but were in the process of applying.** [#26, #30] For example:

- The Black American female owner of a janitorial cleaning services firm stated that her firm is not currently DBE-certified with any state or local agencies but is in the process of applying with the City of Los Angeles.

The same interviewee explained that her firm had not pursued certification since she started her business five years ago because she feared all of the requirements associated with the certification process. She noted that pursuing certification with the City of Los Angeles is very time consuming, which conflicted with her efforts to try to grow her business. However, she recently decided that having certifications would not only help her business grow, but also help bring her firm to the attention of public agencies and prime companies. [#26]

- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated that her firm is not currently certified as a DBE with state or local agencies but is in the process of applying. She explained that her firm sought out certification mainly because her firm does a lot of business with the Los Angeles Department of Water and Power (LADWP) and being certified is one of the requirements LADWP has for any firm that is interesting in doing business with the agency. [#30]

**Several business owners and managers explained why their firms had not pursued DBE certification.** For example:

- The Hispanic American male owner of a demolition and trucking firm stated that his firm is not currently certified as a DBE with state or local agencies. He explained that his firm is not DBE certified for two main reasons: firstly, because it has not been a requirement by any of the main contractors his firm has worked with, and, secondly, because he has not taken the time to fully look into getting certified as a DBE through a local agency. [#22]
- When asked why his firm was not currently certified as a DBE, the non-Hispanic white male owner of a trucking firm explained, "It has never been in our niche. We have worked for state agencies back in the past, but it has been more of an emergency situation." [#23]
- The non-Hispanic white male owner of a specialty construction firm said that he would have pursued DBE certification if it were more readily available. He stated that he would like his wife to become certified. [CT #37]
- When asked why his firm had not become certified, the Asian American male owner of a trucking firm responded that if the firm performs well enough on a job or contract, there is no need of for his firm to become certified because clients will continue to use his firm for transportation services. He stated, "I'm not really sure what benefits can come from holding

these types of certifications. But if my firm is competing with another firm for a contract and I'm awarded the contract, just because I'm a minority, I don't think that's right." [#20]

**Advantages of DBE certification.** Interviewees discussed how DBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by DBE certification. [#29, #1, #41, #21, #22, #6, WT #3, CT #49, #15, CT #37, #8, #2, #11, #25] For example:

- The non-Hispanic white female owner of a WBE-, SBE- and DBE-certified specialty consulting firm responded, "The ability to be on a list where if there is that quota then potential primes will look at that, and have an opportunity to call us...which is why we don't really market." [#29]
- The manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm commented, "The program is great, but not perfect." He clarified that the company's status as a DBE- has not necessarily opened doors, but has given the firm more opportunity. He concluded, "Make no mistake; it only gives us the opportunity to knock on the door." [#1]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated that the DBE certification program provides a competitive advantage for small firm like his to qualify for public contracts. [#25]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that there are no disadvantages to certification. He observed how certification is valuable and important in "opening doors" to new business. The majority of members in his association are certified DBEs and that those that are not certified are mostly new members and not aware of certification and its advantages. [#41]
- The Hispanic American male owner of a demolition and trucking firm noted that he is aware of the benefits of DBE certification even though his firm is not certified. He explained that he had heard that if a firm has DBE certification, it would open doors to other government agency contract opportunities that require DBE participation. [#22]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm responded, "There have been only advantages, no disadvantages [to our DBE status]. Between our reputation for getting the job done and the opportunities provided by the DBE program, we have established a niche for our small company." She explained that the firm is a top performing DBE-certified firm that is in demand by the primes with whom it does business. [#6]
- The Native American male owner of a DBE-certified construction-related firm said that certification "gives the little guy an opportunity to swim with the big ones." He added, "[Certification] gives us an opportunity to get our foot in the door." [CT #49]
- When asked whether the firm has benefitted from the DBE, MBE, or SBE certification, the representative of a DBE-, MBE-, and SBE-certified Hispanic male-owned construction firm

responded, “Yes, significantly. Especially on projects where there is a [contract goal requirement]. When the prime is required to use a DBE or SBE, it opens the door to larger projects, like with Metro. It’s definitely helped us.”[#8]

- The Senior Vice President of a DBE-certified Hispanic woman owned engineering firm stated, “The DBE program provides attraction to our firm that is often overshadowed by the larger firms. MTA has unique programs in force for diversification that others around the country are following suit. It is my hope that MTA continues to support these programs as the leader in DBE participation.”[WT#3]
- When asked to discuss any benefits associated with certification, the Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded, “Our benefits are from our value proposition. I have shown the decision makers that I can do the job. In most cases, our participation for the prime is bigger than the [contract] goal.” [#11]
- When asked to discuss any benefits of the firm’s DBE, MBE, and SBE-certification, the Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm responded, “There are benefits whenever proposals give soliciting firms ten points extra, then it helps. When there is not any bonus, it may not help. It also helps if there is a defined geographic area, like if you’re in a certain geographic area and there are points for that.” [#15]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm stated that one of the advantages of being certified is the fact that prime contractors will take notice of certified firms more than non-certified firms because of public project requirements and the credits they receive. She went on to add, “It puts your name out there more.” [#21]
- The non-Hispanic white male owner of a specialty construction firm stated that one advantage of certification is that there is more money because “You’re setting yourself apart from illegal aliens.” [CT #37]
- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm responded that the DBE certification is firm’s “bread and butter for obtaining work on Metro, SANBAG [SBCTA], and OCTA projects, because of the DBE goals.” [#2]

**Disadvantages of DBE certification.** Interviewees discussed the downsides to DBE certification [#2, WT #11, WT#1]. For example:

- A female representative of a construction firm expressed, “LA Metro has a project labor agreement (PLA) on its large construction projects. When outreaching to DBE and non-DBE subs, in certain scopes there are a lot of non-union contractors who refuse to work on a project with a PLA. This has greatly reduced the number of firms that are willing and available to bid on Metro projects. There is a large amount of construction in LA. Even non-federally funded projects have DBE goals. This has reduced the number of firms that will bid and will continue to be a bigger problem.” [PT#11]



- The executive of a DBE-, MBE-, and SBE-certified Asian American male-owned transportation and engineering consulting firm explained that the only disadvantage to DBE certification is “controlling growth.” His noted that firm has to be careful to not expand beyond the DBE revenue limits. He explained that if the firm exceeded certain revenue limits, they would no longer qualify as a DBE or SBE firm, and that would possibly limit the firm’s opportunities. [#2]

**One business owner reported that his firm has not benefited from certification.** The owner of DBE- and MWBE-certified supply firm responded that his firm sells to many agencies, including Metro. In describing his firm’s work with Metro, he observed, “We have never had any sort of contract with Metro. We were able to gain business by marketing directly to supervisors and offering our services. Once we were able to prove we could handle the business, we had a great business relationship and always went above and beyond with our service. However, things changed when new supervisors were brought in in late 2015. We begin to get no orders and even though we continued to show up and market, we got zero orders. All this began to take place even though we went out of our way to get certified thru CUCP. We thought being certified would legitimize our business relationship with Metro and give these supervisors an incentive to purchase more parts from a small business vendor. To our disappointment, none of this happened. We went from a high of over \$113,000 in sales to barely selling \$4,000 YTD. Honestly, the certification has felt useless to us and we have seen no benefit from it.” [WT#1]

**Experiences with the DBE certification process.** Businesses owners shared their experiences with the DBE certification process.

**Several businesses owners described their experiences with the DBE certification process in negative terms.** [#1, #3, #6, #29, #41, CT #49, CT #56] Their comments included:

- The Subcontinent Asian American female representative of a minority woman owned DBE-certified supply firm commented, “The experiences were very, very intense. The first time they interviewed us the Vice President was here, a tall white male. They took more time listening to him than they were listening to the [minority] female owner, and they actually denied us the first time. And then I think it was six months later that they allowed us to reapply and then they gave it to us.” [CT #56]
- The Native American male owner of a DBE-certified construction-related firm reported that when he applied for DBE certification, the certification packet he ultimately submitted was about 400 pages. He commented, “[The certifying agency] wanted to have every asset that you have.”

The same business owner reported that when he first applied for certification as a DBE the reviewer said, “Even though I’m a Native American Indian, I’m probably not viewed as a minority.” He reported that he was able to provide all the required documentation to support his nationality, and his firm ultimately became certified. [CT #49]

- The non-Hispanic white female owner of a WBE-, SBE- and DBE-certified specialty consulting firm responded that the process is always difficult, cumbersome, and intrusive. She observed, “I like all the certification processes, even though they’re cumbersome and

they take a lot of time, and they – you might as well give them your first-born child because it's just so much information. The sad part is that if somebody hacks into the cloud we're all screwed. We shouldn't have to give our financials every year." [#29]

- When asked about the process of becoming DBE- certified, the manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm described the challenges of certification. He explained that small firms need the certification, but do not always have the resources to go through the application process. While he was not with the firm when it went through the certification process, he knows enough about the process to know it can be “financially, emotionally, and physically stressful.” He said the benefits can be huge, but only if the rewards proceed it immediately. He stated that the financial output is typically high. He then specifically described the costs associated with obtaining corporate financials – which can range between \$5,000 and \$10,000 - as one of the barriers to certification. [#1]
- When asked to describe his experience with the DBE certification process, the Hispanic American male owner of a DBE- and SBE-certified professional service firm responded, “Was [the DBE certification process] a pain? Yes. Was there a lot of paperwork? Yes. Was it painstaking and silly? Yes. The forms are too bureaucratic. It can be discouraging for a lot of people who don't understand this. And to disclose all of your financial information, and not knowing what they do with it, or if they know how to read it concerns me.” [#3]
- When asked about the firm's overall experience with the DBE certification process, the representative of a DBE-certified non-Hispanic white female-owned civil engineering firm stated, “It was interesting. We had to pull tax returns for five years and because we are an S-Corporation, [our application] included the owner's personal returns. It was a lot of paperwork. It is not a difficult process, so long as you have all your paperwork in order.” [#6]
- The non-Hispanic white male representative of a regional disadvantaged business association noted that the only difficulty with the certification process is that the forms are so long and time consuming. He suggested that DVBEs should be spending their time in more constructive pursuits, especially working to secure new business from public sector agencies. He added that Metro's certification includes a 40-page document. [#41]
- A male representative of a DBE-certified firm stated, “[Small businesses] don't have a lot of money to apply to ten different agencies. Part of the problem of doing business with Metro is that [we're] not certified with Metro or certification takes too long on projects that are coming. We've seen that before, where you can't be certified fast enough to be on a team.” [PT#2]

**One business expressed frustration with the way Metro has handled his firm's application for SBE and DBE certification.** The male President of a DBE- and SBE-certified equipment supplier firm explained his experience about becoming certified was a catch 22. He stated, “I received a phone call from the certifying department that asked if I wanted to be included for DBE consideration. I did not believe it would be an easy qualification as the SBE listing. We are now listed as DBE with Department of General Services, L.A. County, LAUSD, MWD and SBA/SAM.

Nevertheless, I agreed to make the effort. While we continued to provide information over the past nine months, I have called back and asked if I could just be considered for the SBE listing in the meantime and was told "NO", because it would require the same detail of information as the DBE application. I have explained that in this time I could have been under consideration by Metro primes and buyers while on the list for SBE opportunities. I would gladly continue to comply to be considered for a DBE certification and in the meantime I feel that with all the information I have provided to date an SBE designation could have easily been approved and would have put us on the 'map' with Metro as an SBE, while pending a DBE approval." [WT#9]

**Recommendations for improving the certification process.** Interviewees recommended a number of improvements to the certification process [#1, #3, #6, #11, #15, #21, #29, CT #2, CT #37, CT #49].

- The Hispanic American male owner of a DBE- and SBE-certified professional service firm suggested, "The process should be changed to just certify once through one agency. Once you do it, you're done. Also, minimize disclosure of financial documents; don't ask for all tax returns with your family information and then you don't know what they're doing with this personal information. Make more of the forms available for submission online, instead of having to print, sign and scan." He also noted his frustration with the definition of "Hispanic." He explained, "I would prefer that Hispanic should be broken down into more discrete categories. This is currently too murky to be accurate and reflect the population of southern California."[#3]
- The non-Hispanic white female owner of a WBE-, SBE- and DBE-certified specialty consulting firm recommended that all public agencies should have one global certification process because "filling [out the forms for] all types of certification processes takes a lot of time." [#29]
- When asked how he would improve the Metro DBE- certification process, the manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm responded that he would "streamline the process," specifically by limiting the financial documents required of applicants. He stated, "Don't ask [applicants] for documentation that creates a cost." [#1]
- The representative of a DBE-certified non-Hispanic white female-owned civil engineering firm observed, "[The certifying agencies] could make the process easier with less paper and more automation, like a direct link to the IRS for the tax return information. A process where we would not have to print copies [of the tax returns]. Paper and printing is expensive."[#6]
- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded, "Doing everything electronically [would help]. Right now there are different forms that ask for the same information. If everything is electronic, the burden of preparing documents is reduced. The people at Metro are very friendly and that helps a lot. If there was a cheat sheet or flow chart to help with the inside process, like, "the next step is...if you have a hiccup, do that" [#11]

- The Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated, “Just keep it simple. Go by net worth, gender, culture, race. Keep it simple, but maintain controls. People do play games, like when a husband makes his wife the majority owner, but all she does is write the checks.” [#15]
- The Hispanic American female owner of a DBE- and MBE-certified specialty trucking and hauling firm noted that he would like to see the certification process made easier. She stated, “Maybe not add so many years of tax returns, or require a notary. It’s hard trying to find the time to go run around and do these things like getting notarized, talking to my accountant trying to get the numbers right but it’s not something I can’t do, it just takes a lot of time.” [#21]
- The non-Hispanic white male owner of a specialty construction firm recommended that Caltrans make the DBE certification process simpler. [CT #37]
- The Native American male owner of a DBE-certified construction-related firm reported that the process was “intimidating and time consuming” and recommended simplification of the certification process. [CT #49]
- The Black American female owner of a construction-related business recommended that the DBE certification approval process be faster. [CT #2]

**Two business owners offered comments about how agencies need to rethink the definition of DBEs.** [#12, #5] For example:

- The Asian American male manager of an international architectural, planning, and engineering services firm responded, “This is my own perspective, I would say we tend to focus a lot on ethnicity. And I think the gender problem, if you call it a problem, is going to disappear. The best students that are coming out of universities today are women. Our entry-level people are predominantly women. I think over time the gender gap is going to take care of itself. What I would personally like to see is less of a focus on ethnicity, speaking as an Asian male, and more of a focus on perhaps income disparity. If you come from a poor family and if you grew up in a poor neighborhood, whether you’re black, white, Asian or Hispanic, it shouldn’t really matter. If we have a program that says, ‘If you can prove that your parents were economically disadvantaged, and we have a program to help you overcome that.’ I think that would be wonderful. Get away from the whole ethnicity thing. Speaking as a Canadian company, it’s amazing how the Canadians are completely blind to ethnicity. They really don’t see color at all. I think the real disparity is income disparity. And you can be white and poor, and why don’t you deserve help? That’s my own personal feelings. If we have a program, a disadvantaged program, let’s look at income.” [#12]
- When asked about his experience with the DBE program, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm observed, “In terms of minorities, I think African Americans and Native Americans certainly qualify. Whether in our profession, women, Latinos, Asians, Pacific Islanders, if I look at who’s in the field and the demographics and who’s been successful, I don’t think it applies anymore to those minorities. If it’s based on socio-economic factors, I don’t know if that’s true in our

profession, if you look at education level, and other indicators, it's hard to categorize those DBE factors as being consistent for being minorities.”[#5]

**Comments on other certification types.** Interviewees shared a several comments about other certification programs [#3, #7]. For example:

- The non-Hispanic white male owner of an SBE-certified engineering firm observed, “I have not seen any benefits [from our SBE certification]. The primes that we work with do not select us for our SBE certification.” [#7]
- When discussing his work with public agencies in the Los Angeles area, the Hispanic American male owner of a DBE- and SBE-certified professional service firm commented, “The definition of SBE is also a huge problem, because they don't use the gross sales of a firm, but the net worth. It allows the largest firms to be classified as a small business. The value has nothing to do with firm, but only the individual owner and you don't even factor in their home. This way, the largest SBEs, not the smallest, get most of the work.”[#3]

## **K. Insights Regarding other Race-/Ethnicity- or Gender-based Measures**

Interviewees, participants in public hearings, and other individuals made a number of comments about the business implications of the Federal DBE program and its implementation by Metro. They also shared their thoughts about the adverse effects of race-/ethnicity- or gender-based programs on businesses not eligible for those programs. Section K presents their insights about these topics:

- Business impacts of the DBE program (*page 109*); and
- Any adverse effects of race-/ethnicity- or gender-based programs on businesses not eligible for those programs (*page 112*).

**Business impacts of the DBE program.** Some interviewees commented on the helpfulness of the program while others criticized it.

**Several business owners and managers described the positive business impact the DBE program has on their firms.** [CT #46a, CT #56, CT #61] For example:

- The Black American male owner of a DBE- and SBE-certified contracting firm indicated that at one time, the DBE program enhanced his business. He noted that he could respond to bids and satisfy the DBE goal 100 percent because he was certified. [CT #61]
- The Subcontinent Asian American female representative of a minority woman owned DBE-certified supply firm when asked how the DBE program impacts her firm's business said, “Oh, positively, 100 percent.” She added, “Bigger corporations will not give you the time of day unless you have that certification. Two companies specifically wanted to use us because of our DBE [certification]. Now, they kept using us because of our customer service and our DBE [status].” [CT #56]

- The Hispanic American male owner of a DBE- and MBE-certified specialty contracting company reported that the DBE program had been helpful to his firm. He stated, “It gave us a place to start, a place to plant our feet and move forward. Other than our connections, we were reaching out to people and they wouldn't give us the time of day sometimes but... [after engaging with the DBE program] they at least listened to us. Yeah. Even if they didn't use us, they knew we were out there.” The same business owner added, “...I'm not sure we'd still be in business without it.” [CT #46a]

**Another business owner thought the DBE program was helpful but was concerned about its enforcement by Metro.** When asked about additional recommendations for improving Metro's or other state agencies' small business inclusion programs, the manager of a DBE- and SBE-certified Black American woman-owned engineering and construction services firm replied, “the DBE- program is great, but it is not perfect.” He explained that if Metro wants to limit disparities, there must be change at the policy and procedures level. He explained that if there is a billion dollar project and 20 percent of that has to be DBE- participation, then there need to be more controls in place to make sure the prime is actually awarding the work to the DBE- firms identified in the bid. He concluded by saying: “Metro needs to make sure this happens.”[#1]

**One business owner expressed that contract goals should focus more on SBEs not DBEs because DBEs sometimes lack the skills and qualifications to complete work.** The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm replied, “Yes. Having a DBE goal, not an SBE goal. That has always been a challenge for us. I went to an annual meeting, they were talking about DBE goal being a failure because out of the many companies that started 30 years ago there should be a lot of DBEs right now. They're not around because they are bankrupt. The challenge of business is not getting the project, it's doing the project and having the money to float. So, giving the project doesn't help a DBE. You've got to help them manage the project or actually do the project. If you give the DBE the financial backbone and tell them if they qualify to do the job, they'd be more successful than just giving them a free project. Giving them the tools to run the business is more important than just giving them the work.” [#13]

**Another business owner felt that Metro's contract goals for DBEs were too high and too onerous.** The Asian American male manager of an international architectural, planning, and engineering services firm responded “Yes. In fact, the [Federal DBE Program] has a lower percentage in mind. It tends to be that the local Metro percentages are much higher. In other agencies, whether it's Orange County, or the Feds, it's 20 percent or lower than 20 percent. So, you can in fact allow multiple large teams to come together along with small businesses to do this work. The only criticism I would have is that percentage would need to come down, from our perspective. All of the things that Metro does is very good. It's very supportive of small businesses. I think the problem we have from an industry perspective is that [required DBE] percentage is getting much too large. And it gets into designing the team to respond to a bid. I think that's not the most effective way to do it. Letting the private sector come, and create the team with some goals in mind. We went from goals that were 10 percent, 15 percent to 20 percent - and those goals are reasonable and fair. But when we start to go to 30 percent and above 30 percent, to 40 percent - then we have social engineered that team, to maybe not be the best team possible to do the work. It's not for a lofty goal of helping small businesses prosper

and grow. But we're putting into risk, 'Is this the very best product that we're going to be designing?' Not that they can't ultimately get there. But if everyone is learning to walk every time with this large percentage, it's not going to be very good." [#12]

**One business owner commented that DBE contract goals can reduce the number of bidders for public sector work.** A female representative of a construction firm expressed, "There is a large amount of construction in LA. Even non-federally funded projects have DBE goals. This has reduced the number of firms that will bid and will continue to be a bigger problem." [PT#11]

**Another business owner described the DBE program's negative impact.** The Black American male owner of a DBE- and SBE-certified contracting firm responded that the DBE program is no longer helpful to his firm. He said, "It's not helpful because it hasn't been like implemented properly. If I just say that, it is not helpful that could lead [others] to believe that it is [unnecessary], but it is [needed].... The need is there." He added that the DBE program is unhelpful because prime contractors abuse the good faith efforts process instead of hiring DBE-certified subcontractors. [CT #61]

**Two interviewees expressed that prime contractors should be held more accountable for reaching DBE goals.** For example:

- A male representative of a DBE-certified firm stated, "We have to create or change [the] policy [when it comes to meeting DBE goals to] where it really ends up hurting the contractors wallet. The disparity lies with holding contractors accountable for not meeting DBE goals. DBE firms run at a higher rate and does work at a larger overhead and cost than the primes." [PT#2]
- The female owner of an SBE-certified professional services firm stated, "[We should] penalize [prime contractors] on future projects [when a DBE goal is not met]. If they are not compliant, the agencies should take away points from your score. This will help discourage [prime contractors] from playing with the numbers. You can get them to comply because they want to be part of the next project that's coming up." [PT#3]

**Three business owners shared other comments about the DBE program.** [CT #37, CT #49, PT#1] For example:

- The non-Hispanic white male owner of a specialty construction firm said he is aware of DBE subcontracting goals programs. He also stated that he would like to participate in them.

The same interviewee commented that DBE, SBE, and DVBE programs could "make some firms millionaires overnight if they can get in and perform the work. It could be huge [for those firms]." [CT #37]

- The Native American male owner of a DBE-certified construction-related firm reported that he is aware of Metro's DBE subcontracting goals program but noted that he has never done business with Metro.

When asked if the DBE program had been helpful to his firm, the same interviewee said, “Not yet...but I have hope.” [CT #49]

- A male representative of a DBE-certified firm stated, “GCAP Services is the only firm that I’ve ever [worked with as part of the DBE program], they have actually followed up to make sure why we either did or did not get a contract. They are the most follow-through organization that I’ve come across. I think that the DBE program has really diminished those over the years. It’s been very solid from a small, disadvantaged perspective.” [PT#1]

**Any adverse effects of race-/ethnicity- or gender-based programs on businesses not eligible for those programs.**

Some business owners thought there were negative effects of the DBE and other disadvantaged business programs [#5, #13, #23, Avail#24, #41, CT#37]. For example:

- The non-Hispanic white male representative of a regional disadvantaged business association observed that Metro is “race conscious, socio-economic-centric, and has race-conscious provisions in some RFPs,” which bar other DVBEs from bidding. “This is very, very disconcerting... Whenever you say, ‘one can qualify and the other cannot’, it limits the quality of the firms available to do the work. Racial and ethnic discrimination started the whole movement but we no longer need race-centric restrictions on competition. It’s an obstacle.” [#41]
- When surveyed, a business owner responded, “It’s terrible that Metro gives awards to race conscious DBE’s. It should be based on qualification, rather than the color of your skin.” [Avail#24]
- The executive of a SBE-certified non-Hispanic white male-owned landscape architecture firm responded, “I think for many years, because of the affirmative action and DBE goals, we wouldn’t even try to get work in the public sector, depending on the job. Because we’re a small firm, we fall into that category that primes are trying to get certain percentages of their team, at 20 percent or 25 percent, or something, representation of minorities. And since we’re a small company, those are the companies that usually meet those goals and since we don’t qualify, we wouldn’t go after that type of project, because we wouldn’t qualify in the eyes of the prime, in order to meet their needs. So I think that this program has really worked against our office in many respects, and I think that we have to be careful with this, and I think that’s why they’re now goals, and they’re not mandated.

The same interviewee continued, “Because, what the federal government defines as a minority in this country, varies from region to region, and what the state of California defines as a minority, maybe should take into account what’s happened in California. Because for instance within the city of Los Angeles, Latinos are no longer the minority, they are greater than the whites in the city of Los Angeles. So I think when you go to the definition of what’s a minority, that’s not necessarily the proper definition. The definition is who’s disadvantaged, and who needs a boost, and historically you have to look at many, many factors. It’s complicated. And I think that there’s no disputing that African Americans have been disadvantaged historically and still to this day. Native Americans, same thing. Latinos? I’m not sure. And even in our field now... women aren’t really a minority. I mean, if



you look at what's happening in education and higher education in our profession, women are still a minority, but when you look at the success of their offices and so on, I don't think you can make that argument anymore. So I think that we really need to look at that program and see if it's fair for the state of California, or for southern California, because we have such a big economy, you have to look at the big picture.”[#5]

- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm stated “The challenge I can see coming down the pipe, is the trend to go to a lot of big projects – design-build – different delivery methods. I know we're going to face a challenge with those contractors because they want to see our DBE goal. So it's a little frightening. The project in New York is design-build. So it's the first time I broke to that system. It's hard for us to break those projects, because those projects require DBE. And we don't have it. The contractor doesn't care about the process, qualification or quality. Right now I see a challenge with big projects like design-build - we will not be able to break into those projects.”

The same interviewee continued, “Having DBE really helps to get an unfair advantage. You should get the job if you are qualified. It should be independent of how you look or what color you have. If a DBE firm is suffering, they should get interest-free money from the government. Not an interest-free project. They get a project and they can't deliver it. The reason they hired me in New York is – they hired this DBE contractor – he is not capable of delivering that project. So they hired me to help them deliver the project. What is going to help us be competitive in this market - don't put DBE requirements in contract goal. Increase small business goal.” [#13]

- The non-Hispanic white male owner of a trucking firm stated, “The minority-owned [certification] programs in southern California should hold no weight anymore because there is no majority. It's southern California.” [#23]

**Several non-Hispanic white business owners highlighted how their non-minority status could be a barrier to business.** [#13, #23, WT#A] For example:

- The non-Hispanic white male owner of a trucking firm explained, “I've always been afforded the opportunity to bid but sometimes I've been outright told that because I'm not a minority, we might have a problem.” [#23]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded, “We were denied [the opportunity to bid and a contract] because we weren't DBE.” [#13]
- The non-Hispanic white female owner of a WBE- and SBE-certified construction firm explained, “A Hispanic woman and 50% company owner told me, ‘Don't even try for that program, you are not a minority’.” [WT#A]
- When asked about any negative effects of DBE programs on businesses not eligible for the programs, the non-Hispanic white male owner of a specialty construction firm stated that “regular” companies [not certified] might be missing opportunities to get contracts. He

went on to say that technically he is a “white guy,” so he could not be considered disadvantaged because he’s not a minority or disabled, and is thus excluded from DBE programs. [CT #37]

## L. Other Insights and Recommendations

Interviewees provided other suggestions to Metro and other agencies about how to improve their small business or DBE programs. They also shared other insights or recommendations. For example:

**Additional insights about enhancing opportunities for small businesses, including DBEs, in Metro or other agency contracting.** Business owners and managers provided additional comments about how agencies can create more small business opportunities. [#3, #5, #6, #7, #9, #11, #12, #13, #14, #15, #20, #21, #24, #25, #26, #28, #30, #41, WT #7, WT #10].

- The Black American female owner of a janitorial services firm stated that there has to be a better way [for Metro] to announce what services are being needed. She explained, “For companies that want to compete, they’re allowed to but it seems like you need to know people, and places to go, to be able to obtain information on how to do the bidding or what time of year they are opening up the solicitation for this particular service. It should be somewhere that our industry and companies in our industry are aware - not just a few people that are probably experienced with it....This is all new for me with Metro. Have a better way of promoting [contracting opportunities].”[#26]
- The Hispanic American male owner of a DBE- and SBE-certified professional service firm shared his views on NAICS codes. He explained “NAICS codes are a problem. I think that there has to be a better way to determine how small business and minorities received their work than using the NAICS codes. The system needs to be refined to identify who is available to do the work. If you enter my code... there are ten different categories under the same code. If you put that NAICS codes in the Metro system, my firm does not show up. There has to be some better way. The selections should be refined; it should be based on the type of work, as opposed to the NAICS code.” [#3]
- The non-Hispanic white female owner of a WBE- and SBE-certified supplier firm stated she has attended several seminars that the City of Los Angeles offers for minority- and women-owned businesses. She stated, “It’s a good experience to be surrounded by other people who are trying to do the same thing that you’re doing....It was helpful because everything was broken down on how these areas can be addressed like how to go about getting a business loan, taxes, marketing, they break it down into different areas where you can choose from.” [#30]
- The Asian American male owner of an MBE- and SBE-certified engineering firm stated, “There shouldn’t be a preference towards certified firms but rather towards qualified firms just to meet the prequalification terms.”[#25]
- When asked what recommendations he has for Metro or other state agencies, the executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm responded,

“If there are programs put on by Metro or agencies, they usually have the person in charge of affirmative action or a particular program to speak to the audience. For myself, it’s informative, but it doesn’t really get to the point that I was trying to make....That person is the head of a program, they’re talking about the program, they go away, and what are you left with? ‘Oh I can fill out that form’ but it’s not really meeting with people who are reviewing the qualifications of your firm, the history of your firm, your experience and understanding the firm. It’s just a set of boxes of whether demographically we fit into that category, or socio-economically. I don’t think necessarily that is the type of program that is effective.”[#5]

- The representative of a DBE-certified non-Hispanic white female owned civil engineering firm replied, “Metro should work on speeding up the process of awarding projects. From the time the proposal is submitted to when they [Metro] award, should only take two months. That would be a good turnaround.”

The same interviewee also commented, “There is a difference between federally-funded versus state-funded projects. We worked as a sub on a state funded project and had to show proof of race, ethnic makeup of the work force. It’s lots of paperwork and you have to ask the employee about their race. I once had a guy that I thought was Hispanic, but he was American-Indian. You can’t go by what you see, and when you ask them [the employee], it can be misinterpreted. I had a guy ask me ‘Why does it matter?’”[#6]

- The non-Hispanic white male owner of an SBE-certified engineering firm responded, “It would help if [public agencies] would reach out to design organizations, like the Structural Engineers Association, the American Society of Engineers. [These professional organizations] all have small business affiliations and it would help if agencies reached out to them for opportunities.”[#7]
- The male managing director of a DBE- and SBE-certified environmental consulting firm stated, “Metro has done a good job of trying to provide opportunities for small disadvantaged businesses to work with Metro. However, Metro’s current SBE/DBE outreach requirements for prime contractors do not provide an equal means for new SBEs/DBEs to compete for subcontract work. As an SBE/DBE still trying to secure my first work with Metro, I can tell you that my experience has been that the prime contractor’s most often have preferred SBE/DBE subcontractors that they use to meet Metro’s SBE/DBE utilization requirements. In addition, while there may be qualified SBEs/DBEs seeking subcontractor roles for specific technical support roles, these types of roles are often reserved for the prime contractor’s employees. The combination of these two issues makes it almost impossible for a new SBE/DBE to be considered as a subcontractor on Metro RFPs. These issues could be addressed, in part, if Metro were to require a portion of contract NAICS codes that exhibit underrepresented SBE/DBE utilization to be used for qualified SBEs/DBEs that have performed less than \$20,000 (or some other reasonably low amount) in total billable work for Metro. Doing so would not only increase the number of new SBEs/DBEs doing work with Metro, but would also incentivize primes to utilize new SBEs/DBEs in other NAICS areas for Metro contracts. In concept, this approach would be

similar to the current SBE/DBE mentoring effort, only with SBEs/DBEs that are already proficient in a particular NAICS area.” [WT#7]

- The Asian American male owner of a DBE-, MBE-, and SBE-certified environmental engineering firm responded that Metro should “subdivide the market into more specialties.” He added, “We [minority environmental engineers] are very few. A lot of SBEs have outgrown being an SBE, but are in my same market. They may not be the size of AECOM, but have muscle that allows them to lower pricing.” [#11]
- The Hispanic American male owner of a DBE- and SBE-certified professional service firm emphasized the need for an agency RFP tailored to professional services firms. He commented, “The RFPs [issued by most agencies, including Metro] are massive, and the requirements and forms are applicable only to construction firms. There should be one [RFP issued] for professional services and [a separate RFP issued] for construction, specifically for architects and engineers. Get rid of construction related forms. For example, why are you asking me about bonding, when that is only applicable to construction work? Create a separate RFP with its own requirements for professional services.” [#3]
- The non-Hispanic white male co-owner of an SBE-certified construction management and consulting firm responded “I think the hardest thing for a business is not getting a project – it’s delivering a project. Everybody focuses on giving the projects to DBEs, instead of helping them deliver the project. The notion that if you should give a project to somebody to make them successful, that’s a wrong mindset. You should give a project and help them deliver. They need money, cash, people, and management skills to learn how to run [the project.] My suggestion is to think about the program differently. Not just blindly give them a project and hope they deliver it. I’ve seen them fail. Everyone in the industry knows they fail.”

The same interviewee continued, “If you cannot change the DBE Program, the SBE goal is there. At least help us with small business. Those who do not qualify as DBE. So we will be able to participate in big projects. I’m against requiring a goal for project. The project should be qualification-based. Contracting is different. But design-build should have a combination of both. You should be required to have qualified consultants and a team to be on the project. If you can’t get rid of DBE goals, put SBE goals on projects.” [#13]

- When asked about additional recommendations for improving Metro’s or other state agencies’ small business inclusion programs, the Black American male co-owner of a DBE-, MBE-, and SBE-certified architecture firm stated, “I think having mandatory goals on the contracts. For a contract that is \$20M, there should be mandatory goals exceeding 20-25 percent to the SBE’s. Beyond the mandatory goals, there should be five extra points for exceeding the mandatory goals. If you consider the fact that design builds are winning \$2B contracts, how much is going to small local business? You’re probably going to have 20 percent or \$400,000M in soft cost services. When you have number like that, you have to ask how much is going to small DBE firms? I should at least have a \$10M contract, instead of a \$2M opportunity. If they make that cultural shift, then small businesses are going to get the tangible benefits.” He added, “If you have \$10M over five years, you’re going to grow

your company and manage your profit. But if you are struggling and always having to chase the next opportunity, your quality will suffer.” [#15]

- The Asian American male manager of an international architectural, planning, and engineering services firm commented, “I think a lot has been done already and there are a lot of programs in place. And I think tweaking them, refining them is where I would recommend as opposed to creating more programs. To see if we can bring it into a right sizing of the program, focus on the quality of the program, focus on enhancing the efficiency of the program. So that it’s not simply a numbers game or bureaucratic process where people just follow the numbers and they don’t know why they are doing it anymore. That would be my suggestion - is to take a look at the program and see how you can get quality out of it as opposed to quantity. If we can get further away from just specifying a high number of small business or disadvantaged business as a marker for success. Think about it in a different way. Because ultimately as a public agency, whether you’re Metro or City of Los Angeles, you really want to focus on the quality, not just the quantity [of the program.] I think that’s where the big difference is going to happen.” [#12]
- The Asian American male manager of a non-Hispanic white male owned-engineering and consulting firm stated, “All public agencies should focus on streamlining their bids and also bring on board third party subject-matter experts.” He explained, “The process could be improved but it’s really good because [public agencies] don’t have all the experts in-house. They can bring on subject-matter experts who will review work, who will provide input to the organization, and that helps ensure they’re getting what they’re paying for.”[#28]
- The Asian American male owner of a trucking firm stated that his one recommendation concerning Metro contracting is that Metro should improve its web presence. [#20]
- The non-Hispanic white male owner of a specialty trucking firm expressed that public agencies including Metro should use “public broadcasting” to get the word out. [#24]
- The Asian American male owner of an MBE- and SBE-certified engineering firm suggested that Metro and other city agencies should not have so many different types of certifications. [#25]
- When asked about additional recommendations for Metro or other state agencies, the non-Hispanic white male owner of a janitorial services firm responded by saying, “To give a chance to small businesses, like us, to participate.”[#9]
- The female administrator of a DBE- and SBE-certified architecture firm expressed, “I want to hear about new DBE/SBE success stories. Unlike companies that sell goods to Metro, it’s harder for professionals like us establish ourselves with Metro. I would like other DBE/SBE professionals who were successful share their knowledge & experience as to how/what made them successful. Find a way for them to support, sponsor, team, group with others like us trying to enter this segment of the market. Network within the SBE/DBE network. After establishing themselves with Metro, they can become the Mentor under the Mentor/Protégé program. It would give those who’ve succeeded an opportunity to ‘pay it forward’ and continue the program for the benefit of the future DBE/SBE professionals. We

would love to be a Mentor someday! Also, given how difficult this has been for us, I would be interested to know how many new DBE/SBE firms are approved annually and compare that to how many new firms are/were given a contract and do work for Metro. I would think the [percentage] would be a good indicator of the success of the program.” [WT#10]

- The non-Hispanic white male owner of a pest control firm responded “I have a recommendation that has to do with the city tax...When I first registered with my company, I didn’t receive any information about any city tax. For the first two years, there was a tax break and I missed that. I wasn’t given any information, so I didn’t register at the time. Whatever your gross receipts are, you’re going to pay 1 percent. I didn’t think that was fair.” [#14]
- The non-Hispanic white male representative of a regional disadvantaged business association stated that Metro’s SBE Prime program is “excellent”, but that Metro should simplify the RFP process, and race-consciousness at Metro is “no longer necessary.”[#41]

**Other final comments.** Some business owners or managers provided final comments on the certification processes, contracting, race- and gender-based programs and other interview topics. [#3, #5, CT #14, CT #46a, PT #3, WT #5] For example:

- When asked if he had any final comments, the Hispanic American male owner of a DBE- and SBE-certified professional firm concluded, “Of all programs, Metro has the strongest, despite all these issues. It [the overall bidding process and contract and performance requirements] just can be done better. I wish other cities and agencies had the same [approach as Metro].”[#3]
- The executive of an SBE-certified non-Hispanic white male-owned landscape architecture firm responded “...Going forward, the question from my point of view, within landscape architecture, if Metro’s goals are to promote the opportunity for small businesses to be successful, that’s one thing. If Metro’s goals are for making sure that DBE firms are successful, that’s a totally different thing. If Metro were to look at the composition of firms not bidding their projects but just the professions in landscape architecture, they would then maybe evaluate whether the DBE program is as necessary as it was 30 years ago. Because I think in Los Angeles now, there’s no question and there’s never an issue at least when we’ve hired sub-consultants or when we’ve worked with others whether they’re minority, majority, white, black. This is such a diverse population. We can’t get qualified people unless they are minorities often. It doesn’t factor in. My question is whether Metro is promoting in our field, small businesses or minorities. And I would question the minorities now, because it is a diverse population.”[#5]
- The female owner of a DBE-, SBE-, and MBE-certified engineering firm stated, “The Metro website used to post Small Business Participation Summaries, and it was obvious that the largest percentage of work was going to Hispanic American-owned businesses (at least 6 times as much as that going to Asian Pacific American-owned firms). When I brought this up to the staff member of a former Metro board member, the following happened: first, the time period of the Small Business Participation Summary was manipulated so that it reflected a very short period of time when some more and/or larger awards were made to

Asian Pacific American-owned firms so the data looked as if Asian Pacific American-owned firms were winning the most work at Metro. Then, the Small Business Participation Summary was no longer even uploaded to the Metro website. So by speaking up, no positive change took place; instead, data was manipulated and then hidden.”[WT#5]

- A business owner recently certified as a Metro subcontractor testified at public hearing that “aside from a good-faith effort [by primes], picking up the phone and making a serious effort to help small businesses goes a long way. Because, as small businesses are getting certified, we start to get bombarded by a lot of opportunities. And many times we don't know if there's a true effort... to give some of that - a piece of the pie - to small businesses. But in my experiences, when somebody picks up the phone or sends a direct email trying to set up a meeting, something of that nature, it truly shows true interest. And then things start to go in motion. “ [PT#3]
- The Subcontinent Asian American male owner of a MBE-certified professional services firm said, “The main thing is for [subcontractors], [agencies] need to let the prime release the information to all the subs about potential assignment so [all of the subcontractors] have a shot at getting to do the good work.”

The same business owner suggested, “Cutting down big contracts just for small businesses to compete without the big business...because I guess the playing field is not level.” [CT #14]

- In his final comments, the Hispanic American male owner of a DBE- and MBE-certified specialty contracting company suggested that there should be a change with the waiver of subrogation, because it has a “crippling effect for small businesses.” [CT #46a]

# **APPENDIX E.**

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## **General Approach to Availability Analysis**



# APPENDIX E.

## General Approach to Availability Analysis

The study team used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts that the Los Angeles County Metropolitan Transportation Authority (Metro) awarded between January 1, 20011 and December 31, 2015. Appendix E expands on the information presented in Chapter 5 to describe the study team’s:

- A. General approach to collecting availability information;
- B. Development of the business establishments list;
- C. Development of the survey instrument;
- D. Execution of surveys; and
- E. Additional considerations related to measuring availability.

### A. General Approach to Collecting Availability Information

BBC Research & Consulting (BBC) contracted with Customer Research International (CRI) to conduct telephone surveys with thousands of business establishments in Los Angeles County, which BBC identified as the *relevant geographic market area* for Metro contracting. Business establishments that CRI surveyed were businesses with locations in Los Angeles County that the study team identified as doing work in fields closely related to the types of contracts that Metro awarded during the study period. The study team began the survey process by determining the subindustries for each relevant Metro contract element and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries.<sup>1</sup> The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations. Rather than drawing a sample of business listings from D&B, the study team attempted to contact every business establishment listed under relevant work specialization codes.<sup>2</sup>

As part of the telephone survey effort, the study team attempted to contact 7,558 business establishments in the local marketplace that do work that is relevant to Metro contracting. That total included 3,649 construction establishments; 1,926 professional services establishments; and 1,983 goods and other services establishments. The study team was able to successfully contact 2,734 of those establishments—42 percent of the establishments with valid phone

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<sup>1</sup> D&B has developed 8-digit industry codes that provide more precise definitions of business specializations than the 4-digit Standard Industrial Classification (SIC) codes or the North American Industry Classification System (NAICS) codes that the federal government has prepared.

<sup>2</sup> Because D&B organizes its database by *business establishment* and not by “business” or “firm,” BBC purchased business listings in that fashion. Therefore, in many cases, the study team purchased information about multiple locations of a single business and called all of those locations. BBC’s method for consolidating information for different establishments that were associated with the same business is described later in Appendix C.

listings (1,063 business establishments did not have valid phone listings). Of business establishments that the study team contacted successfully, 959 establishments completed availability surveys.

## **B. Development of the Business Establishments List**

The study team did not expect every business establishment that it contacted to be potentially available for Metro work. The study team’s goal was to develop—with a high degree of precision—unbiased estimates of the availability of minority- and woman-owned businesses for the types of contracts that Metro awarded during the study period. In fact, for some subindustries, BBC anticipated that relatively few businesses would be available to perform that type of work for Metro.

In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction, professional services, or goods and other services work. To do so would have required the study team to include subindustries that are only marginally related or unrelated to the types of contracts that Metro awarded during the study period. Moreover, some business establishments working in relevant subindustries may have been missing from corresponding D&B or other listings.

BBC determined the types of work involved in Metro prime contracts by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure E-1 lists the 8-digit work specialization codes within construction, professional services, or goods and other services that the study team determined were most related to the contract dollars that Metro awarded during the study period and that BBC considered as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure E-1.

## **C. Development of the Survey Instrument**

BBC drafted an availability survey instrument to collect business information from construction, professional services, or goods and other services business establishments in Los Angeles County. 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).<sup>3</sup>

**Survey structure.** The availability survey included 17 sections, and CRI attempted to cover all sections with each business establishment that they successfully contacted and that was willing to complete a survey. Surveyors did not know the race/ethnicity or gender of business owners when calling business establishments.

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<sup>3</sup> BBC also developed a fax and e-mail version of the survey instrument for business establishments that reported a preference to complete the survey in those formats.

**Figure E-1.**  
**Subindustries included in the availability analysis**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Construction</b>			
<b>Asphalt and concrete supply</b>			
14420000	Construction sand and gravel		
32720300	Precast terrazzo or concrete products		
<b>Building construction</b>			
15420101	Commercial and office building, new construction		
15429901	Custom builders, non-residential		
<b>Electrical work</b>			
17319903	General electrical contractor		
<b>Excavation and drilling</b>			
17949901	Excavation and grading, building construction		
<b>Fencing, guardrails, and signs</b>			
17999912	Fence construction		
<b>Flagging services</b>			
73599912	Work zone traffic equipment (flags, cones, barrels, etc.)		
<b>Heavy construction</b>			
16220000	Bridge, tunnel, and elevated highway construction		
16119901	General contractor, highway and street construction		
16290000	Heavy construction, nec		
16110000	Highway and street construction		
<b>Heavy construction equipment rental</b>			
50820000	Construction and mining machinery		
73530000	Heavy construction equipment rental		
35360000	Hoists, cranes, and monorails		
<b>Land site prep</b>			
17990900	Building site preparation		
16299902	Earthmoving contractor		
<b>Landscape services</b>			
07829903	Landscape contractors		
<b>Other construction</b>			
17110301	Fire sprinkler system installation		
17990702	Parking lot maintenance		
<b>Painting and striping</b>			
17210200	Commercial painting		
<b>Plumbing, heating, and air</b>			
17110000	Plumbing, heating, air-conditioning		
<b>Railroad construction</b>			
16290200	Railroad and subway construction		
<b>Rebar and reinforcing steel</b>			
17910000	Structural steel erection		
<b>Roofing, siding, and sheetmetal work</b>			
17610000	Roofing, siding, and sheetmetal work		
<b>Trucking</b>			
42129905	Dump truck haulage		
42120000	Local trucking, without storage		
<b>Water, sewer, and utility lines</b>			
16230302	Sewer line construction		
16230203	Telephone and communication line construction		
16239906	Underground utilities contractor		
16230300	Water and sewer line construction		
<b>Wrecking and demolition</b>			
17950000	Wrecking and demolition work		

**Figure E-1.**  
**Subindustries included in the availability analysis (continued)**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Professional Services</b>			
<b>Construction management</b>		<b>Public finance</b>	
87419902	Construction management	87420401	Banking and finance consultant
<b>Engineering</b>		<b>Surveying and mapping</b>	
87110402	Civil engineering	87130000	Surveying services
87110000	Engineering services	<b>Transportation consulting</b>	
<b>Environmental research and consulting</b>		87420410	Transportation consultant
87489905	Environmental consultant	87480200	Urban planning and consulting services
<b>Landscape architecture</b>			
07810201	Landscape architects		
<b>Goods and Other Services</b>			
<b>Cleaning and janitorial services</b>		<b>Industrial equipment and machinery</b>	
17990501	Cleaning building exteriors, nec	35890201	Car washing machinery
73490104	Janitorial service, contract basis	<b>Office goods</b>	
<b>Cleaning supplies</b>		50440000	Office equipment
50870304	Janitors' supplies	<b>Other goods and supplies</b>	
<b>Communications equipment</b>		50440200	Copying equipment
38610300	Cameras and related equipment	<b>Paints and allied products</b>	
<b>Electrical supplies</b>		28510000	Paints and allied products
36290000	Electrical industrial apparatus, nec	<b>Passenger Transport</b>	
36690206	Traffic signals, electric	41190000	Local passenger transportation, nec
36690200	Transportation signaling devices	<b>Pest control</b>	
<b>Elevator goods and services</b>		73420200	Pest control services
17969901	Elevator installation and conversion		
50840803	Elevators		
76992501	Elevators: inspection, service, and repair		

**Figure E-1.**  
**Subindustries included in the availability analysis (continued)**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Goods and Other Services (continued)</b>			
<b>Petroleum products</b>		<b>Uniforms and vestments</b>	
51720203	Gasoline	56990102	Uniforms
49240000	Natural gas distribution		
51729905	Petroleum brokers	<b>Vehicle parts</b>	
51720000	Petroleum products, nec	55310100	Auto and truck equipment and parts
		35190000	Internal combustion engines, nec
<b>Security and safety supplies</b>		25310303	Seats, automobile
59990103	Safety supplies and equipment	37130000	Truck and bus bodies
		37130102	Truck bodies (motor vehicles)
<b>Security services</b>		37130100	Truck bodies and parts
73810101	Armored car services		
73829903	Protective devices, security	<b>Waste services</b>	
73810105	Security guard service	17990500	Exterior cleaning, including sandblasting
		49530100	Hazardous waste collection and disposal
<b>Towing</b>			
75490301	Towing service, automotive		
75490300	Towing services		

Source: BBC Research & Consulting.

**1. Identification of purpose.** The surveys began by identifying Metro as one of the survey sponsors and describing the purpose of the study (e.g., “developing a list of companies interested in providing construction-related services for state or local government agencies or for public colleges in Los Angeles County”).

**2. Verification of correct business name.** The surveyor verified that he or she had reached the correct business, and if not, inquired about the correct contact information for the correct business. When the business name was not correct, surveyors asked if the respondent knew how to contact the business. CRI followed up with the desired company based on the new contact information (see areas “X” and “Y” of the availability survey instrument at the end of Appendix E).

**3. Verification of work related to relevant projects.** The surveyor asked whether the organization does work or provides materials related to construction, maintenance, or design (Question A1). Surveyors continued the survey with businesses that responded “yes” to that question.<sup>4</sup>

**4. Verification of for-profit business status.** The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit entity (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

**5. Confirmation of main lines of business.** Businesses confirmed their main lines of business according to D&B (Question A4a). If D&B’s work specialization codes were incorrect, businesses then described their main lines of business (Question A4b). After the survey was complete, as necessary, BBC coded new information on main lines of business into appropriate 8-digit D&B work specialization codes.

**6. Sole location or multiple locations.** Because the study team surveyed business establishments and not businesses or firms, the surveyor asked business owners or managers if their businesses had other locations (Question A5) and whether their establishments were affiliates or subsidiaries of other businesses (Questions A6 and A7).

**7. Past bids or work with government agencies and private sector organizations.** The surveyor asked about bids and work on past government and private sector contracts. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B1 through B8).<sup>5</sup>

**8. Qualifications and interest in future work.** The surveyor asked about businesses’ qualifications and interest in future work with state or local government agencies or public colleges in California. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B9 through B12).<sup>6</sup>

**9. Geographic areas.** The surveyor asked questions about the geographic regions within California in which businesses serve customers (Question C1).

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<sup>4</sup> Goods and other services businesses were not asked questions about whether they work or provides materials related to construction, maintenance, or design.

<sup>5</sup> Goods and other services businesses were not asked questions about subcontract work.

<sup>6</sup> Goods and other services businesses were not asked questions about subcontract work.

**10. Year established.** The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

**11. Largest contracts.** The study team asked businesses to identify the value of the largest contract on which they had bid on or had been awarded during the past five years. CRI asked those questions for both prime contracts and subcontracts (Questions D2 through D4).<sup>7</sup>

**12. Ownership.** The surveyor asked whether businesses were at least 51 percent owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of their business' ownership (Questions E1 through E3). The study team confirmed that information through several other data sources including:

- The California Department of Transportation directory of certified minority- and woman-owned business enterprises (MBE/WBEs);
- Metro and other participating entities' vendor data;
- Metro staff review; and
- Information from D&B and other sources.

When information about race/ethnicity or gender of ownership conflicted between sources, the study team reconciled that information through follow-up telephone calls with the businesses.

**13. Business revenue.** The surveyor asked several questions about the size of businesses in terms of their revenues. For businesses with multiple locations, the Business Revenue section also asked about their revenues and number of employees across all locations (Questions F1 through F3).

**14. Potential barriers in the marketplace.** The surveyor asked an open-ended question concerning general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

**15. Contact information.** The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

## **D. Execution of Surveys**

BBC held planning sessions via telephone with CRI executives and surveyors prior to conducting the availability surveys. CRI conducted all surveys in 2017. CRI programmed the surveys, conducted them via telephone, and provided BBC with weekly data reports. To minimize non-response, CRI made up to five attempts during different times of the day and on different days of the week to successfully reach each business establishment. CRI attempted to survey an available company representative such as the owner, manager, chief financial officer, or other key official who could provide accurate and detailed responses to survey questions.

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<sup>7</sup> Goods and other services businesses were not asked questions about subcontract work.

**Establishments that the study team successfully contacted.** Figure E-2 presents the disposition of the 7,582 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 2,755 establishments that the study team was able to successfully contact.

**Figure E-2.**  
**Disposition of attempts to survey business establishments**

Note:

CRI made up to five attempts to complete a survey with each establishment.

Source:

BBC Research & Consulting availability analysis.

	Number of firms	Percent of business listings
Beginning list	7,582	
Less duplicate phone numbers	147	
Less non-working phone numbers	668	
Less wrong number/business	251	
Unique business listings with working phone numbers	6,516	100.0 %
Less no answer	3207	49.2
Less could not reach responsible staff member	457	7.0
Less language barrier	97	1.5
<b>Establishments successfully contacted</b>	<b>2,755</b>	<b>42.3 %</b>

**Non-working or wrong phone numbers.** Some of the business listings that the study team purchased from D&B and that CRI attempted to contact were:

- Duplicate phone numbers (147 listings);
- Non-working phone numbers (668 listings); or
- Wrong numbers for the desired businesses (251 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

**Working phone numbers.** As shown in Figure E-2, there were 6,516 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 3,207 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 457 establishments.
- CRI could not conduct the availability survey due to language barriers for 97 establishments.
- CRI sent hardcopy fax or e-mail availability surveys upon request but did not receive completed surveys from 236 establishments.

After taking those unsuccessful attempts into account, CRI was able to successfully contact 2,755 business establishments, or about 42 percent of establishments with valid phone listings.



**Establishments included in the availability database.** Figure E-3 presents the disposition of the 2,755 business establishments that CRI successfully contacted and how that number resulted in the 582 businesses that the study team included in the availability database and that the study team considered available for Metro and other entity work.

**Figure E-3.**  
**Disposition of successfully contacted business establishments**

	Number of Establishments
Establishments successfully contacted	2,755
Less establishments not interested in discussing availability for Metro work	1,415
Less unreturned fax/email surveys	236
Establishments that completed interviews about firm characteristics	1,104
Less no relevant work	241
Less not a for-profit business	13
Less line of work outside scope	9
Less no past bid/award	167
Less no interest in future work	76
Less established after study period	6
Less multiple establishments	10
<b>Establishments potentially available for entity work</b>	<b>582</b>

Source: BBC Research & Consulting availability analysis.

**Establishments not interested in discussing availability for Metro work.** Of the 2,555 business establishments that the study team successfully contacted, 1,415 establishments were not interested in discussing their availability for Metro work. In total, 1,104 (43%) successfully-contacted business establishments completed availability surveys.

**Establishments available for entity 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 Metro and other entities participating in the disparity study awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 241 establishments that indicated that their businesses were not involved in relevant contracting work.
- Of the establishments that completed availability surveys, 13 indicated that they were not a for-profit business. The survey ended when respondents reported that their establishments were not for-profit businesses.
- BBC excluded 9 establishments that indicated that their businesses were involved in construction, professional services, or goods and other services work but reported that their main lines of business were outside of the study scope.
- BBC excluded 167 establishments that reported not having bid on or been awarded contracts within the past five years.

- BBC excluded 76 establishments that reported not being qualified or interested in either prime contracting or subcontracting opportunities with state or local government agencies in California.
- BBC excluded 6 business establishments that reported being established in 2016 or later. Those business establishments would not have been available for contract elements that Metro or other entities awarded during the study period.
- Ten 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 582 businesses that were considered potentially available for Metro and other entity work.

**Coding responses from multi-location businesses.** Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work that establishments of the same business reported (i.e., prime contractor or subcontractor) into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.<sup>8</sup>
- Except when there were large discrepancies among individual responses regarding establishment dates, BBC used the earliest founding date that establishments of the same business provided. In cases of large discrepancies, BBC followed up with the business establishments to obtain accurate establishment date information.
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the business' relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC considered the largest revenue total that any establishments of the same business reported as the business' revenue cap (for purposes of determining status as a potential DBE).
- BBC determined the number of employees for businesses by calculating the mode or the mean of responses from its establishments.
- BBC coded businesses as minority- or woman-owned if the majority of its establishments reported such status.

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<sup>8</sup> Goods and other services businesses were not asked questions about subcontract work.

## E. Additional Considerations Related to Measuring Availability

The study team made several additional considerations related to its approach to measuring availability to ensure that the study team’s estimates of the availability of minority- and woman-owned businesses for Metro work were as accurate as possible.

**Not providing a count of all businesses available for Metro work.** The purpose of the availability analysis was to provide precise and representative estimates of the percentage of Metro contracting dollars for which minority- and woman-owned businesses are available. The availability analysis did not provide a comprehensive listing of every business that could be available for Metro work and should not be used in that way. Federal courts have approved BBC’s use of that approach to measuring availability. In addition, federal regulations, such as the United States Department of Transportation’s (USDOT’s) “Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program” recommend similar approaches to measuring availability for agencies implementing minority- and woman-owned owned business programs.<sup>9</sup>

**Not basing the availability analysis on MBE/WBE or DBE directories, prequalification lists, or bidders lists.** Federal guidance, such as USDOT guidance for determining the availability of minority- and woman-owned businesses, recommends dividing the number of businesses in an entity’s certification directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of minority- or woman-owned businesses for an entity’s prime contracts and subcontracts. The primary reason why the study team rejected such approaches when measuring the availability of minority- and woman-owned businesses for Metro work is that dividing a simple count of certified businesses by the total number of businesses does not provide the data on business characteristics that the study team desired for the disparity study. The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the surveys provided data on qualifications, relative capacity, and interest in Metro work for each business, which allowed the study team to take a more refined approach to measuring availability. Court cases involving implementations of minority- and woman-owned business programs have approved the use of such approaches to measuring availability.<sup>10</sup>

**Using D&B lists as the sample frame.** BBC began its custom census approach of measuring availability with D&B business lists. D&B does not require businesses to pay a fee to be included in its listings—it is completely free to listed businesses. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in California:

- There can be a lag between formation of a new business and inclusion in D&B, meaning that the newest businesses may be underrepresented in the sample frame. Based on information

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<sup>9</sup> Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>.

<sup>10</sup> Note that BBC used MBE/WBE and DBE certification directories and other sources of information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability surveys.

from BBC's survey effort, newly formed businesses are more likely to be minority- or woman-owned, suggesting that minority- and woman-owned businesses might be underrepresented in the final availability database.

- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or woman-owned, which again suggests that minority- and woman-owned businesses might be underrepresented in the final availability database.

BBC is not able to quantify the degree to which minority- and woman-owned businesses were underrepresented in the final availability database, if at all. However, estimates presented in the disparity study should be considered conservative estimates of the availability of minority- and woman-owned businesses. Note that there are no alternative business listings that would better address such issues.

**Selection of specific subindustries.** Defining subindustries based on specific work specialization codes (e.g., NAICS or D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. For example, it was not possible for BBC to include all businesses possibly doing work in relevant industries without conducting surveys with nearly every business in the relevant geographic market area.

In addition, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at the 8-digit level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed many of the work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

**Non-response bias.** An analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Work specializations; and
- Language barriers.

**Research sponsorship.** Surveyors introduced themselves by identifying Metro as one of the survey sponsors, because businesses may be less likely to answer somewhat sensitive business questions if the surveyor was unable to identify the sponsor. In past survey efforts—particularly those related to availability studies—BBC has found that identifying the sponsor substantially increases response rate.

**Work specializations.** Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate the availability of minority- and woman-owned businesses would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone. However, work specialization as a potential source of non-response bias in the BBC availability analysis is minimized, because the availability analysis examines businesses within particular work fields before calculating overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

**Language barriers.** Metro contracting documents are in English and are not in other languages. For that reason, the study team made the decision to only include businesses able to complete surveys in English in the availability analysis. Businesses unable to complete the survey due to language barriers represented less than one percent of contacted businesses.

**Response reliability.** Business owners and managers were asked questions that may be difficult to answer including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures. BBC explored the reliability of survey responses in a number of ways. For example:

- BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from Metro and other participating entities. For example, certification databases include data on the race/ethnicity and gender of the owners of MBE/WBE- and DBE-certified businesses. The study team compared survey responses concerning business ownership with that information.
- BBC examined Metro contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual Metro contract data.
- Metro reviewed vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.

# LA Metro Disparity Study — Availability Survey Instrument [Construction]

Hello. My name is *[interviewer name]* from Customer Research International. We are calling on behalf of the Los Angeles County Metropolitan Transportation Authority (Metro).

This is not a sales call. Metro is developing a list of companies involved in construction, maintenance, or design on a wide range of projects including transit facilities, rail lines, parking facilities, paving, concrete work, tunnels, and bridges. Who can I speak with to get the information we need from your firm?

*[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY INCLUDING THIS STATEMENT AND BEGIN WITH QUESTIONS]*

*[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO METRO'S EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE DEPARTMENT]*

*[IF ASKED ABOUT CONFIDENTIALITY, PLEASE RESPOND WITH:*

**We will make every effort to maintain all the confidentiality of the information gathered in this survey.**

**X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is *[firm name]*?**

1=RIGHT COMPANY – **SKIP TO A1**

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – **TERMINATE**

**Y1. What is the name of this firm?**

1=VERBATIM

**Y2a. Is *[new firm name]* the same as *[firm name]* doing business under a new name?**

1=Yes, same firm doing business under a different name

2=No, different firm – **SKIP TO Y3**

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

**Y2b. Was [firm name] bought or sold, or did it change ownership?**

1=Yes, company bought/sold/changed ownership

2=No, same ownership

98=No, does not have information – **TERMINATE -**

99=Refused to give information – **TERMINATE -**

**Y3. Can you give me the complete address or city for [new firm name]?**

*(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT):*

. *STREET ADDRESS*

. *CITY*

. *STATE*

. *ZIP*

1=VERBATIM

**Y5. Can you give me the name of the owner or manager of [new firm name]?**

*(ENTER UPDATED NAME)*

1=VERBATIM

**Y6. Can I have a telephone number for him/her?**

*(ENTER UPDATED PHONE)*

1=VERBATIM

**Y8. Do you work for this new company?**

1=YES -

2=NO – **TERMINATE -**

**A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance, or design on transportation-related projects. Is this correct?**

(NOTE TO INTERVIEWER – INCLUDES ANY WORK RELATED TO CONSTRUCTION, MAINTENANCE OR DESIGN SUCH AS TRANSIT FACILITIES, RAIL LINES, PARKING FACILITIES, PAVING, CONCRETE WORK, TUNNELS, BRIDGES, AND OTHER TRANSPORTATION-RELATED PROJECTS. IT ALSO INCLUDES TRUCKING AND HAULING)

(NOTE TO INTERVIEWER – INCLUDES HAVING DONE WORK, TRYING TO SELL THIS WORK, OR PROVIDING MATERIALS)

1=Yes

2=No - TERMINATE

**A2. Let me confirm that [firm name / new firm name] is a 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

**A3. 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 this correct?**

(NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES BUSINESS INFORMATION THROUGHOUT THE COUNTRY)

1=Yes – SKIP TO A5

2=No

98=(DON'T KNOW)

99=(REFUSED)

**A4. 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 INDUSTRIAL BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION)

(ENTER VERBATIM RESPONSE)

1=VERBATIM

**A5. Is this the sole location for your business, or do you have offices in other locations?**



1=Sole location -

2=Have other locations -

98=(DON'T KNOW) -

99=(REFUSED) -

**A6. Is your company a subsidiary or affiliate of another firm?**

1=Independent – **SKIP TO B1** -

2=Subsidiary or affiliate of another firm -

98=(DON'T KNOW) – **SKIP TO B1** -

99=(REFUSED) – **SKIP TO B1** -

**A7. What is the name of your parent company?**

1=ENTER NAME -

98=(DON'T KNOW) -

99=(REFUSED) -

**A8. ENTER NAME OF PARENT COMPANY**

1=VERBATIM

**B1. Next, I have a few questions about your company's role in transportation-related construction, maintenance, or design. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a city, state, county, or local government agency in California?**

1=Yes -

2=No – **SKIP TO B3** -

98=(DON'T KNOW) – **SKIP TO B3** -

99=(REFUSED) – **SKIP TO B3** -

**B2. Were those bids or price quotes to work as a prime contractor/consultant, a subcontractor/consultant, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor/consultant

2=Subcontractor/consultant

3=Trucker/hauler

98=(DON'T KNOW)

4=Supplier (or manufacturer)

99=(REFUSED)

**B3. During the past five years, has your company received an award for work on any part of a contract for a city, state, county, or local government agency in California?**

1=Yes -

2=No – SKIP TO B5 -

98=(DON'T KNOW) – SKIP TO B5 -

99=(REFUSED) – SKIP TO B5 -

**B4. Were those awards to work as a prime contractor/consultant, a subcontractor/consultant, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor/consultant -

2=Subcontractor/consultant -

3=Trucker/hauler -

4=Supplier (or manufacturer) -

98=(DON'T KNOW) -

99=(REFUSED) -

**B5. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector organization in California?**

1=Yes -

2=No – SKIP TO B7 -

98=(DON'T KNOW) – SKIP TO B7 -

99=(REFUSED) – SKIP TO B7 -

**B6. Were those bids or price quotes to work as a prime contractor/consultant, a subcontractor/consultant, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor/consultant

2=Subcontractor/consultant

3=Trucker/hauler

98=(DON'T KNOW)

4=Supplier (or manufacturer)

99=(REFUSED)

**B7. During the past five years, has your company received an award for work on any part of a contract for a private sector organization in California?**

1=Yes -

2=No – **SKIP TO B9 -**

98=(DON'T KNOW) – **SKIP TO B9 -**

99=(REFUSED) – **SKIP TO B9 -**

**B8. Were those awards to work as a prime contractor/consultant, a subcontractor/consultant, a trucker/hauler, or as a supplier?**

*[MULTIPUNCH]*

1=Prime contractor/consultant

4=Supplier (or manufacturer)

2=Subcontractor/consultant

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

**B9. Please think about future transportation-related work as you answer the following few questions. Is your company qualified and interested in working with Metro as a prime contractor/consultant?**

1=Yes -

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**B10. Is your company qualified and interested in working with cities, counties, or other local transportation agencies in California as a prime contractor?**

1=Yes

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**B11. Is your company qualified and interested in working with Metro as a subcontractor/consultant, trucker/hauler, or supplier?**

1=Yes -

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**B12. Is your company qualified and interested in working with cities, counties, or other local transportation agencies in California as a subcontractor, trucker/hauler, or supplier?**

1=Yes -

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**C1. Now I want to ask you about the geographic area your company serves within California. As you answer, think about whether your company could be involved in potential transportation-related projects in that area. Could your company do work in the Los Angeles County area?**

1=Yes

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**D1. About what year was your firm established?**

*(RECORD FOUR-DIGIT YEAR, e.g., '1977')*

9998=(DON'T KNOW) -

9999=(REFUSED) -

1=NUMERIC (1600-2015) -

**D2. In rough dollar terms, what was the largest transportation-related contract or subcontract your company was awarded in California during the past five years?**

*(NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR)*

*(NOTE TO INTERVIEWER –INCLUDES CONTRACTS NOT YET COMPLETE)*

*(NOTE TO INTERVIEWER –READ CATEGORIES IF NECESSARY)*

- |  |  |
|--|--|
| 1=\$100,000 or less                      | 8=More than \$20 million to \$50 million     |
| 2=More than \$100,000 to \$500,000       | 9=More than \$50 million to \$100 million    |
| 3=More than \$500,000 to \$1 million     | 10= More than \$100 million to \$200 million |
| 4=More than \$1 million to \$2 million   | 11=\$200 million or greater                  |
| 5=More than \$2 million to \$5 million   | 97=(NONE)                                    |
| 6=More than \$5 million to \$10 million  | 98=(DON'T KNOW)                              |
| 7=More than \$10 million to \$20 million | 99=(REFUSED)                                 |

**D3. Was that the largest transportation-related contract or subcontract that your company bid on or submitted quotes for in California during the past five years?**

- 1=Yes – **SKIP TO E1 -**
- 2=No -
- 98=(DON'T KNOW) – **SKIP TO E1 -**
- 99=(REFUSED) – **SKIP TO E1 -**

**D4. What was the largest transportation-related contract or subcontract that your company bid on or submitted quotes for in California during the past five years?**

*(NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR)*

*(NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY)*

- |  |  |
|--|--|
| 1=\$100,000 or less                      | 8=More than \$20 million to \$50 million     |
| 2=More than \$100,000 to \$500,000       | 9=More than \$50 million to \$100 million    |
| 3=More than \$500,000 to \$1 million     | 10= More than \$100 million to \$200 million |
| 4=More than \$1 million to \$2 million   | 11=\$200 million or greater                  |
| 5=More than \$2 million to \$5 million   | 97=(NONE)                                    |
| 6=More than \$5 million to \$10 million  | 98=(DON'T KNOW)                              |
| 7=More than \$10 million to \$20 million | 99=(REFUSED)                                 |

**E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is [*firm name / new firm name*] a woman-owned business?**

- 1=Yes -
- 2=No -
- 98=(DON'T KNOW) -
- 99=(REFUSED) -

**E2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is Black American, Asian, Hispanic, Native American or another minority group. By this definition, is [*firm name || new firm name*] a minority-owned business?**

- 1=Yes -
- 2=No – **SKIP TO F1 -**
- 3=(OTHER GROUP - SPECIFY) -
- 98=(DON'T KNOW) – **SKIP TO F1 -**
- 99=(REFUSED) – **SKIP TO F1 -**

**E2. OTHER GROUP - SPECIFY**

- 1=VERBATIM

**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, Tuvalu, 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) -

**E3. OTHER - SPECIFY**

1=VERBATIM

**E4. A business is defined as veteran-owned if more than half—that is, 51 percent or more—of the ownership and control is by veterans. By this definition, is [*firm name* || *new firm name*] a veteran-owned business?**

1=Yes -

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**F1. Dun & Bradstreet indicates that your company has about [*number*] employees working out of just your location. Is that an accurate estimate of your company's average employees over the last three years?**

(NOTE TO INTERVIEWER – INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION)

1=Yes – **SKIP TO F3 -**

2=No -

98=(DON'T KNOW) – **SKIP TO F3 -**

99=(REFUSED) – **SKIP TO F3 -**

**F2. About how many employees did you have working out of just your location, on average, over the last three years?**

(RECORD NUMBER OF EMPLOYEES)

1=NUMERIC (1-999999999)

**F3. 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 F5 -**

2=No -

98=(DON'T KNOW) – **SKIP TO F5 -**

99=(REFUSED) – **SKIP TO F5 -**

**F4. Roughly, what was the average annual gross revenue of your company, just considering your location, over the last three years? Would you say . . . (READ LIST)**

1=Less than \$1 Million

6=\$16.6 Million - \$18.5 Million

2=\$1 Million - \$4.5 Million

7=\$18.6 Million - \$24 Million

3=\$4.6 Million - \$7 Million

8=\$24.1 Million or more

4=\$7.1 Million - \$12 Million

98= (DON'T KNOW)

5=\$12.1 Million - \$16.5 Million

99= (REFUSED)

**F5. [ONLY IF A5 = 2] About how many employees did you have, on average, for all of your locations over the last three years?**



1=(ENTER RESPONSE) -

98=(DON'T KNOW) -

99=(REFUSED) -

**F6. [ONLY IF A5 = 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 \$1 Million

6=\$16.6 Million - \$18.5 Million

2=\$1 Million - \$4.5 Million

7=\$18.6 Million - \$24 Million

3=\$4.6 Million - \$7 Million

8=\$24.1 Million or more

4=\$7.1 Million - \$12 Million

98= (DON'T KNOW)

5=\$12.1 Million - \$16.5 Million

99= (REFUSED)

**G1. We're interested in whether your company has experienced barriers or difficulties in California 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. Finally, we're asking for general insights on starting and expanding a business in your industry or winning work in California. Do you have any thoughts to offer on these topics?**

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS) -

97=(NOTHING/NONE/NO COMMENTS) -

98=(DON'T KNOW) -

99=(REFUSED) -

**G3. Would you be willing to participate in a follow-up interview about any of these issues?**

1=Yes -

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**H1. Just a few last questions. What is your name?**

*(RECORD FULL 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) -

**H2. OTHER - SPECIFY**

1=VERBATIM

**H3. For purposes of receiving information from Metro, is your mailing address [*firm address*]:**

1=Yes – **SKIP TO H5**

2=No -

98=(DON'T KNOW) -

99=(REFUSED) -

**H4. What mailing address should they use to get any materials to you?**

1=VERBATIM

**H5. What fax number could they use to fax any materials to you?**

1=NUMERIC (1000000000-9999999999)

**H6. What e-mail address could they use to get any materials to you?**

1=ENTER E-MAIL -

97=(NO EMAIL ADDRESS) -

98=(DON'T KNOW) -

99=(REFUSED) -

*(RECORD EMAIL ADDRESS) (VERIFY ADDRESS LETTER BY LETTER: EXAMPLE: 'John@CRI-RESEARCH.COM' SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com)*

1=VERBATIM

**Thank you very much for your participation. If you have any questions, please contact Tashai Smith at Metro. Ms. Smith's phone number is (213) 922-2128. Ms. Smith's email address is [SmithT@metro.net](mailto:SmithT@metro.net).**

# **APPENDIX F.**

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## **Disparity Tables**

Figure F-1.

Table	Characteristics						Analysis of Potential DBEs
	Time period	Contract area	Contract role	Funding	Size	Goals	
F-2	2011-2015	All industries	Prime contracts and subcontracts	Federal and local	All sizes	Goals, no goals, and other	No
F-3	<b>2011-2013</b>	All industries	Prime contracts and subcontracts	Federal and local	All sizes	Goals, no goals, and other	No
F-4	<b>2013-2015</b>	All industries	Prime contracts and subcontracts	Federal and local	All sizes	Goals, no goals, and other	No
F-5	2011-2015	<b>Construction</b>	Prime contracts and subcontracts	Federal and local	All sizes	Goals, no goals, and other	No
F-6	2011-2015	<b>Professional services</b>	Prime contracts and subcontracts	Federal and local	All sizes	Goals, no goals, and other	No
F-7	2011-2015	<b>Goods and other services</b>	Prime contracts and subcontracts	Federal and local	All sizes	Goals, no goals, and other	No
F-8	2011-2015	All industries	<b>Prime contracts</b>	Federal and local	All sizes	Goals, no goals, and other	No
F-9	2011-2015	All industries	<b>Subcontracts</b>	Federal and local	All sizes	Goals, no goals, and other	No
F-10	2011-2015	All industries	<b>Prime contracts</b>	Federal and local	<b>Large</b>	Goals, no goals, and other	No
F-11	2011-2015	All industries	<b>Prime contracts</b>	Federal and local	<b>Small</b>	Goals, no goals, and other	No
F-12	2011-2015	All industries	Prime contracts and subcontracts	<b>Federal</b>	All sizes	Goals, no goals, and other	No
F-13	2011-2015	All industries	Prime contracts and subcontracts	<b>Local</b>	All sizes	Goals, no goals, and other	No
F-14	2011-2015	All industries	Prime contracts and subcontracts	<b>Federal</b>	All sizes	<b>Goals</b>	No
F-15	2011-2015	All industries	Prime contracts and subcontracts	Federal and local	All sizes	<b>No goals</b>	No
F-16	2011-2015	All industries	Prime contracts and subcontracts	<b>Federal</b>	All sizes	Goals, no goals, and other	<b>Yes</b>
F-17	2011-2015	<b>Construction</b>	Prime contracts and subcontracts	<b>Federal</b>	All sizes	Goals, no goals, and other	<b>Yes</b>
F-18	2011-2015	<b>Professional services</b>	Prime contracts and subcontracts	<b>Federal</b>	All sizes	Goals, no goals, and other	<b>Yes</b>
F-19	2011-2015	<b>Goods and other services</b>	Prime contracts and subcontracts	<b>Federal</b>	All sizes	Goals, no goals, and other	<b>Yes</b>

**Figure F-2.**  
**Time period: January 1, 2011 to December 31, 2015**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Prime contractors and subcontractors**  
**Funding source: All**  
**Program: All programs**

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	12,149	\$3,028,625	\$3,028,625				
(2) MBE/WBE	3,411	\$703,237	\$703,237	23.2	31.3	-8.1	74.1
(3) WBE	574	\$79,021	\$79,021	2.6	4.4	-1.8	59.2
(4) MBE	2,837	\$624,216	\$624,216	20.6	26.9	-6.3	76.6
(5) Black American-owned	195	\$101,992	\$104,362	3.4	6.8	-3.3	50.9
(6) Asian Pacific American-owned	461	\$75,213	\$76,961	2.5	2.5	0.0	101.8
(7) Subcontinent Asian American-owned	139	\$28,486	\$29,148	1.0	0.6	0.4	159.1
(8) Hispanic American-owned	1,744	\$383,074	\$391,976	12.9	16.3	-3.4	79.2
(9) Native American-owned	17	\$21,273	\$21,768	0.7	0.7	0.1	110.2
(10) Unknown MBE	281	\$14,177					
(11) DBE-certified	1,723	\$445,672	\$445,672	14.7			
(12) Woman-owned DBE	110	\$27,825	\$27,825	0.9			
(13) Minority-owned DBE	1,602	\$412,759	\$412,759	13.6			
(14) Black American-owned DBE	156	\$96,279	\$96,283	3.2			
(15) Asian Pacific American-owned DBE	361	\$54,275	\$54,277	1.8			
(16) Subcontinent Asian American-owned DBE	27	\$22,247	\$22,248	0.7			
(17) Hispanic American-owned DBE	1,049	\$223,754	\$223,764	7.4			
(18) Native American-owned DBE	17	\$21,273	\$21,274	0.7			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-3.**  
**Time period: January 1, 2011 to December 31, 2013**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Prime contractors and subcontractors**  
**Funding source: All**  
**Program: All programs**

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	6,220	\$1,255,500	\$1,255,500				
(2) MBE/WBE	1,562	\$347,168	\$347,168	27.7	32.2	-4.6	85.8
(3) WBE	239	\$39,905	\$39,905	3.2	4.8	-1.7	65.8
(4) MBE	1,323	\$307,264	\$307,264	24.5	27.4	-2.9	89.3
(5) Black American-owned	99	\$66,269	\$67,341	5.4	7.3	-1.9	73.7
(6) Asian Pacific American-owned	224	\$23,769	\$24,154	1.9	2.6	-0.6	75.0
(7) Subcontinent Asian American-owned	80	\$12,439	\$12,640	1.0	0.7	0.3	140.1
(8) Hispanic American-owned	780	\$192,655	\$195,771	15.6	16.3	-0.7	95.9
(9) Native American-owned	5	\$7,241	\$7,358	0.6	0.5	0.1	126.9
(10) Unknown MBE	135	\$4,890					
(11) DBE-certified	614	\$245,348	\$245,348	19.5			
(12) Woman-owned DBE	60	\$21,224	\$21,224	1.7			
(13) Minority-owned DBE	552	\$223,996	\$223,996	17.8			
(14) Black American-owned DBE	85	\$61,446	\$61,451	4.9			
(15) Asian Pacific American-owned DBE	168	\$17,032	\$17,033	1.4			
(16) Subcontinent Asian American-owned DBE	8	\$3,688	\$3,689	0.3			
(17) Hispanic American-owned DBE	285	\$134,698	\$134,709	10.7			
(18) Native American-owned DBE	5	\$7,241	\$7,242	0.6			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-4.**  
**Time period: January 1, 2014 to December 31, 2015**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Prime contractors and subcontractors**  
**Funding source: All**  
**Program: All programs**

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	5,929	\$1,773,125	\$1,773,125				
(2) MBE/WBE	1,849	\$356,069	\$356,069	20.1	30.7	-10.6	65.4
(3) WBE	335	\$39,116	\$39,116	2.2	4.1	-1.9	53.8
(4) MBE	1,514	\$316,952	\$316,952	17.9	26.6	-8.7	67.3
(5) Black American-owned	96	\$35,723	\$36,802	2.1	6.4	-4.3	32.4
(6) Asian Pacific American-owned	237	\$51,444	\$52,997	3.0	2.4	0.5	122.1
(7) Subcontinent Asian American-owned	59	\$16,047	\$16,532	0.9	0.5	0.4	177.8
(8) Hispanic American-owned	964	\$190,418	\$196,166	11.1	16.4	-5.3	67.5
(9) Native American-owned	12	\$14,032	\$14,456	0.8	0.8	0.0	103.6
(10) Unknown MBE	146	\$9,287					
(11) DBE-certified	1,109	\$200,324	\$200,324	11.3			
(12) Woman-owned DBE	50	\$6,601	\$6,601	0.4			
(13) Minority-owned DBE	1,050	\$188,763	\$188,763	10.6			
(14) Black American-owned DBE	71	\$34,833	\$34,833	2.0			
(15) Asian Pacific American-owned DBE	193	\$37,243	\$37,243	2.1			
(16) Subcontinent Asian American-owned DBE	19	\$18,559	\$18,559	1.0			
(17) Hispanic American-owned DBE	764	\$89,056	\$89,056	5.0			
(18) Native American-owned DBE	12	\$14,032	\$14,032	0.8			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.



Figure F-5.

Time period: January 1, 2011 to December 31, 2015  
 Contract area: Construction  
 Contract role: Prime contractors and subcontractors  
 Funding source: All  
 Program: All programs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,526	\$1,831,941	\$1,831,941				
(2) MBE/WBE	601	\$440,911	\$440,911	24.1	26.7	-2.6	90.1
(3) WBE	88	\$37,955	\$37,955	2.1	0.8	1.3	200+
(4) MBE	513	\$402,956	\$402,956	22.0	25.9	-3.9	84.8
(5) Black American-owned	90	\$83,388	\$83,649	4.6	6.3	-1.7	72.9
(6) Asian Pacific American-owned	63	\$35,100	\$35,210	1.9	1.3	0.6	144.1
(7) Subcontinent Asian American-owned	17	\$13,240	\$13,282	0.7	0.4	0.3	186.5
(8) Hispanic American-owned	232	\$251,158	\$251,945	13.8	17.8	-4.1	77.1
(9) Native American-owned	13	\$18,811	\$18,870	1.0	0.1	0.9	200+
(10) Unknown MBE	98	\$1,259					
(11) DBE-certified	342	\$280,318	\$280,318	15.3			
(12) Woman-owned DBE	22	\$14,041	\$14,041	0.8			
(13) Minority-owned DBE	311	\$261,392	\$261,392	14.3			
(14) Black American-owned DBE	84	\$81,596	\$81,596	4.5			
(15) Asian Pacific American-owned DBE	47	\$26,736	\$26,736	1.5			
(16) Subcontinent Asian American-owned DBE	14	\$17,128	\$17,128	0.9			
(17) Hispanic American-owned DBE	162	\$122,007	\$122,007	6.7			
(18) Native American-owned DBE	13	\$18,811	\$18,811	1.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.  
Time period: July 1, 2011 to June 30, 2015  
Contract area: Professional services  
Contract role: Prime contractors and subcontractors  
Funding source: All  
Program: All programs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	845	\$512,660	\$512,660				
(2) MBE/WBE	424	\$125,510	\$125,510	24.5	18.1	6.3	135.0
(3) WBE	102	\$22,303	\$22,303	4.4	3.6	0.7	119.2
(4) MBE	322	\$103,207	\$103,207	20.1	14.5	5.6	139.0
(5) Black American-owned	39	\$6,987	\$7,062	1.4	5.0	-3.6	27.6
(6) Asian Pacific American-owned	119	\$31,673	\$32,011	6.2	4.6	1.6	134.5
(7) Subcontinent Asian American-owned	25	\$13,378	\$13,520	2.6	1.0	1.7	200+
(8) Hispanic American-owned	129	\$49,607	\$50,136	9.8	3.5	6.3	200+
(9) Native American-owned	2	\$473	\$478	0.1	0.0	0.1	200+
(10) Unknown MBE	8	\$1,089					
(11) DBE-certified	310	\$84,652	\$84,652	16.5			
(12) Woman-owned DBE	65	\$10,631	\$10,631	2.1			
(13) Minority-owned DBE	243	\$73,820	\$73,820	14.4			
(14) Black American-owned DBE	34	\$6,109	\$6,109	1.2			
(15) Asian Pacific American-owned DBE	86	\$19,516	\$19,516	3.8			
(16) Subcontinent Asian American-owned DBE	13	\$5,119	\$5,119	1.0			
(17) Hispanic American-owned DBE	110	\$42,804	\$42,804	8.3			
(18) Native American-owned DBE	2	\$473	\$473	0.1			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.  
Time period: July 1, 2011 to June 30, 2015  
Contract area: Goods and Other services  
Contract role: Prime contractors and subcontractors  
Funding source: All  
Program: All programs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	9,778	\$684,024	\$684,024				
(2) MBE/WBE	2,386	\$136,816	\$136,816	20.0	53.6	-33.6	37.3
(3) WBE	384	\$18,763	\$18,763	2.7	14.7	-12.0	18.6
(4) MBE	2,002	\$118,053	\$118,053	17.3	38.9	-21.6	44.4
(5) Black American-owned	66	\$11,617	\$12,911	1.9	9.4	-7.6	20.0
(6) Asian Pacific American-owned	279	\$8,440	\$9,380	1.4	4.0	-2.6	34.2
(7) Subcontinent Asian American-owned	97	\$1,868	\$2,076	0.3	0.9	-0.6	33.3
(8) Hispanic American-owned	1,383	\$82,309	\$91,475	13.4	21.9	-8.6	61.0
(9) Native American-owned	2	\$1,989	\$2,211	0.3	2.6	-2.3	12.5
(10) Unknown MBE	175	\$11,829					
(11) DBE-certified	1,071	\$80,701	\$80,701	11.8			
(12) Woman-owned DBE	23	\$3,154	\$3,154	0.5			
(13) Minority-owned DBE	1,048	\$77,548	\$77,548	11.3			
(14) Black American-owned DBE	38	\$8,574	\$8,576	1.3			
(15) Asian Pacific American-owned DBE	228	\$8,023	\$8,025	1.2			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	777	\$58,943	\$58,957	8.6			
(18) Native American-owned DBE	2	\$1,989	\$1,990	0.3			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-8.**  
**Time period: July 1, 2011 to June 30, 2015**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Prime contractors**  
**Funding source: All**  
**Program: All programs**

<b>Business Group</b>	<b>(a) Number of contract elements</b>	<b>(b) Total dollars (thousands)</b>	<b>(c) Estimated total dollars (thousands)*</b>	<b>(d) Utilization percentage</b>	<b>(e) Availability percentage</b>	<b>(f) Utilization - Availability</b>	<b>(g) Disparity index</b>
(1) All firms	10,785	\$2,101,835	\$2,101,835				
(2) MBE/WBE	2,559	\$153,042	\$153,042	7.3	22.9	-15.6	31.8
(3) WBE	426	\$23,788	\$23,788	1.1	4.5	-3.3	25.3
(4) MBE	2,133	\$129,255	\$129,255	6.1	18.4	-12.3	33.4
(5) Black American-owned	55	\$9,616	\$10,662	0.5	3.2	-2.7	15.8
(6) Asian Pacific American-owned	303	\$17,261	\$19,139	0.9	1.8	-0.9	51.6
(7) Subcontinent Asian American-owned	110	\$10,278	\$11,396	0.5	0.3	0.3	187.7
(8) Hispanic American-owned	1,390	\$72,917	\$80,852	3.8	12.3	-8.4	31.4
(9) Native American-owned	5	\$6,498	\$7,205	0.3	0.8	-0.4	44.6
(10) Unknown MBE	270	\$12,685					
(11) DBE-certified	1,074	\$70,696	\$70,696	3.4			
(12) Woman-owned DBE	28	\$2,756	\$2,756	0.1			
(13) Minority-owned DBE	1,044	\$67,708	\$67,708	3.2			
(14) Black American-owned DBE	26	\$6,416	\$6,418	0.3			
(15) Asian Pacific American-owned DBE	231	\$6,549	\$6,550	0.3			
(16) Subcontinent Asian American-owned DBE	5	\$3,472	\$3,473	0.2			
(17) Hispanic American-owned DBE	776	\$44,987	\$44,999	2.1			
(18) Native American-owned DBE	5	\$6,498	\$6,499	0.3			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-9.**  
**Time period: January 1, 2011 to December 31, 2015**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Subcontractor and suppliers**  
**Funding source: All**  
**Program: All programs**

<b>Business Group</b>	<b>(a) Number of contract elements</b>	<b>(b) Total dollars (thousands)</b>	<b>(c) Estimated total dollars (thousands)*</b>	<b>(d) Utilization percentage</b>	<b>(e) Availability percentage</b>	<b>(f) Utilization - Availability</b>	<b>(g) Disparity index</b>
(1) All firms	1,364	\$926,790	\$926,790				
(2) MBE/WBE	852	\$550,195	\$550,195	59.4	50.5	8.9	117.6
(3) WBE	148	\$55,233	\$55,233	6.0	4.2	1.7	140.8
(4) MBE	704	\$494,962	\$494,962	53.4	46.2	7.2	115.5
(5) Black American-owned	140	\$92,376	\$92,656	10.0	14.8	-4.8	67.5
(6) Asian Pacific American-owned	158	\$57,952	\$58,128	6.3	4.2	2.1	150.8
(7) Subcontinent Asian American-owned	29	\$18,209	\$18,264	2.0	1.3	0.6	149.1
(8) Hispanic American-owned	354	\$310,156	\$311,094	33.6	25.6	8.0	131.3
(9) Native American-owned	12	\$14,776	\$14,820	1.6	0.4	1.2	200+
(10) Unknown MBE	11	\$1,493					
(11) DBE-certified	649	\$374,976	\$374,976	40.5			
(12) Woman-owned DBE	82	\$25,069	\$25,069	2.7			
(13) Minority-owned DBE	558	\$345,051	\$345,051	37.2			
(14) Black American-owned DBE	130	\$89,863	\$89,863	9.7			
(15) Asian Pacific American-owned DBE	130	\$47,726	\$47,726	5.1			
(16) Subcontinent Asian American-owned DBE	22	\$18,775	\$18,775	2.0			
(17) Hispanic American-owned DBE	273	\$178,767	\$178,767	19.3			
(18) Native American-owned DBE	12	\$14,776	\$14,776	1.6			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.

Time period: January 1, 2011 to December 31, 2015

Contract area: Construction, Professional Services, Goods and Other Services

Contract role: Prime contractors

Funding source: All

Program: All programs

Large Contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	273	\$1,910,393	\$1,910,393				
(2) MBE/WBE	58	\$105,932	\$105,932	5.5	20.4	-14.9	27.1
(3) WBE	12	\$14,244	\$14,244	0.7	4.1	-3.4	18.0
(4) MBE	46	\$91,688	\$91,688	4.8	16.3	-11.5	29.4
(5) Black American-owned	4	\$6,846	\$7,672	0.4	3.0	-2.6	13.4
(6) Asian Pacific American-owned	7	\$12,799	\$14,343	0.8	1.5	-0.7	51.3
(7) Subcontinent Asian American-owned	4	\$7,545	\$8,456	0.4	0.2	0.2	200+
(8) Hispanic American-owned	24	\$50,405	\$56,488	3.0	10.7	-7.7	27.6
(9) Native American-owned	3	\$4,220	\$4,730	0.2	0.8	-0.5	31.0
(10) Unknown MBE	4	\$9,873					
(11) DBE-certified	25	\$49,374	\$49,374	2.6			
(12) Woman-owned DBE	2	\$2,303	\$2,303	0.1			
(13) Minority-owned DBE	23	\$47,070	\$47,070	2.5			
(14) Black American-owned DBE	3	\$4,274	\$4,274	0.2			
(15) Asian Pacific American-owned DBE	3	\$2,846	\$2,846	0.1			
(16) Subcontinent Asian American-owned DBE	2	\$3,091	\$3,091	0.2			
(17) Hispanic American-owned DBE	12	\$32,639	\$32,639	1.7			
(18) Native American-owned DBE	3	\$4,220	\$4,220	0.2			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.

Time period: January 1, 2011 to December 31, 2015

Contract area: Construction, Professional Services, Goods and Other Services

Contract role: Prime contractors

Funding source: All

Program: All programs

Small Contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	10,512	\$191,442	\$191,442				
(2) MBE/WBE	2,501	\$47,110	\$47,110	24.6	47.3	-22.7	52.1
(3) WBE	414	\$9,544	\$9,544	5.0	7.9	-2.9	63.1
(4) MBE	2,087	\$37,566	\$37,566	19.6	39.4	-19.8	49.8
(5) Black American-owned	51	\$2,770	\$2,994	1.6	5.3	-3.8	29.3
(6) Asian Pacific American-owned	296	\$4,462	\$4,823	2.5	4.8	-2.2	52.8
(7) Subcontinent Asian American-owned	106	\$2,732	\$2,953	1.5	1.0	0.6	158.2
(8) Hispanic American-owned	1,366	\$22,513	\$24,334	12.7	27.8	-15.1	45.7
(9) Native American-owned	2	\$2,277	\$2,462	1.3	0.5	0.8	200+
(10) Unknown MBE	266	\$2,811					
(11) DBE-certified	1,049	\$21,322	\$21,322	11.1			
(12) Woman-owned DBE	26	\$453	\$453	0.2			
(13) Minority-owned DBE	1,021	\$20,638	\$20,638	10.8			
(14) Black American-owned DBE	23	\$2,143	\$2,144	1.1			
(15) Asian Pacific American-owned DBE	228	\$3,702	\$3,705	1.9			
(16) Subcontinent Asian American-owned DBE	3	\$381	\$381	0.2			
(17) Hispanic American-owned DBE	764	\$12,348	\$12,359	6.5			
(18) Native American-owned DBE	2	\$2,277	\$2,279	1.2			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-12.**  
**Time period: January 1, 2011 to December 31, 2015**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Prime contractors and subcontractors**  
**Funding source: Federal**  
**Program: All programs**

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	10,189	\$2,229,903	\$2,229,903				
(2) MBE/WBE	2,772	\$531,350	\$531,350	23.8	28.1	-4.3	84.8
(3) WBE	419	\$55,235	\$55,235	2.5	3.3	-0.9	74.3
(4) MBE	2,353	\$476,116	\$476,116	21.4	24.8	-3.4	86.3
(5) Black American-owned	123	\$82,122	\$82,527	3.7	6.6	-2.9	56.2
(6) Asian Pacific American-owned	335	\$48,196	\$48,433	2.2	1.8	0.4	120.8
(7) Subcontinent Asian American-owned	114	\$17,133	\$17,218	0.8	0.5	0.3	151.8
(8) Hispanic American-owned	1,538	\$310,856	\$312,389	14.0	15.3	-1.3	91.5
(9) Native American-owned	11	\$15,473	\$15,549	0.7	0.5	0.2	143.3
(10) Unknown MBE	232	\$2,335					
(11) DBE-certified	1,332	\$336,157	\$336,157	15.1			
(12) Woman-owned DBE	53	\$18,041	\$18,041	0.8			
(13) Minority-owned DBE	1,276	\$314,471	\$314,471	14.1			
(14) Black American-owned DBE	91	\$80,316	\$80,316	3.6			
(15) Asian Pacific American-owned DBE	264	\$30,155	\$30,155	1.4			
(16) Subcontinent Asian American-owned DBE	13	\$16,717	\$16,717	0.7			
(17) Hispanic American-owned DBE	900	\$175,455	\$175,455	7.9			
(18) Native American-owned DBE	11	\$15,473	\$15,473	0.7			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.



Figure F-13.

Time period: January 1, 2011 to December 31, 2015

Contract area: Construction, Professional Services, Goods and Other Services

Contract role: Prime contractors and subcontractors

Funding source: Local

Program: All programs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,960	\$798,722	\$798,722				
(2) MBE/WBE	639	\$171,887	\$171,887	21.5	40.4	-18.8	53.3
(3) WBE	155	\$23,786	\$23,786	3.0	7.4	-4.4	40.3
(4) MBE	484	\$148,100	\$148,100	18.5	33.0	-14.4	56.2
(5) Black American-owned	72	\$19,870	\$21,597	2.7	7.3	-4.6	37.2
(6) Asian Pacific American-owned	126	\$27,018	\$29,366	3.7	4.5	-0.8	82.6
(7) Subcontinent Asian American-owned	25	\$11,353	\$12,340	1.5	0.9	0.7	176.9
(8) Hispanic American-owned	206	\$72,217	\$78,494	9.8	19.2	-9.4	51.2
(9) Native American-owned	6	\$5,800	\$6,304	0.8	1.1	-0.3	70.8
(10) Unknown MBE	49	\$11,842					
(11) DBE-certified	391	\$109,515	\$109,515	13.7			
(12) Woman-owned DBE	57	\$9,785	\$9,785	1.2			
(13) Minority-owned DBE	326	\$98,288	\$98,288	12.3			
(14) Black American-owned DBE	65	\$15,962	\$15,965	2.0			
(15) Asian Pacific American-owned DBE	97	\$24,120	\$24,125	3.0			
(16) Subcontinent Asian American-owned DBE	14	\$5,530	\$5,531	0.7			
(17) Hispanic American-owned DBE	149	\$48,299	\$48,308	6.0			
(18) Native American-owned DBE	6	\$5,800	\$5,801	0.7			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-14.**  
**Time period: January 1, 2011 to December 31, 2015**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Prime contractors and subcontractors**  
**Funding source: Federal**  
**Program: Race/gender conscious goals**

<b>Business Group</b>	<b>(a) Number of contract elements</b>	<b>(b) Total dollars (thousands)</b>	<b>(c) Estimated total dollars (thousands)*</b>	<b>(d) Utilization percentage</b>	<b>(e) Availability percentage</b>	<b>(f) Utilization - Availability</b>	<b>(g) Disparity index</b>
(1) All firms	5,293	\$1,797,262	\$1,797,262				
(2) MBE/WBE	1,703	\$449,441	\$449,441	25.0	26.0	-0.9	96.4
(3) WBE	281	\$44,125	\$44,125	2.5	2.1	0.3	116.0
(4) MBE	1,422	\$405,316	\$405,316	22.6	23.8	-1.3	94.6
(5) Black American-owned	104	\$79,967	\$80,326	4.5	7.0	-2.5	63.7
(6) Asian Pacific American-owned	196	\$43,105	\$43,299	2.4	1.6	0.8	148.8
(7) Subcontinent Asian American-owned	51	\$14,373	\$14,438	0.8	0.5	0.3	159.6
(8) Hispanic American-owned	930	\$251,430	\$252,560	14.1	14.3	-0.3	98.1
(9) Native American-owned	10	\$14,627	\$14,692	0.8	0.4	0.5	200+
(10) Unknown MBE	131	\$1,814					
(11) DBE-certified	1,025	\$275,221	\$275,221	15.3			
(12) Woman-owned DBE	37	\$13,715	\$13,715	0.8			
(13) Minority-owned DBE	985	\$257,862	\$257,862	14.3			
(14) Black American-owned DBE	79	\$79,061	\$79,061	4.4			
(15) Asian Pacific American-owned DBE	161	\$29,010	\$29,010	1.6			
(16) Subcontinent Asian American-owned DBE	11	\$16,140	\$16,140	0.9			
(17) Hispanic American-owned DBE	727	\$122,668	\$122,668	6.8			
(18) Native American-owned DBE	10	\$14,627	\$14,627	0.8			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-15.**  
**Time period: January 1, 2011 to December 31, 2015**  
**Contract area: Construction, Professional Services, Goods and Other Services**  
**Contract role: Prime contractors and subcontractors**  
**Funding source: All**  
**Program: Race/gender neutral**

<b>Business Group</b>	<b>(a) Number of contract elements</b>	<b>(b) Total dollars (thousands)</b>	<b>(c) Estimated total dollars (thousands)*</b>	<b>(d) Utilization percentage</b>	<b>(e) Availability percentage</b>	<b>(f) Utilization - Availability</b>	<b>(g) Disparity index</b>
(1) All firms	6,856	\$1,231,363	\$1,231,363				
(2) MBE/WBE	1,708	\$253,796	\$253,796	20.6	39.2	-18.6	52.6
(3) WBE	293	\$34,896	\$34,896	2.8	7.7	-4.9	36.6
(4) MBE	1,415	\$218,900	\$218,900	17.8	31.4	-13.7	56.6
(5) Black American-owned	91	\$22,025	\$23,344	1.9	6.4	-4.5	29.6
(6) Asian Pacific American-owned	265	\$32,108	\$34,030	2.8	3.8	-1.0	73.1
(7) Subcontinent Asian American-owned	88	\$14,113	\$14,958	1.2	0.8	0.5	161.2
(8) Hispanic American-owned	814	\$131,643	\$139,524	11.3	19.3	-7.9	58.8
(9) Native American-owned	7	\$6,647	\$7,045	0.6	1.1	-0.5	52.4
(10) Unknown MBE	150	\$12,364					
(11) DBE-certified	698	\$170,451	\$170,451	13.8			
(12) Woman-owned DBE	73	\$14,111	\$14,111	1.1			
(13) Minority-owned DBE	617	\$154,898	\$154,898	12.6			
(14) Black American-owned DBE	77	\$17,218	\$17,220	1.4			
(15) Asian Pacific American-owned DBE	200	\$25,265	\$25,268	2.1			
(16) Subcontinent Asian American-owned DBE	16	\$6,107	\$6,108	0.5			
(17) Hispanic American-owned DBE	322	\$101,086	\$101,097	8.2			
(18) Native American-owned DBE	7	\$6,647	\$6,647	0.5			
(19) Unknown DBE-MBE	3	\$18					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.

Time period: January 1, 2011 to December 31, 2015

Contract area: Construction, Professional Services, Goods and Other Services

Contract role: Prime contractors and subcontractors

Funding source: Federal

Program: All programs

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	10,189	\$2,229,903	\$2,229,903				
(2) MBE/WBE	2,772	\$531,350	\$531,350		27.0		
(3) WBE	419	\$55,235	\$55,235		3.2		
(4) MBE	2,353	\$476,116	\$476,116		23.8		
(5) Black American-owned	123	\$82,122	\$82,527		6.6		
(6) Asian Pacific American-owned	335	\$48,196	\$48,433		1.5		
(7) Subcontinent Asian American-owned	114	\$17,133	\$17,218		0.5		
(8) Hispanic American-owned	1,538	\$310,856	\$312,389		14.7		
(9) Native American-owned	11	\$15,473	\$15,549		0.5		
(10) Unknown MBE	232	\$2,335					
(11) DBE-certified	1,332	\$336,157	\$336,157				
(12) Woman-owned DBE	53	\$18,041	\$18,041				
(13) Minority-owned DBE	1,276	\$314,471	\$314,471				
(14) Black American-owned DBE	91	\$80,316	\$80,316				
(15) Asian Pacific American-owned DBE	264	\$30,155	\$30,155				
(16) Subcontinent Asian American-owned DBE	13	\$16,717	\$16,717				
(17) Hispanic American-owned DBE	900	\$175,455	\$175,455				
(18) Native American-owned DBE	11	\$15,473	\$15,473				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.

Time period: January 1, 2011 to December 31, 2015  
 Contract area: Construction  
 Contract role: Prime contractors and subcontractors  
 Funding source: Federal  
 Program: All programs

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,110	\$1,598,753	\$1,598,753				
(2) MBE/WBE	485	\$402,841	\$402,841		23.3		
(3) WBE	60	\$35,320	\$35,320		0.6		
(4) MBE	425	\$367,521	\$367,521		22.7		
(5) Black American-owned	75	\$74,784	\$74,968		6.6		
(6) Asian Pacific American-owned	48	\$27,106	\$27,172		1.3		
(7) Subcontinent Asian American-owned	14	\$12,990	\$13,022		0.4		
(8) Hispanic American-owned	190	\$237,207	\$237,790		14.4		
(9) Native American-owned	9	\$14,533	\$14,568		0.1		
(10) Unknown MBE	89	\$901					
(11) DBE-certified	278	\$248,074	\$248,074				
(12) Woman-owned DBE	17	\$13,348	\$13,348				
(13) Minority-owned DBE	258	\$231,082	\$231,082				
(14) Black American-owned DBE	70	\$74,105	\$74,105				
(15) Asian Pacific American-owned DBE	40	\$19,056	\$19,056				
(16) Subcontinent Asian American-owned DBE	10	\$16,035	\$16,035				
(17) Hispanic American-owned DBE	132	\$110,997	\$110,997				
(18) Native American-owned DBE	9	\$14,533	\$14,533				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.

Time period: January 1, 2011 to December 31, 2015  
 Contract area: Professional services  
 Contract role: Prime contractors and subcontractors  
 Funding source: Federal  
 Program: All programs

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	260	\$247,220	\$247,220				
(2) MBE/WBE	140	\$57,968	\$57,968		13.7		
(3) WBE	30	\$9,493	\$9,493		2.8		
(4) MBE	110	\$48,475	\$48,475		10.9		
(5) Black American-owned	15	\$4,099	\$4,099		3.8		
(6) Asian Pacific American-owned	44	\$18,852	\$18,852		3.0		
(7) Subcontinent Asian American-owned	8	\$2,484	\$2,484		0.6		
(8) Hispanic American-owned	42	\$22,945	\$22,945		3.6		
(9) Native American-owned	1	\$94	\$94		0.0		
(10) Unknown MBE	0	\$0					
(11) DBE-certified	94	\$38,127	\$38,127				
(12) Woman-owned DBE	15	\$3,842	\$3,842				
(13) Minority-owned DBE	79	\$34,285	\$34,285				
(14) Black American-owned DBE	12	\$3,357	\$3,357				
(15) Asian Pacific American-owned DBE	27	\$9,063	\$9,063				
(16) Subcontinent Asian American-owned DBE	3	\$681	\$681				
(17) Hispanic American-owned DBE	36	\$21,090	\$21,090				
(18) Native American-owned DBE	1	\$94	\$94				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.

Time period: January 1, 2011 to December 31, 2015  
 Contract area: Goods and Other Services  
 Contract role: Prime contractors and subcontractors  
 Funding source: Federal  
 Program: All programs

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	8,819	\$383,930	\$383,930				
(2) MBE/WBE	2,147	\$70,541	\$70,541		50.9		
(3) WBE	329	\$10,422	\$10,422		14.5		
(4) MBE	1,818	\$60,119	\$60,119		36.4		
(5) Black American-owned	33	\$3,239	\$3,318		8.2		
(6) Asian Pacific American-owned	243	\$2,238	\$2,292		1.6		
(7) Subcontinent Asian American-owned	92	\$1,659	\$1,699		0.9		
(8) Hispanic American-owned	1,306	\$50,704	\$51,943		23.1		
(9) Native American-owned	1	\$846	\$867		2.5		
(10) Unknown MBE	143	\$1,434					
(11) DBE-certified	960	\$49,955	\$49,955				
(12) Woman-owned DBE	21	\$850	\$850				
(13) Minority-owned DBE	939	\$49,104	\$49,104				
(14) Black American-owned DBE	9	\$2,854	\$2,854				
(15) Asian Pacific American-owned DBE	197	\$2,036	\$2,036				
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0				
(17) Hispanic American-owned DBE	732	\$43,368	\$43,368				
(18) Native American-owned DBE	1	\$846	\$846				
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0				

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

# **APPENDIX G.**

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## **Best Practices for Mega Projects and Public-Private Partnership Projects**



# APPENDIX G.

## Best Practices for Mega Projects and Public-Private Partnership Projects

Due to the complex nature, risk, and dollars involved in mega projects and Public Private Partnerships (P3s), an effective and sustainable small business program must be in place to strengthen small businesses and help them build capacity for required work. A successful and sustainable small business program begins with agency commitment at all levels and throughout all departments. The program should have the ability to sustain itself even in the event that key staff or program champions leave the agency. When that level of commitment is absent, the program will typically default to being driven by perfunctory efforts in lieu of strategies that enable businesses to perform work for the agency and continually build on their experience and capabilities. Leadership commitment involves decision-makers being focused, strategic, and methodical about small business initiatives and incorporating those initiatives into the core values of the organization.

BBC Research & Consulting (BBC) describes best practices for implementing strong and sustainable small business programs for mega projects and P3s. They include strategies and efforts to reduce barriers for small businesses; enable their success on projects; and build their capacity for growth. BBC describes practices that can be implemented by the agency, the project team, or both. BBC has organized best practices into the following categories:

- General Practices;
- Communication and Outreach;
- Supportive Services;
- Capacity Building;
- Program Oversight, Compliance, and Reporting; and
- Workforce Development Program.

### General Practices

Consideration for small business participation and growth needs to be embedded in the general procurement process with all relevant stakeholders involved in the planning and execution of a mega project or P3. Examples of best practices that have been shown to be particularly effective in encouraging small business participation are described below.

**Relationship building.** It is important for agencies and project teams to establish ongoing, sustainable relationships with small and disadvantaged businesses rather than only engaging with them in a one-off manner. Doing so can result in more meaningful commitments from small and disadvantaged businesses and more competitive pricing. Project teams should begin

building such relationships before the need arises for particular solicitations. Those efforts might include working with small businesses on private sector projects. Doing so enables trusting relationships to grow and opportunities for project teams to understand the true capabilities with small and disadvantaged businesses. Agencies can emphasize the benefits of such efforts prior to awarding mega projects or P3s to prime contractors.

**Project goals.** Agencies should establish realistic goals for the participation of small businesses in individual mega projects and P3 projects. Those goals should be based on the availability of small businesses for the various types of work involved in each project. When feasible, agencies should reach out to both the small and large business community for input into goals (e.g., via goal setting committees or community roundtables).

**Small business set asides.** As part of mega projects or P3 projects, many agencies identify certain contract elements to set aside for small business bidding (e.g., contracts of particular work types worth less than \$100,000). Small business set-asides are effective in helping small businesses compete for small, manageable contract elements. Performing that work helps them build experience and increase their capacity for larger projects in the future.

**Unbundling contracts.** During the design phase of mega projects or P3 projects, project teams should be cognizant of the size of individual contracts associated with the project and how accessible they are to small businesses. Project teams should make efforts to unbundle contract pieces into appropriate sizes to encourage small business competition. It is important that such efforts take place during the design phase of projects and not during the scoping process to avoid confusion and any misalignment between design objectives and the final scope.

**Scope definitions.** Because mega projects and P3s typically use bid document management systems for soliciting small and disadvantaged businesses for contract opportunities, and those solicitations are usually organized by industry codes, it is critical that the agency or project team accurately defines the corresponding industry codes early in the process. Doing so will ensure that businesses receive bid solicitations that correspond to their primary lines of work and interest. The agency or project team should include detailed scope definitions for all available contract elements. In addition, it is often helpful for the agency to provide information about performance and pricing on similar projects for which it contracted in the recent past. Information about the required pricing structure may also be useful (e.g., lump sum, hourly pricing, or time and materials).

**Providing timely communication.** Once the project team has been awarded a mega project or P3, the project team and the agency must communicate information about bid opportunities, project schedules, and contract values to the business community in a timely and effective manner. Timely, detailed communications help small and disadvantaged businesses prepare for solicitations in which they are interested while effectively managing their current workloads. Both project teams and agencies should use tools to help facilitate effective communication about bid opportunities (e.g., yearly calendars or six month outlooks). In addition, it is important that project teams and agencies do not rely on passive approaches to soliciting small and

disadvantaged businesses but instead use approaches that push information directly to those businesses via e-mail, mobile applications, face-to-face interactions, and other tools.

**Discipline Group Opportunity Sessions (DGOSs).** An effective means to provide information and communicate project requirements to small and disadvantaged businesses is for agencies and project teams to host Discipline Group Opportunity Sessions (DGOSs) during the outreach and pre-bid phases of mega projects and P3s. DGOSs are tailored specifically to particular work areas that will be relevant to upcoming mega projects and P3s and focus on providing discipline-specific information and requirements to participating small and disadvantaged businesses. It also enables those businesses to market their capabilities to the project teams. DGOSs are particularly useful for architectural, engineering, surveying, and other professional services firms, because those types of contracts are typically awarded at the beginning phases of mega projects and P3s.

**Training sessions.** For mega projects and P3s, part of the prequalification process should include small business participation in a specified amount of training hours to learn how to successfully bid, perform and meet contractual requirements on such projects. Agencies and project teams can be responsible for facilitating and tracking attendance at the training sessions. Training sessions should be offered on an ongoing basis rather than just before bidding. The sessions should also be attended by all relevant levels of agency and project team staff.

**Partnerships.** In many cases, a small business might have the experience that is relevant to performing a particular contract but not the capacity to do so (e.g., the business might be able to perform \$125,000 worth of work but the contract is \$500,000 worth of work). Agencies should provide guidance on how two or more businesses can develop partnerships that will allow them to pool their resources and compete for larger contracts. Such partnerships would not necessarily have to take the form of joint ventures (JVs). JVs tend to be complex arrangements that require legal resources that are often cost and time prohibitive for small businesses.

**Supply lists.** For small businesses who supply construction materials, gaining access to mega projects and P3s can be difficult, given that their pricing may not be as competitive as that of large, national suppliers. To help level the playing field, project teams can provide small and disadvantaged suppliers with lists of the types of materials that will be needed on particular projects. Small and disadvantaged suppliers may not be price competitive for all items but may be price competitive on certain items, allowing them an entry point into supplying materials on mega projects and P3s.

**Contract awarding and management.** As part of awarding and managing contracts on mega projects and P3s, agencies and project teams should establish clear evaluation and selection processes; value both technical capabilities and price in the selection process; and ensure that the process is fair, open, and transparent. Agencies should also ensure that evaluation team members are trained on the specifics of small business procurement processes; how to evaluate all bidders in an unbiased manner; and compliance with procurement documents. After contract award, agencies should monitor whether project teams eliminate or reduce scopes of work for small businesses.

## Communication and Outreach

Ongoing communication and outreach are two foundational pillars of a successful small business program for mega projects and P3s. Those efforts drive awareness, participation, and development among small disadvantaged businesses. In order for them to be effective, owners and project teams must take a holistic and comprehensive approach to implementing them. Examples of best practices in communication and outreach are described below.

**Foundational components.** There are certain types of meetings and presentations that agencies and project teams should consider foundational to effective communication and outreach plans as part of mega projects and P3s. Such events include:

- Pre-bid meetings;
- Open houses;
- Trade organization meetings; and
- One-on-one meetings.

Such events and presentations should be held at strategic venues that are well-known to the business community and at times that are convenient to most businesses that might be interested in pursuing contracting opportunities.

Other elemental components to effective communication and outreach include:

- Small and disadvantaged business databases;
- Project websites;
- Monthly newsletters;
- Community event sponsorship and participation; and
- Engagement with small business resource organizations.

**Continual outreach.** Agencies and project teams should communicate with and outreach to small and disadvantaged businesses on a continual basis as opposed to on a project-by-project basis. Continual outreach enables agencies and project teams to leverage resources, relationships, and knowledge gained over time as opposed to forging new relationships with small businesses just before the bid periods begin on new contract opportunities. In addition, agencies and project teams should be tracking and maintaining a database of their work histories with small and disadvantaged businesses. Doing so helps facilitate the transfer of knowledge to new personnel and builds on past relationships with small businesses.

**Market assessment.** It is crucial for an agency to understand what small and disadvantaged businesses exist within their local marketplaces and understand any barriers that those businesses are facing in competing for agency contracts. Information from the 2017 disparity study will provide the Los Angeles Metropolitan Transportation Authority (Metro) will provide substantial information about those topics. That information can help Metro tailor its communication and outreach efforts for future mega projects and P3s.

**Identifying stakeholders.** With mega projects and P3s, it is critical to identify all relevant stakeholders. Agencies and project teams can do so by developing a matrix of potential collaborators, partners, allies, and advocates early in the planning process. Those efforts should be followed by connecting with those stakeholders and making sure that they are involved in communication and outreach efforts, as appropriate. In addition, if small businesses in the region are not used to preparing for mega projects and P3s, stakeholder engagement will provide additional opportunities for education the local business community about what to expect and how to prepare for especially large projects and associated contracting opportunities.

**Targeted communications.** Small and disadvantaged businesses are inundated with e-mail communications about various projects. Although some match their capabilities and interests, others do not. It is important for agencies and project teams to ensure that all project-related communications are targeted and appropriately tailored to be effective. Doing so includes ensuring that the correct businesses are receiving the communications based on work and industry types. It also includes ensuring that have current and appropriate contact information for relevant business representatives. In addition to sending more targeting communications, agencies and project teams should monitor who is benefitting from them or attending subsequent events as a result of them.

**Open houses.** Open houses allow agencies and project teams to be available in one location to meet directly with small and disadvantaged businesses and answer questions about contracting opportunities on mega projects and P3s. Such events help to facilitate dialogue about work scopes, expectations, timelines, and other information. It also helps small and disadvantaged businesses build relationships with agency and project team representatives.

**One-on-one meetings.** Agencies should offer opportunities for small and disadvantaged businesses to have one-on-one dialogue with project team members through ad hoc meetings or regularly scheduled office hours. Such meetings provide small businesses with the opportunity to market themselves and ask questions about specific contracting opportunities. It is important to designate specific, knowledgeable individuals to have responsibility for facilitating the meetings or holding office hours. The point of contact could be a small business manager or the project team's design-build manager.

**Senior leadership engagement.** Having agency and project team leadership visible as part of communication efforts and outreach events is crucial to set the tone for the agency's commitment to small business engagement as part of mega projects and P3s. Engaging leaders in outreach events puts them face-to-face with both the community and small businesses and provides them with an opportunity to hear first-hand about any issues or concerns from the business community that might affect competition for project-related contracts.

**Planholder searches.** Planholder lists offer up-to-date views of who is bidding on currently-advertised contracting opportunities. Well-developed planholder search capabilities allow prime contractors to search for small and disadvantaged businesses who have viewed plans and vice versa. Those capabilities help prime contractors build their teams and help encourage the participation of small and disadvantaged businesses in contracts associated with mega projects and P3s.

**Leveraging multi-media formats.** Agencies and project teams should use a combination of traditional media and social media to connect with the small business community on mega projects and P3s. Although traditional media—including e-mail, websites, and radio announcements—are still preferred by more mature businesses, younger businesses and entrepreneurs often make use of social media, blogs, and mobile applications for information. Leveraging newer media could increase agencies’ ability to connect with small and disadvantaged businesses.

**Advisory committees and roundtables.** Advisory committees and roundtables can be effective in engaging the local business community as part of awarding mega projects and P3s. Advisory committees are typically made up of prime contractors and other stakeholders that can provide advice and counsel to agencies and project teams and also serve as liaisons to small and disadvantaged businesses working in the region. Such committees often include members from respected and credible community associations, small business resource organizations, and prominent prime contractors. In addition, round tables or focus groups with small and disadvantaged businesses can be an effective way to generate ideas and obtain feedback on any number of specific topic areas such as capacity building; contracting goals; and barriers to bidding mega project or P3 work.

## **Supportive Services**

Supportive services help address many of the barriers that small businesses face on mega projects and P3s. They are designed to position small and disadvantaged businesses for success and should be an ongoing component of any small business program. The components listed below have been repeatedly aligned with best practices for supportive services.

**Certification support.** Agencies should provide businesses with education and resources related to obtaining various certifications (e.g., small business enterprise certification or disadvantaged business enterprise certification). They should also make efforts to clearly outline their own certification requirements. In addition, establishing internal teams that can identify small businesses that are certifiable is an effective, proactive practice. Agencies should do so with enough lead time to allow small and disadvantaged business to become certified prior to upcoming mega projects and P3s. A fast track certification process may also help those businesses become certified in such circumstances.

**Bonding and insurance.** Agencies and project teams should identify and enlist the assistance of bonding and insurance resources to educate and assist small and disadvantaged businesses with understanding and meeting bonding requirements on mega projects and P3s. Many agencies participate in the United States Department of Transportation’s Bonding Education Program (BEP) in partnership with the Surety and Fidelity Association of America. The program helps small and disadvantaged businesses obtain surety bonds and increasing bond capacity. Additional bonding and insurance measures that can help reduce barriers to entry include:

- Bond waivers;
- Having insurance requirements that are similar to those of comparable projects; and

- Eliminating requirements for expensive types of insurance professional liability and errors and omissions requirements for design and professional services firms if they are not working on critical elements of the project. This type of insurance can be expensive.

**Safety and quality.** Agencies and project teams can communicate safety and quality standards and help small and disadvantaged businesses adhere to those standards by requiring all subcontractors to receive initial training on safety procedures and quality expectations. In addition, it is helpful for agencies and project teams to provide daily checklists and keep subcontractors informed of any on-going safety or quality issues—particularly as they related to small and disadvantaged businesses—to explore options for reconciling them.

**Financial assistance.** Access to capital is a common barrier that small and disadvantaged business report experiencing as it relates to working on large government contracts. Agencies and project teams can help small businesses in accessing capital by working with appropriate federal agencies to seek resources for financing for small and disadvantaged businesses; developing and establishing effective financial and accounting systems; and establishing agreements with a diverse network of local financial assistance organizations and banks; and establishing a network of local resources for small and disadvantaged businesses on an as needed basis including:

- Accountants ;
- Licensed attorneys; and
- Bonding, surety, and insurance providers.

**Prompt pay.** Agencies and contractors may operate small business programs that have extensive capacity building and outreach efforts, but small and disadvantaged businesses must be paid promptly to be successful. Agencies should make prompt an explicit priority on mega projects and P3s. Doing so will communicate the importance of prompt pay to project teams. In addition, agencies and project teams should include prompt pay policies as part of flow down provisions in associated contracts. Agencies should work to make efforts to minimize their timetables for paying prime contractors so that prime contractors can then pay subcontractors as quickly as possible.

**Materials and supplies.** Agencies and project teams should encourage prime contractors to use joint checks for materials and supply purchases, which allows prime contractors to pay suppliers instead of subcontractors. Such assistance may help small and disadvantaged businesses to manage their cash flow more effectively.

**Certified payroll support.** Because of the Davis Bacon Act, or Prevailing Wage Act, all labor compliance is reported using certified payrolls. Certified payroll education is critical for businesses to report payments accurately and be in compliance with state and local laws. Payroll reporting processes may be challenging for certain small and disadvantaged businesses, particularly in industries in which computers are not used as much or in which the representation of native English speakers is lower. Such challenges can lead to situations in which the agency withholds payment from contractors, who can in turn withhold payments from

subcontractors that have not followed certified payroll requirements. Providing education and training to small and disadvantaged businesses on all administrative requirements including on electronic submission of certified payrolls might help prevent such issues.

**Onboarding training sessions.** Many businesses are eager to start work once their contracts have been signed, but there are pre-construction activities that must occur such as enrollment in the Owner Controlled Insurance Program (OCIP). Agencies and project teams should offer onboarding training sessions to review contract and administrative requirements (e.g. certified payroll and subcontractor reporting) and project specifications and expectations (e.g., providing winter protection for equipment). Such training will better position small businesses for successful performance as well as contribute to the overall success of the project.

**Softs skills training.** Estimators are often not visible at outreach events and may refrain from engaging in conversations with small and disadvantaged businesses for many reasons. However, estimators are critical to identifying scopes that will be appropriate for small and disadvantaged business participation. Agencies and project teams should provide training to estimators that stresses how important it is for them to be aware of the challenges that small businesses face and helps them build the communication and interpersonal skills necessary to engage with small businesses. In addition, estimators should be included on panels at outreach events and should be expected to be present in other external forums.

## Capacity Building

Effective small business programs include robust and extensive efforts to build the capacity of small and disadvantaged businesses. Both agencies and project teams should develop efforts and provide resources to grow small and disadvantaged businesses.

**Capacity assessment.** Agencies and project teams should assess the capabilities of individual small and disadvantaged businesses to determine the levels and scopes of work that they are able to perform. Those assessments should include identifying developmental needs that are common to different small businesses and developing strategies that would help address those needs and help grow the capacity of small and disadvantaged businesses. Capacity assessments of this kind will help agencies and project teams better align work scopes with the capabilities of interested small and disadvantaged businesses.

**Mentoring programs.** Mentoring programs provide small and disadvantaged businesses with opportunities to participate in a mentor-protégé-type relationship with larger, more experienced businesses working in similar industries. (High performing small businesses can serve in a mentoring role as well.) Mentoring programs on mega projects and P3s should include comprehensive mentoring and technical assistance efforts to assist small businesses in successfully completing their contracts; developing and broadening their capabilities; expanding their businesses; and yielding sustainable growth. The ultimate goal is to improve the competitive position of small and disadvantaged businesses and enable them to graduate to work as prime contractors.

**Technical assistance workshops.** To support capacity building, agencies and project teams should identify technical assistance needs that are relevant to particular mega projects and P3s



and develop workshops and events to address those needs. Workshop content should be designed to help enhance project-relevant skills as well as expertise and knowledge. Examples of such workshops include:

- Project requirements and expectations;
- Bidding and contracting processes;
- Marketing and relationship-building;
- Design-build and other project delivery methods;
- Negotiation skills;
- Business administration and staffing; and
- Business development and strategy.

Participation in technical workshops should help small and disadvantaged businesses be in a more competitive position on future mega project and P3 contracting opportunities.

**Coaching.** In many cases small and disadvantaged subcontractors will have a Subcontract Monitor or “field person” assigned to them from the agency or prime contractor who can provide individualized coaching and guidance. Those individuals help ensure that subcontractors have all the information that they need to perform and be available to answer project-related questions.

**Prime contract opportunities.** Agencies and project teams should work to identify prime contracting opportunities for small and disadvantaged businesses on mega projects and P3s. Such opportunities might be available in only in select industries. Agencies and project teams would identify small businesses that could perform those contracts and help build their capacities for future prime contracting opportunities.

**Rolling stock procurements.** Rolling stock procurements are a specialty that is conceptually divided into numerous project delivery phases (e.g., design, first article assessment of subsystems functional compliance, and post-delivery oversight). Consultant support is very limited and with the exception of certain document control and clerical functions, requires subcontractors with high levels of experience. Project teams and agencies could focus on helping small businesses grow skills and possess the requisite technical expertise to provide such consulting support. That strategy would require the full participation of rolling stock suppliers in making genuine efforts to increase their use of small and disadvantaged businesses rather than relying solely on good faith efforts to meet project goals.

**Operations and Maintenance opportunities.** Over the life of a P3 Program, Operations and Maintenance (O&M) requirements represent the most expensive functional area. Furthermore, the potential for substantial O&M small and disadvantaged business participation is limited only by the innovation, experience, and overall outreach efforts of the Concessions Program Manager and O&M Management Teams. O&M Programs are functional and fairly straightforward in conceptual requirements, yet, in practice, can vary substantially due primarily to policy dictates and anticipated O&M costs. Reliance upon outsourced O&M is typically driven by local customs

and practices and the availability of a cost-effective pool of requisite managers, supervisors, and line employees. Recruitment for contracted O&M typically involves review of known domestic contract service suppliers. Oversight of contracted O&M is performed by the Owner, using appropriate functional subject-matter experts. As a recommended practice, the project team's O&M representative should actively engage in all functional development project phases including providing substantial input in the original design. Emphasis on the potential use of small and disadvantaged businesses in key O&M oversight areas should be reviewed during the early stages of the project and continuously evaluated up to the time when final decisions are made regarding which functions will be performed in-house and which will be outsourced. Outreach efforts related to O&M should include the use of charrettes to invite industry suppliers and qualified small and disadvantaged businesses with aspirations to participate in long term O&M Program activity.

## **Program Oversight, Compliance, and Reporting**

Agencies and project teams should assign a full time, dedicated Compliance Officer to ensure that all prime contractors are in compliance with small business and minority- and woman owned business programs as part of mega projects and P3s. The Compliance Officer should communicate regularly with all relevant departments and disciplines. The Compliance Officers should also be very visible in the community, serving as a representative for the agency and the project team and serve as a liaison to small businesses and other external stakeholders. The Compliance Officer would be responsible for:

- Monitoring bidding and awards;
- Collecting and maintaining data relevant to program objectives;
- Performing random site visits;
- Preparing monthly small and disadvantaged business participation reports;
- Monitoring performance quality relative to contracting requirements'
- Replacing small and disadvantaged businesses when circumstances require;
- Ensuring that all businesses are performing commercially useful functions;
- Monitoring prompt payments to subcontractors;
- Auditing certified payrolls for compliance;
- Performing labor compliance activities; and
- Performing contract close-out activities.

Additional recommendations and best practices related to program oversight, compliance, and reporting are presented below.

**Compliance Manager competency.** The competence and capacity of the Compliance Manager has a substantial impact on the success of small business and minority- and woman-owned business programs on mega projects and P3s. Compliance Officers must possess a well-rounded and comprehensive understanding of mega project management principles as well as

federal and local contract compliance policies and practices. Compliance Officers should be expected to deliver solid management oversight coupled with innovation in project development and management.

**Innovative program measures.** Agencies should work to develop small and disadvantaged business programs and policies to provide clarity regarding program objectives and requirements. Such programs should address lessons-learned and also incorporate incentives for prime contractors to develop more innovative approaches to encouraging the participation of small and disadvantaged businesses.

**Rebrand Compliance Manager as Success Assurance Manager.** Agencies should consider rebranding Compliance Managers as Success Assurance Managers (SAMs) on mega projects at P3s. The SAM would report to the Program Manager and have the responsibility and authority to oversee the development and integrated execution of small business and minority- and woman-owned business programs. The SAM could also take the lead on influencing the development of “Innovative Value-added” approaches to the project’s functional oversight managers.

**Phased performance metrics.** Often, agencies and project teams give insufficient attention to early indicators of subcontractor failure; oversight requirements; and early signs of issues of non-conformance. Agencies and project teams should consider using “Four-Square” style performance metrics and associated monthly depictions of overall contract compliance results in each functional area. Agencies or project teams would develop four contract compliance measures against which each subcontractor with active assignments would be assessed. Performance on each measure would be depicted in green [compliant], yellow [partially compliant], or red [non-compliant]. That process would provide a continuous and highly objective assessment of subcontractor development and progress. Agencies and project teams would be able to identify areas of non-compliance and receive timely attention in order to enhance project performance.

## **Workforce Development Program**

It is becoming conventional practice to include the development and implementation of workforce development efforts alongside small business programs on mega project and P3s. The long term nature of those projects and impact on regional economic development underscores the logic for implementing workforce development and small business programs in tandem. In addition, projected labor shortages based on skill and training gaps affect both large and small business and are acutely noticeable in industries like transit and construction. As a consequence, agencies and project teams should collaborate with other community stakeholders to implement workforce development efforts that align with project goals and small business program outcomes.

Workforce development requirements in requests for proposals are often high-level policy requirements that typically do not emphasize specific quantitative goals or appropriately outline the practical processes required to ensure that local workers are put in a position to be hired. In many cases, hiring practices reflect pre-existing practices in the marketplace and thus reflect the

built-in biases that favor certain stakeholder groups. Recommended practices around workforce development include two important concepts that must be inculcated in RFP requirements:

- 1) Sensitivity to the practical life-cycle of employment opportunities in the marketplace; and
- (2) Awareness of the demographics of the populations from which future workforce participants will be pulled.

In many cases, there is a disconnect between those two concepts. Reconciling them requires substantial effort and innovation on the part of agencies and project teams to account for institutional realities and challenges. A major focus on construction opportunities will require substantial cooperation from organized labor (specifically those representing construction trades and transit employees). Furthermore, the development of trade academies within the public education system is essential to producing the qualified entry-level employees of the future. Stakeholders should also work to create a robust “Ex-Offender” Program that could include the training of incarcerated men and women who could be better positioned to enter the workforce if sufficient requisite skills could be developed prior to their release.